



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

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

17/10/2013

17 OCTOBER 2013

DATE

SIGNATURE

CASE NO: 58884/2012

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES: Appellant

AND

ONICCAH MAKGEBELE NKOE

: Respondent

JUDGMENT

MASANGO AJ

[1] The applicant is the Law Society of the Northern Provinces which includes Mpumalanga, Gauteng and Limpopo Province and every attorney appointed under the Attorneys Act in these Provinces are members of the applicants. The applicants' duty is to monitor the professional conduct of its member and to ensure that the members conduct themselves in a professional way in the running of the profession as contained in paragraph 3 to 5 of the applicant's founding affidavit.

[2] The respondent is an attorney who has since closed her practice and is employed by the Elias Motsoaledi Municipality. She was admitted as an attorney on the 28 May 1998. She was practicing as an attorney under the name and style of Onnicah M Nkoe at Harmony International Care Centre, Portion 32 Onspoed Farm Bronkhorstspuit. At the time when the application was made the respondent was employed by Elias Motsoaledi Municipality as a Legal Advisor.

[3] The applicant is applying to this Court for the removal of the respondent from the roll of the attorneys alternatively that the respondent be suspended from her practice as an attorney on such terms and condition this court will deem appropriate alleging that her conduct has deviated from the standard of profession and that she is not a fit and proper person to continue to practice as an attorney.

[4] The respondent has raised a point *in limine* that the applicant has no *locus standi* to bring this application as she was no longer practicing as an attorney and have closed her practice on 20 April 2010. That at the time when application was launched she was in full time employment as a Legal Advisor at Elias Motsoaledi Municipality in Groblersdal. The respondent also relies on section 57(1) of the Attorneys Act 53 of 1979 which provides that "every practitioner who practices in any Province whether in his own account or otherwise shall be a member of the Society of that Province."

[5] The applicant's response to the point *in limine* was that the interest of the Law Society in this application flows from the Attorneys Act Section 22(1) d and the rules made in terms of section 74 of the Act and that the respondent was still enrolled on the roll of attorneys and admitted as an attorney of this Honorable Court. An attorney is not limited to a person who is practicing but also includes non-practicing attorneys.

[6] I will first deal with the point *in limine* raised by the respondent in this matter. It is common cause that the respondent was employed by Elias Motsoaledi Municipality and no longer practices as an attorney since she was employed by the Municipality. Section 1 of the Attorneys Act defines an attorney to mean any person duly admitted to practice as an attorney in any part of the Republic. The respondent is not contesting that she is an attorney but that she has closed down her practice and joined the Elias Motsoaledi Municipality.

[7] Section 57(1) provides that any practitioner who practice in any Province shall be a member of the Society of that Province. Section 57(2) provides that even a practitioner who is not practicing in the Province of the Law Society concerned as long as he/she was enrolled as an attorney in any Court in that Province may by notice addressed to that person be declared a member of the Law Society in that Province.

[8] Before a person is admitted as an attorney he must have been a member of the Society of that Province in terms of section 16 of the Act and must have satisfied the Society that he is a fit and proper person to be admitted as an attorney. An attorney ceases to be a member of the Law Society of his or her Province when he has been dealt with in terms of section 22 of the Act. I accordingly conclude that the respondent's membership with the Law Society of the Northern Provinces is still intact and she is still a member of the applicant until she has been dealt with in terms of section 22 of the Attorneys Act.

Accordingly the applicant has the *locus standi* to bring this application and the point *in limine* raised by the respondent is dismissed.

[9] I now turn to the merits of the matter. The basis of the complaint against the respondent is contained in paragraph (9) of the founding affidavit of the of the applicant. In paragraph 9.1 it is alleged that she failed to co-operate with the Law Society in a proposed inspection of her accounting records and failed to hand to the Law Society her accounting records and office files for the purposes of such inspection. In her answering affidavit the respondent denied this allegation against her and she further stated that at that time she was employed by the Elias Motsoaledi Municipality and her practice was closed and that was also confirmed by the investigator of the applicant Ms.M. Geringer in Paragraph 2 and 3 of the report compiled. Rule 70 provides that she should have submitted her closing audit report at the time when she was closing the practice.

[10] The respondent failed to comply with Rule 70 to cause her auditors to lodge the audit report with the applicant within 6(six) months of the annual accounting period when she closed her Practice on the 20 April 2010 and she was supposed to have acted in terms of Rule 70 of the applicants rules. She consulted with Ms Geringer on 27 June 2012 and at that time the records were still outstanding. In my view she contravened Rule70 of the Applicant's rules.

[11] The second complaint is that she failed to account to a client which is FM Mokone, though there is no affidavit attached as to the time of the complaint and no file was found which would be of assistance to the applicant. The respondent failed to make the records of the client Mokone available to the applicant's investigator.

[12] The other complaint against the respondent relates to the mishandling of the Trust money and the mismanagement of the Trust account. The complaint by the client Makgetlane was that out of the her claim of R594 106.00 which

was paid to the Trust account by the Road Accident Fund on behalf of the client R141 925.00 was paid to the client and a balance of R362 181.00 unaccounted for. The claim was received during 2007 and payment to the client was only made during 2009.

[13]As already mentioned above this is an application to remove the responded from the roll of attorneys and in the application of this nature the Court held in *The Law Society, Northern Provinces V Mogami*2010(1)186(SCA)para4:

“Applications for the suspension or removal from the roll require a three-stage enquiry. First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual enquiry. Second, it must consider whether the person concerned is “in the discretion of the court” not a fit and proper person to continue to practice. This involves a weighing-up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgement. And third, the Court must enquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice”.

[14] Whether the first enquiry is established can be judged from the conduct of the parties to the issue. In paragraph 5 of the respondent’s notice of motion for the postponement her representative conceded that the respondent was causing undue delay in this matter and she even stated in paragraph [4] of the notice of motion “She promised to attend to this matter urgently and as at today she has not yet managed to give me proper instructions as to how far she is with the full accounting” to me this is an indication of a lack of commitment on the part of the respondent to answer to the allegation against her and to resolve the matter. In the complaint of Makgetlane the respondent conceded that the balance owed

to the complainant was R325 493.20 but tried to justify that that money covered her costs and it was not clear how she arrived at that.

[15] I have already mentioned that she was obliged in terms of the rules to file her Rule 70 closing audit report when she joined the Municipality but she did not do so. The respondent was slack in the conduct of her practice and in the compliance with the rules of the applicant and that leads me to the conclusion that the first enquiry has been established on a preponderance of probabilities.

[16] I now turn to the second enquiry which is to weigh up the conduct of the respondent towards what is complained of against what is expected of a reasonable attorney to have acted or behaved under the circumstance. Section 22(1) (d) of the Attorneys Act provides that “the Court when exercising its discretion it must have found that the respondent is not a fit and proper person to continue to practice as an attorney”. The conduct complained of to me is of a serious nature as the dignity and the integrity of the profession is being compromised. A reasonable attorney under the circumstance would have acted differently for instance in the case of Makgetlane she would have preferred the interest of her client above her own. I am therefore satisfied that the respondent is not a fit and proper person to continue to practice as an attorney.

[17] I now turn to the Third enquiry which is the most critical enquiry. The appeal Court in *Summerley v The Law Society of The Northern Provinces* 2006(5) SA613SCA, Brand JA described the test to be applied as followed: “The Third enquiry again requires the Court to exercise its discretion. At this stage the Court must decide in the exercise of its discretion whether the person who has been found not to be fit and proper person to practice as an attorney deserve the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice”. Considering the submissions and

evidence that has been tendered in this matter. I come to the conclusion that she be removed from the roll of the attorneys.

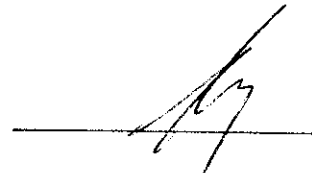
[18] I accordingly propose the following order:

(a) That the draft order marked "X" be made an order of the court.



NS MASANGO
ACTING JUDGE OF THE HIGH COURT

I agree



N KOLLAPEN
JUDGE OF THE HIGH COURT

IN THE NORTH GAUTENG HIGH COURT – PRETORIA
REPUBLIC OF SOUTH AFRICA

Case number: **58884/2012**

PRETORIA THIS 20TH DAY OF AUGUST 2013

BEFORE THE HONOURABLE JUSTICE KOLLAPEN J
BEFORE THE HONOURABLE JUSTICE MASANGO AJ

In the application of:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

(Incorporated as the Law Society of the Transvaal)

Applicant

and

ONICCAH MAKGABELE NKOE

Respondent

DRAFT ORDER

Having heard counsel for the applicant and having read the papers filed of record

IT IS ORDERED

1. That the name of Oniccah Makgabele Nkoe (the respondent) be struck from the roll of attorneys of this Honourable Court.
2. That the respondent hands and delivers her certificate of enrolment as an attorney to the Registrar of this Honourable Court.

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T.M.

3. That in the event of the respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the sheriff of the district in which the certificates are, be authorised and directed to take possession of the certificates and to hand it to the Registrar of this Honourable Court.
4. That the respondent be prohibited from handling or operating on her trust accounts as detailed in paragraph 5 hereof.
5. That Johan van Staden, the head: member affairs of the applicant or any person nominated by him, be appointed as *curator bonis* (curator) to administer and control the trust accounts of the respondent, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with the respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by the respondent at a bank in the Republic of South Africa in terms of section 78(1) of Act No 53 of 1979 and/or any separate savings or interest-bearing accounts as contemplated by section 78(2) and/or section 78(2A) of Act No. 53 of 1979, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said sub-sections or in which monies in any manner have been deposited or credited (the said accounts being hereafter referred to as the trust accounts), with the following powers and duties:

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- 5.1 immediately to take possession of respondent's accounting records, records, files and documents as referred to in paragraph 6 and subject to the approval of the board of control of the attorneys fidelity fund (hereinafter referred to as the fund) to sign all forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which the respondent was acting at the date of this order;
- 5.2 subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against the respondent in respect of monies held, received and/or invested by respondent in terms of section 78(1) and/or section 78(2) and/or of Act No 53 of 1979 (hereinafter referred to as trust monies), to take any legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions, if any, in which the respondent was and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);
- 5.3 to ascertain from the respondent's accounting records the names of all persons on whose account the respondent appears to hold or to have received trust monies (hereinafter referred to as trust creditors); to call upon

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the respondent to furnish him, within 30 (thirty) days of the date of service of this order or such further period as he may agree to in writing, with the names, addresses and amounts due to all trust creditors;

- 5.4 to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of, the board of control of the fund, to determine whether any such trust creditor has a claim in respect of the monies in the trust account(s) of the respondent and, if so, the amount of such claim;
- 5.5 to admit or reject, in whole or in part, subject to the approval of the board of control of the fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;
- 5.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the board of control of the fund;
- 5.7 in the event of there being any surplus in the trust account(s) of the respondent after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce (as the case may be), firstly, any claim of the fund in terms of section 78(3) of Act No 53 of 1979 in respect of any interest therein referred to and, secondly, without prejudice to the rights

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of the creditors of the respondent, the costs, fees and expenses referred to in paragraph 10 of this order, or such portion thereof as has not already been separately paid by the respondent to the applicant, and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the board of control of the fund, to the respondent, if she is solvent, or, if the respondent is insolvent, to the trustee(s) of the respondent's insolvent estate;

- 5.8 in the event of there being insufficient trust monies in the trust banking account(s) of the respondent, in accordance with the available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which may be available in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the Attorneys Fidelity Fund;
- 5.9 subject to the approval of the chairman of the board of control of the fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and
- 5.10 to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of respondent has/have been dealt

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with, until such time as the board notifies him that he may regard his duties as curator as terminated.

6. That the respondent immediately delivers her accounting records, records, files and documents containing particulars and information relating to:
 - 6.1 any monies received, held or paid by the respondent for or on account of any person while practising as an attorney;
 - 6.2 any monies invested by the respondent in terms of section 78(2) and/or section 78(2A) of Act No 53 of 1979;
 - 6.3 any interest on monies so invested which was paid over or credited to the respondent;
 - 6.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by the respondent, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;
 - 6.5 any insolvent estate administered by the respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;
 - 6.6 any trust administered by the respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;

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- 6.7 any company liquidated in terms of the Companies Act, No 61 of 1973, administered by the respondent as or on behalf of the liquidator;
- 6.8 any close corporation liquidated in terms of the Close Corporations Act, 69 of 1984, administered by the respondent as or on behalf of the liquidator;
- 6.9 respondent's practice as an attorney of this Honourable Court, to the curator appointed in terms of paragraph 5 hereof, provided that, as far as such accounting records, records, files and documents are concerned, the respondent shall be entitled to have access to them but always under supervision of such curator or his nominee.
7. That should the respondent fail to comply with the provisions of the preceding paragraph of this order of service thereof upon her or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on the respondent (as the case may be), the sheriff for the district in which the accounting records, records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator.
8. That the curator shall be entitled to:

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- 8.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;
- 8.2 require from the persons referred to in paragraph 8.1 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or the respondent and/or the respondent's clients and/or the fund in respect of money and/or other property entrusted to the respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;
- 8.3 publish this order or an abridged version thereof in any newspaper he considers appropriate.
9. That the respondent be and is hereby removed from office as –
- 9.1 executor of any estate of which the respondent has been appointed in terms of section 54(1)(a)(v) of the Administration of Estates Act, No 66 of 1965 or the estate of any other person referred to in section 72(1);

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- 9.2 curator or guarding of any minor or other person's property in terms of section 72(1) read with section 54(1)(a)(v) and section 85 of the Administration of Estates Act, No 66 of 1965;
- 9.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;
- 9.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973;
- 9.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;
- 9.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984.
10. That the respondent be and is hereby directed:
- 10.1 to pay, in terms of section 78(5) of Act No. 53 of 1979, the reasonable costs of the inspection of the accounting records of the respondent;
- 10.2 to pay the reasonable fees of the auditor engaged by the applicant;

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- 10.3 to pay the reasonable fees and expenses of the curator, including travelling time;
- 10.4 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;
- 10.5 to pay the expenses relating to the publication of this order or an abbreviated version thereof; and
- 10.6 to pay the costs of this application on an attorney-and-client scale.
11. That if there are any trust funds available the respondent shall within 6 (six) months after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, shall satisfy the curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to her (respondent) in respect of her former practice, and should she fail to do so, she shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as she may have against the trust creditor(s) concerned for payment or recovery thereof;
12. That a certificate issued by a director of the Attorneys Fidelity Fund shall constitute *prima facie* proof of the curator's costs and that the registrar be

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authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.

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**BY ORDER OF COURT
REGISTRAR**

64. **ROOTH & WESSELS INC**
A Bloem/es/B30376