

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 66778/2015

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

13.02.2017

13/2/2017

In the matter between:

LAW SOCIETY OF THE NORTHERN PROVINCES

Applicant

and

RAMOKATANE JOSEPH MOGALE

Respondent

JUDGMENT

BASSON, J

- [1] This is an application brought by the Law Society of the Northern Provinces ("Law Society") for an order removing the name of the respondent from the roll of attorneys.
- [2] The respondent - Mr Mogale – was admitted as an attorney on 13 June 2001 and practiced under the name and style of Mogale Attorneys. He is still on the roll of attorneys.

Rule 70 reports for the period ending February 2013 and February 2014

- [3] Various complaints are levelled against the respondent. The first complaint against the defendant relates to the fact that he had failed to cause his auditor to timeously lodge unqualified audit reports for the period ending February 2013 and February 2014. As a result of this failure the respondent was not issued with a Fidelity Fund Certificate but nonetheless continued to practice without such certificates in contravention of the Attorneys Act and the Rules.
- [4] In terms of Rule 70.4 read with Rule 70.3 it is required that every attorney who practices for his own account must cause his auditor to lodge a report with the Law Society within six months of the annual closing of his accounting records. The lodging of an unqualified audit report is a prerequisite for an attorney to be issued with a Fidelity Fund Certificate in terms of section 41 of the Attorney Act.
- [5] The respondent was called to appear before a disciplinary hearing. He failed to attend the hearing on 13 November 2013 but in a letter (dated 13 November 2013) he stated that he found it difficult to explain why his audit reports had not been submitted. He also stated that he would plead guilty to the charges. The Law Society sent numerous letters to the respondent reminding him of the outstanding audit reports. He was also reminded that he was practicing without being in possession of a Fidelity Fund Certificate since 1 January 2014.

- [6] Belatedly on 17 October 2014 the Law Society received the respondent's firm's audit report for the year ending February 2013 and on 28 November 2013 the respondent submitted his audit report for the period ending February 2014. From the audit reports it appears that the respondent's firm's account was dormant and as a result the Law Society accepted the reports. The respondent was issued with Fidelity Fund Certificates for the period commencing 1 January 2014 and 1 January 2015. The respondent was not issued with a Fidelity Fund Certificate for the year 2016.

Outstanding subscription fees

- [7] The respondent further failed to pay the required subscriptions for the year 2013 and also failed to pay the fine imposed on him following a disciplinary hearing.

Complaint by Mr MG Seitsang

- [8] The Law Society also received complaints in that he is accused of unprofessional, dishonourable and unworthy conduct. In respect of the complaint by Mr MG Seitsang it is not disputed that the respondent was instructed to institute a claim on behalf of Mr Seitsang against the RAF.
- [9] The complainant had advised the Law Society that the respondent had to pay him an amount of R 70 000.00. An amount of R 10 000.00 was paid in cash to him and R10 000.00 was paid with a trust cheque dated 30 June 2012. According to the complainant the respondent had undertaken to pay him an amount of R 70 000.00 and retain a fee of R 30 000.00. The respondent failed to account to the complainant and also failed to effect payment of the balance due to the complainant.
- [10] A complaint was forwarded to the respondent on 20 August 2014. Only on 1 December 2014 did the respondent respond to the correspondence stating that there was a delay in effecting the payment because the complainant had changed

his banking details. At the time an amount of R 72 439.00 was still due to the complainant. On 18 May 2015 Scorpion Legal Protection advised the respondent that the complainant had only received R 60 000.00 and that the respondent had failed to advise the complainant of the actual amount that he had received from the RAF.

Complaint by Mr Seisa

- [11] A further complaint was received from Mr Seisa. It was not disputed that the respondent had consulted with Mr Seisa on 6 July 2010 to institute a damages claim on his behalf against a company (Bojanala Fleet Bus Services). Mr Seisa paid the respondent a deposit of R 1 500.00.
- [12] During June 2012 the complainant was informed that the matter had become settled and that an amount of R 74 749.50 was paid in settlement of the damages. The respondent, however, failed to account to Mr Seisa and also failed to effect payment in his favour.
- [13] The complaint was then forwarded to the respondent on 19 September 2012. The respondent failed to answer to the correspondence. In November 2012 the respondent was cautioned and urged to furnish the Law Society with a response to the complaint.
- [14] Only on 6 December 2012 did the respondent confirm that he had acted on behalf of Mr Seisa. According to the respondent an offer of R 74 000.00 was made to settle the damages caused to the complainant's vehicle but that the said offer was initially rejected by the complainant. The respondent then issued summons against the company but the complainant later accepted the initial offer made by the company. According to the respondent the legal costs exceeded R 10 000.00. The complaint was resolved and was withdrawn against the respondent.

- [15] In March 2013 the respondent was requested to furnish the Law Society with a copy of the cheque that was issued in favour of the complainant together with a proper statement of account in respect of services rendered. In April, a month later, the respondent was again reminded to furnish the documents to the Law Society. The respondent advised the Law Society that the cheque had not been returned. The statement of account, however, showed that an amount of R 9 845.00 was charged for services rendered. The deposit of R 1 500 00 is also not reflected on the statement of account.
- [16] The Law Society obtained a copy of the cheque in the amount of R 60 000.00 issued in favour of the complainant. The respondent was thereafter requested to explain what became of the R 15 000.00 as the settlement was in the region of R 75 000.00 and also to explain why the R 1 500.00 that was paid towards the deposit was not accounted for. The respondent failed to respond to this request.

Previous fines imposed on the respondent

- [17] Following a disciplinary hearing that was held on 17 February 2014 relating to a complain of a certain Mr Lesenya, the applicant was found guilty and was ordered to pay a total fine with costs amounting to R 5 607.71. The respondent failed to effect the payment.

Report by Ms Mapfumo

- [18] Ms Mapfumo (employed as an auditor in the Law Society's Monitoring Unit) visited the premises of the respondent on two occasions. The respondent arrived at the meeting without any of the complainants' files. Mapfumo sent various letters to the respondent requesting documents and proof of payments in respect of both complaints. The respondent failed to furnish her with the documents. Mapfumo expressed the view that the respondent was uncooperative.
- [19] Mapfumo also established from the trust bank statements for the period 1 March 2014 – 31 July 2014 that the respondent withdrew cash from the trust account.

He also transferred money to clients and/or the firm's business account through automated teller machines. When the respondent was confronted with these allegations, he informed Mapfumo that he was unaware that cash withdrawals from the trust account were not allowed. The respondent also admitted that he did not maintain a fee transfer book. Mapfumo furthermore established that no proper fee debiting documents were kept.

Trust position of the firm

- [20] Mapfumo expressed concerns about the trust position of the firm in light of the fact that the list of trust creditors as at 31 October 2014 did not even reflect the complaints as trust creditors though they have not been paid in full.
- [21] The respondent has contravened various provisions of the Attorneys Act and the Rules in that – (i) The respondent failed and/or neglected to answer within a reasonable time correspondence which reasonably required a reply. (iii) He neglected to file his firm's Rule 70 reports within the required time. (iii) He transgressed sections 41(1) and 42(2) of the Attorneys Act in that he practiced without being in possession of a Fidelity Fund Certificate for the period commencing January 2014 and while practicing he received and accepted fees, rewards and disbursements from clients. (iv) The respondent failed to pay his subscription fees payable to the Law Society. (v) The respondent failed within a reasonable time to account for fees received by him and to account for amounts due or owed to complainants.

Proceedings in terms of section 22 of the Attorneys Act

- [22] The Law Society may apply for the striking of an attorney from the roll in terms of section 22 of the Attorneys Act. When the Law Society brings such an application it performs a public duty.¹

¹ Incorporated Law Society of Natal v JJ & FM Hillier 1913 (34) NLR 237 at 250-251.

- [23] In terms of the three-stage enquiry as set out by the Supreme Court of Appeal in *Botha v Law Society of the Northern Provinces*² the court will firstly decide whether the alleged offending conduct has been established on a preponderance of probabilities. Secondly, the court must consider whether or not the person against whom the application is brought is a fit and proper person to continue to practise as an attorney. Thirdly, the court must inquire whether in all the circumstances the attorney is to be removed from the roll of attorneys or whether an order of suspension would suffice.
- [24] The respondent is not disputing the charges against him and in fact it appears from the answering affidavit that the respondent is admitting all the acts of dishonourable, unworthy and unprofessional conduct as set out in the founding papers of the Law Society. The only issue that the respondent raises is whether such incidences are sufficient to warrant the removal of his name from the roll of attorneys.
- [25] On behalf of the Law Society it was submitted that considering all the facts and the complaints – especially if they are considered cumulatively - the respondent has made himself guilty of unprofessional, dishonourable and unworthy conduct and that he is no longer a fit and proper person to continue to practice as an attorney or to act as an officer of this court.
- [26] The respondent submitted that he had repaid the monies owed to the complainants and submitted that he is the only practitioner at the service of the entire Northam community.
- [27] Does this excuse the respondent's conduct? I am of the view that it does not. The fact that the complainants have subsequently been paid does not detract from the occurrence of the misconduct itself. The misconduct remains and it is that infraction that the Law Society is entitled to place before this court for a decision.

² 2009 (3) SA 329 (SCA) para [4].

[28] The law extracts from an attorney the highest possible degree of good faith and it is expected from an attorney to scrupulously observe and comply with the provisions of the Act in respect of all practice related matters and especially pecuniary matters. An attorney also has the obligation to diligently guard the interests of his or her clients. Our courts have also been consistent in requiring that attorneys should earn the trust of the public and that they should exercise their duties with honesty and dignity. See in this regard: *Kaplan v Incorporated Law Society, Transvaal*:³

"In exercising its discretion whether or not the applicant is a fit and proper person to be re-admitted as an attorney, the Court will have to consider his personal qualities and decide whether he is fit and proper in relation to such matters as the prestige, status and dignity of the profession, and the integrity, standards of professional conduct and responsibility of practitioners, the kind of personal qualities in respect of which a Law Society has to be satisfied in terms of s 16 as mentioned earlier in this judgment."⁴

The prestige, status and dignity of the profession in turn relates to the position or image the profession has in the eyes of the public in general and in the eyes of the practitioners and the Court in particular. In this connection it is not to be overlooked that the trust and confidence reposed by the public and by the Court in practitioners to carry on their profession under the aegis of the Courts must make the Courts astute to see that persons who are enrolled as attorneys are persons of dignity, honour and integrity.

Whether a person is fit and proper to be re-admitted is certainly a matter on which the Court must exercise its discretion on the evidence placed before it.

It is essential for the prestige, status and dignity of the profession that practitioners should not be identified with any form of dishonesty or dishonourable conduct in the eyes of the public at large, the Court and those concerned with the administration of justice."⁵

³ 1981 (2) SA 762 (T). These comments was made in the context of an application for the readmission as an attorney.

⁴ At 790A – B.

⁵ At 792H – 793B.

[29] I am not persuaded that the respondent has shown himself to be a fit and proper person to practice as an attorney. In this regard it is apparent from the two complaints referred to the Law Society that the respondent did not diligently and professionally guard the interest of his clients. The respondent also displayed an indifferent attitude towards requests from the Law Society for information regarding the complaints against him. It can also not be disregarded that the respondent practiced without a Fidelity Certificate for a period of time,

[30] Should the respondent be struck from the roll or should he be suspended? It is trite that a removal from the roll does not automatically follow a finding that the attorney in question is not fit and proper to practise as an attorney. The court has a discretion to consider the appropriate sanction and must do so taking into account all the circumstances. One of the factors that this court should consider is whether the imposition of suspension from practice will not achieve the objectives of the Court's supervisory powers over the conduct of attorneys. (See in this regard: *Summerley v Law Society of the Northern Provinces*.⁶)

[31] Although the respondent has undoubtedly committed serious offences, especially to practice without a Fidelity Fund Certificate following a failure to submit unqualified audit reports, I am nonetheless of the view that the conduct of the respondent in this matter warrants considering a penalty of suspension. I am of the view that it would be an appropriate sanction to suspend the respondent from practicing as an attorney for one year and to impose certain conditions to his reenrolment. See also: *Law Society of The Cape of Good Hope v C*.⁷

⁶ *Summerley v Law Society Northern Provinces* 2006(5) SA 613 (SCA): "[19] Before imposing this severe penalty, the Court should therefore be satisfied that the lesser stricture of suspension from practice will not achieve the objectives of the Court's supervisory powers over the conduct of attorneys. These objectives have been described as twofold: first, to discipline and punish errant attorneys and, secondly, to protect the public, particularly where trust funds are involved (see eg *Budricks (supra)* at 16E - G)."

⁷ 1986 (1) SA 616 (A).

"There have been many cases in which a Court has not found that an attorney is unfit to practise but has nevertheless suspended him from practice and suspended the suspension order. One such case is *Incorporated Law Society, Transvaal v G1953 (4) SA 150 (T)* where MURRAY J said at 160E - F:

"We have come to the conclusion that the case, although proved against the respondent, is not of such gravity as to require the drastic step of removing respondent from the rolls of the attorneys, notaries and conveyancers of the Court. At the same time we entertain a very unfavourable view of his conduct; his conduct as proved to us passes beyond that which could appropriately be dealt with by a reprimand, however severe. It appears to us that some form of disciplinary action midway between the drastic step of striking off and the mere administration of a reprimand must be imposed."

Other such cases are to be found in the list of cases set out in *The Law of South Africa* vol 14 at para 357.

If a Court makes an order suspending an attorney from practice it follows that at the end of the period of suspension he is automatically entitled to resume practice. In making such an order the Court is not necessarily giving effect to a finding that he is unfit to practise.

It follows from what has been said above that the Court has retained its common law power to suspend an attorney from practice by reason of unprofessional conduct falling short of what is required for his striking off. If the legislation had intended to deprive the Court of its common law power to suspend an attorney (or to suspend such a suspension order) in cases where it has not been shown that the attorney is unfit to practise, the old s 28 *bis* and the new s 22 (1) (d) would have been differently worded."

[32] I accordingly propose the following order:

- (i) Mr Ramokatane Joseph Mogale is suspended from practicing as an attorney of this Court for a period of one year.
- (ii) Mr Mogale's re-enrolment as an attorney is subject to him having successfully and to the satisfaction of the Law Society completed a

practical attorneys bookkeeping course necessary for the keeping of proper accounting records as contemplated by section 78 of the Attorneys Act 53 of 1979 as amended.

- (iii) The respondent is to pay the costs of this application on the attorney and client scale.


AC BASSON
JUDGE OF THE HIGH COURT

I agree


L VORSTER
ACTNG JUDGE OF THE HIGH COURT

Appearances:

Heard on

: 9 February 2017

For the appellant : S L Magardi

Instructed by : Damons Margardie Richardson Attorneys

For the respondent : N Matlala

Instructed by : Maluleke Seriti Makume Matlala Inc.