

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT

PARTIES:

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE APPLICANT

and

MZINGAYE LEWINTHOL GQOMO RESPONDENT

- Registrar: **CASE NO: 699/2007**
- Magistrate:
- High Court: **EASTERN CAPE DIVISION**

DATE HEARD: **19/02/2009**

DATE DELIVERED: **5/03/2009**

JUDGE(S): **PLASKET J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Appellant(s): Mr R. Brooks
- for the Respondent(s): Mr J. Keyser

Instructing attorneys:

- Appellant(s): Neville Borman & Botha
- Respondent(s): Nettletons

CASE INFORMATION -

- ***Nature of proceedings :*** **Application to strike off the roll of attorneys**

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)**

CASE NO: 699/2007

DATE HEARD: 19/02/2009

DATE DELIVERED: 5/03/2009

NOT REPORTABLE

In the matter between:

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE APPLICANT

and

MZINGAYE LEWINTHOL GQOMO RESPONDENT

The applicant applied for the respondent, an attorney, to be struck from the roll of attorneys. The conduct complained of was the misappropriation of funds from his trust account. His defence was a bare denial. The court held that this did not create a dispute of fact and that the applicant had accordingly established the respondent's misconduct. It held too that the dishonest, persistent and widespread nature of the conduct rendered the respondent a person who was not fit and proper to practice as an attorney. These characteristics as well as the absence of any mitigatory explanation or expression of remorse rendered striking off the only appropriate sanction. The application was granted with costs.

JUDGMENT

PLASKET J

[1] The applicant was admitted as an attorney of this court on 5 December 1996. He commenced practice for his own account in New Brighton, Port Elizabeth on 9 May 1997. He was interdicted from practicing as an attorney on 17 August 2000 as a result of his failure to obtain a Fidelity Fund certificate. The applicant now applies for the respondent's name to be struck off the roll of attorneys of this court, as well as for the usual additional relief in a matter such as this.

[2] The basis of the application is that the respondent is guilty of serious misconduct, and is hence not a fit and proper person to practice as an attorney, in that he misappropriated money from his trust account.

[3] It is not necessary to set out this misconduct in any detail. Suffice it to say that money entrusted by 11 clients of the respondent, that totalled R175 303.32, was misappropriated by him. (These clients claimed from and were re-reimbursed by the Attorneys Fidelity Fund.)

[4] The respondent opposes the relief sought by the applicant. His denials of the misappropriations in question are bald denials and nothing more. That does not create a dispute of fact as 'a bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases'. (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T), 1165. See too *Peterson v Cuthbert and Co Ltd* 1945 AD 420, 428-429; *Soffiantini v Mould* 1956 (4) SA 150 (E), 154G-H.) As a result, the applicant has succeeded in establishing the respondent's misconduct.

[5] Section 22(1)(d) of the Attorneys Act 53 of 1979 provides:

'Any person who has been admitted and enrolled as an attorney may, on application by the Society concerned, be struck off the roll or suspended from practice by the court within the jurisdiction of which he

practices ... if he, in the discretion of the court, is not a fit and proper person to practice as an attorney.'

[6] In *Summerley v Law Society of the Northern Provinces* [2006] SCA 59 (RSA), para 2 Brand JA said the following of the application of s 22(1)(d):

'It has now become settled law that the application of s 22(1)(d) involves a threefold enquiry The first enquiry is aimed at determining whether the law society has established the offending conduct upon which it relies, on a balance of probabilities. The second question is whether, in the light of the misconduct thus established, the attorney concerned is not a "fit and proper person to continue to practice as an attorney". Although this has not always been the position, s 22(1)(d) now expressly provides that the determination of the second issue requires an exercise of its discretion by the court As was pointed out by Scott JA in *Jasat* (at 51 E-F), the exercise of the discretion at the second stage "involves in reality a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment" The third enquiry again requires the court to exercise a discretion. At this stage the court must decide, in the exercise of its discretion, whether the person, who has been found not to be a fit and proper person to practice as an attorney, deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice.'

[7] The first issue has been determined above: the offending conduct has been established by the applicant. The second is whether that conduct is of such a nature that it renders the respondent a person who is not fit and proper to practice as an attorney. In my view, the answer to this question is in the affirmative. The conduct was dishonest, persistent and widespread. The respondent behaved in a way entirely and absolutely at odds with how an attorney should behave.

[8] The third issue is whether the ultimate sanction of striking off or suspension is appropriate. As with the second issue, the dishonesty of the

conduct, its persistence, its widespread nature and the absence of any mitigatory explanation or expression of remorse lead me to the conclusion that suspension from practice would not be appropriate and that the striking of the respondent from the roll is, indeed, the only appropriate sanction.

[9] In the result, the application succeeds with costs. An order is made in terms of paragraphs 1 to 12 of the Notice of Motion.

C. PLASKET
JUDGE OF THE HIGH COURT

I agree:

M. MAKAULA
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Mr R. Brooks instructed by Neville Borman & Botha

For the Respondent: Mr J. Keyser instructed by Nettletons