IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

CASE NO: 10150/07

DATE: 2007-05-10

In the matter between:

LAW SOCIETY OF THE NORTHERN PROVINCES	**Applicant**
and	
A P G P NQOKO AND OTHERS	**1st Respondent**
JONGIKAYA GWE	**2nd Respondent**
FUNDILE NCWANA	**3rd Respondent**

J U D G M E N T

BOSIELO, J: This is an *ex tempore* judgment. This application has two legs. The first leg relates to the suspension of the respondents from practicing as attorneys while the second leg, which forms part B of the notice of motion which is not for consideration today, relates the ultimate striking off of the three respondents from the roll of attorneys.

This matter came before me by way of urgency. I interpose to state that I have been placed in possession of correspondence from attorneys purporting to represent the first and the third respondent to the effect that first and third respondents do not intent to oppose part A of this proceedings but that they reserve their rights to oppose part B of this application. As I have already alluded to part B of this application relates to the ultimate and final striking off of the applicants from the roll of attorneys. Consequently,

based on the two letter referred to above an order will be made as against the first and third respondents as prayed for by the applicant in terms of prayer 1.2 of the notice of motion.I will deal with the other prayers later in the course of this judgment.

I find it necessary to state that the position of the second respondent is somewhat different to that of the first and third respondents. In the sense that this application is vigorously opposed by the second respondent. In addition thereto, the second respondent has duly filed a notice of a counter application. The effect thereof is to issue a directive to the applicant, The Law Society of the Northern Provinces [incorporated as the Law Society of the Transvaal], to issue to the second respondent a fidelity fund certificate in terms of the provisions of section 42(3) of the Attorneys Act, 53 of 1979 as amended for the period ending 31 December 2007. In his answering affidavit the second respondent pertinently raise the issue of urgency in this proceedings. As a result of that approach by the second respondent the applicant deemed it fit to address and deal pertinently with that issue. This issue was to a large extent canvassed and covered in the applicant's replying affidavit deposed to by one Mr Hussain who, according to the papers, is the current President of the Law Society of the Northern Provinces.

The essence of the response by Mr Hussain on the issue of urgency as it appears from his replying affidavit is the fact that the Law Society has a responsibility to the general members of the public to ensure that they are properly protected against unscrupulous legal practitioners. He had furthermore giving the nature and the seriousness of the allegations made against the respective respondents as contained in the reports submitted by the Law Society's auditor in the name of Farris that it is in the interest of the public that this matter be heard as a matter of urgency. It is so that this court being an urgent court is obliged to investigate the question of urgency to determine

whether this is the kind of matter that requires to be dealt with in the urgent court as a preliminary issue.

My careful reading of the documents filed and the averments contained in the various affidavits has revealed the following. That on or about November 2006 the applicant issued instructions to Farris to investigate the law firm where the three respondents were partners which practice under the name and style of Nqoko, Ncwana & Gwe Incorporated which was situated in Johannesburg. It is clear from the papers that notwithstanding some initial problems in locating the managing partner of this firm, Mr Nqoko, ultimately Farris succeeded therein in securing a meeting with the said Mr Nqoko which ultimately enabled the said Farris to undertake his investigation of the affairs of this partnership.

It is common cause, this is fully supported by the affidavit of Farris himself, that on 20 December 2006 he furnished and submitted his report to the applicant. It is not in dispute that amongst other things in that report Farris reported about the unsatisfactory financial affairs of this partnership, the fact that the books of account of this partnership were not been kept at the office of this partnership. The fact that he discovered certain trust deficit in the trust account of this partnership and of importance, the fact that this partnership had not submitted a rule 70 report as is required in terms of the rules of the Law Society. What is also remarkable is the fact that having received this report on 20 December 2006 the Law Society took some time in terms of its own internal processes to consider this report and in all likelihood to secure the necessary resolution of the council authorising them to take appropriate and further steps against the respondents.

According to the affidavit by the applicant on 7 February 2007 instructions were

sent to the Law Society's attorneys to institute this application against the respondents. Having spent some time to prepare and settle the founding affidavit supporting this application that affidavit which was duly completed was sent to the Law Society for signature on 15 February 2007. However, according to Mr Hussain the President of the Law Society, he needed time to read, peruse and consider the founding affidavit and could only sign it on 1 March 2007 which therefore enabled this application to be issued on 15 March 2007.

It should be clear here from that the Law Society should have known as far back as 20 December 2006, having received the report from Farris which underpins this application, that there was serious problems in the partnership comprising of the respondents before this court. As alluded to earlier on justification for this application being brought on urgency is the allegation by the Law Society that it cannot afford to delay any further because by so doing members of the public are unduly expose to the risk of attorneys who are practicing without a fidelity fund certificate. It is not in dispute that notwithstanding this realisation by the Law Society the Law Society delayed for a period of two months before this application could be formally launched. To my mind, the Law Society has not satisfactorily explained in its affidavit, including the replying affidavit, where attempts were made to address this issue of the patent delay in hearing this application in particularly having received the clear report from Farris on 20 December 2006.

Giving the concession and the undertakings made by first and third respondents I fail to understand how members of the public will still be exposed to the risk of harm particularly emanating from the first and third respondents who have undertaken to abide by an order of this court to have them suspended from practicing until part B of

this application is considered and finalised. I have already alluded to the fact that the position of the second respondent differ somewhat from that of first respondent and the third respondent. I find it necessary at this stage to state that in so much as appreciate the duty of the Law Society to protect the general public and to act responsibly I also hold the view that the Law Society owes its own members the same duty to act responsibly and with compassion.

I have listened carefully to Mr Ganya arguing on behalf of the applicant but at some stage I got a clear impression that he does not seem to have an understanding of the position in which the second respondent found himself. It is indeed so that the second respondent considered that he subsequently became aware that at the time when he left this partnership there was a deficit of some R35 000 in the trust account of this partnership. His explanation as to why he was not aware as at that time and during the time when he was a partner in this firm it that it is due to the fact that the first respondent was exclusively responsible for the day-to-day management including the financial management of this firm. It is not disputed, that having been made aware of the inability or the failure by the former partnership to submit the rule 70 certificate, that the second respondent did everything within his powers to investigate the cause thereof and put pressure on the first respondent who was responsible for the day to day running of the partnership to ensure that this certificate is timeously prepared and submitted to the applicant.

It is furthermore not disputed that in the course of those frantic efforts he communicated with the bookkeeper for the former partnership who was responsible for preparing and finalising the rule 70 certificate and that the second respondent was given the assurance that that certificate would be submitted in due course. I was reliably

informed from the bar in the course of the submission, which report was not controverted, that the rule 70 report has since been submitted to the Law Society although it is qualified. However, a point that I consider to be of critical importance is the fact that with effect from September 2005 when the second respondent left the former partnership and open up his own partnership to date hereof, he has conducted a partnership or a practice where he was exclusively responsible for his own books of account and that in fact he has already submitted his rule 70 report in respect of his own practice which was met with the approval of the applicant in this matter. The problem relates to his application for a new fidelity fund certificate which he submitted as is required by the rules which the applicant refuses to consider based initially on the failure to submit the rule 70 certificate in respect of the old partnership. As the evidence unfolded in this matter, it now appears that that report has since been submitted to the Law Society but that it has been disqualified.

In my view, this seem to tally with. the assertion by the respondent that whatever problems which existed during his partnership with his previous partners i.e. the first and the third respondent were the result of conduct on the part of the first respondent which could not be attributed to him. I venture to state that the fact that subsequent to the dissolution of that partnership and second respondent now operating on his own and the fact that there is no evidence that there is any trust deficit or any contravention of any of the rules relating to trust accounts relating to his own practice, is ample proof of the fact that it cannot be said that the second respondent is not a fit and proper person to be allowed to practice the profession of an attorney. It may well be that a case can be made out that the second respondent was not diligent or vigilant during the time at the former partnership to ensure the first respondent to complies with the rules of the Law Society strictly. That in any event, in my view, would amount to negligence as oppose to

intentional and deliberate contravention of the rules of the Law Society. The question that one would need to answer in that context therefore would be is that negligence which has been attributed to the second respondent of such a gross nature that it would justify the inference that the second respondent is not a fit and proper person to be allowed to practice as an attorney.

I am not required in this application to pronounce myself or express a view as to whether the second respondent is in fact a fit and proper person to practice as an attorney. I understand my task to be to determine whether the applicant has demonstrated on the admitted evidence that there is some *prima facie* evidence which will justify the court hearing ultimate the application to come to a finding that the respondent is not a fit and proper person to be an attorney and that therefore he should be struck off the roll.

Mr Ganya appearing for the applicant argued quite strenuously and correctly that the applicant cannot afford to have its members practicing as either attorneys, conveyors or notaries who are not in possession of a valid fidelity fund certificate because it denies members of the public the protection which they found would ordinarily be extend to them in the event where there is theft of trust monies by such practicing attorneys. I do not think that anybody could argue to the contrary unless one first appreciates the very reason and significance why the attorneys' fidelity fund was set up. However, in the case of the second respondent justice and fairness requires that I should go beyond the mere fact that he does not have a fidelity certificate. I should require as to the reason why he does not have a valid fidelity fund certificate. Initially the applicant said that the second respondent is not is not entitled to a fidelity fund certificate because he together with his former partners failed to submit a rule 70 certificate as

required by the rules of the Law Society.

That argument was subsequently water down to the fact that although that a rule 70 certificate has now been furnished it is qualified and in terms of the rules of the Law Society a fidelity fund certificate cannot be issued where the report is qualified. It is not in dispute that the reason why this report is qualifies amongst others relates to the trust shortages which were found in the accounts of this partnership as well as the fact that the books were not properly kept. At a risk of repetition,
I have already alluded to the fact that the second respondent's version is that this fault lies exclusively with the first respondent who had the responsibility to ensure that the books of account of this firm were properly kept and that the proper reports were submitted to the applicant as is required.

It is remarkably and noteworthy that the assertion by the second respondent that the books of his old firm starting from October 2005 until today are in order and strictly in accordance with the statutory requirements laid down by the Attorneys Admission Act has not been controverted by the applicant. All that the applicant has said in response thereto is that that period is irrelevant for purposes of this application. In. my view that response is disingenuous to say the least, as I am of the view that the fact that as from October 2005 up until today there is no evidence that the second respondent has made himself guilty of any contravention of the rules and the act governing the attorney profession, save for the fact that he does not have a fidelity fund certificate, is sufficient proof to me that he is still a fit an proper person to be allowed to practice as an attorney. I am mindful of the fact that for him to be able to continue to practice properly and lawfully he requires to be issued with a current and valid fidelity fund certificate by the Law Society. The Law Society has made it very clear that despite • the fact that he has

submitted an application to be issued with a fidelity fund certificate accompanied by a rule 7 certificate which is unqualified it does not intent to issue the required fidelity fund certificate to the respondent.

I do not think that the Law Society is acting properly and responsibly in that regard. The Law Society, in my view, is creating circumstances wittingly or unwittingly which have the effect of making it impossible for the second respondent to practice without falling foul of the rules and the act governing attorneys in this country. I am of the view that the Law Society has an obligation to properly consider the second respondent's application for a fidelity fund certificate which is currently serving before the Law Society expeditiously and without any unnecessary delay and to determine whether to issue that certificate to the second respondent or not. I wish to add, that I hereby ask the Law Society to do it as soon as it is reasonably possible in order to ensure the second respondent is unnecessary and unjustifiably denied his constitutionally protected right to pursue his lawful career.

I have already alluded to the fact that I am not persuaded that the Law Society has set out sufficient and cogent reasons, giving the history of this matter, why this matter came before me on urgency. I am not satisfied that, save for the conduct of the applicant, the second respondent poses any potential and/or actually or imminent danger to members of the public. Under the circumstances, I therefore find that this application is not urgent, it should not have been argued before me. However, given the fact that the first respondent and the third respondent are not opposing this application and are willing to abide by .their suspension I am of the view that in the circumstances the following order would be appropriate:

1. That in terms of the undertakings and tenders made by the first and the third respondents is hereby suspended from practicing as attorneys with effect from today pending the final determination of this application.

2. The first and third respondents are hereby ordered to surrender and deliver to the Registrar of this court their certificates of annulment as attorneys of this court.

3. That should the first and third respondent fail to comply with 2 above on service of this order upon them the sheriff of this court is hereby authorised, empowered and directed to take into his immediate possession the certificate of annulment in respect of both first and third respondents.

4. The orders as e embodied and reflected in prayer 1.5, 1.6., 1.6.1, 1.6.2, 1.6.3, 1.6.4, 1.6.5, 1.6.7, 1.6.8, 1.6.9, 1.6.10, up to 1.11, that is inclusive of 1.11, I hereby granted in respect of the first respondent and the third respondent.

5. Insofar as the second respondent is concerned, save for the comments I have made about urgency, I am not satisfied that the applicant has made out a case to have the respondent suspended from practicing as an attorney and consequently the prayer the prayer with regard to the second respondent is hereby dismissed.

6. With regards to the counter application by the second respondent the applicant is hereby ordered to give prompt and proper consideration to the

application furnished to it by the second respondent to be issued with a fidelity fund certificate and to communicate its decision to the second respondent within 20 days of the order.

7. The costs of this application insofar as it relates to the second respondent are reserved and will be dealt with during the considering of part B of this application

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