



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 21758/2018

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
2/5/19	
DATE	SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

Applicant

and

BABATUNDE BAMIDELE ADEKEYE

First Respondent

**MKHABELA HUNTLEY ATTORNEYS
INCORPORATED**

Second Respondent

JUDGMENT

D S FOURIE, J:

[1] This is an application in terms of section 22(1)(d) of the Attorneys Act, No 53 of 1979 for striking the name of the first respondent from the Roll of Attorneys. This Act has been repealed in terms of section 119 of the Legal Practice Act, No 28 of 2014 which came into force on 1 November 2018. In terms of section 116(2) thereof any proceedings in respect of the suspension or the removal of the name of any person from the Roll of Attorneys which have

been instituted in terms of any law repealed by this Act, and which have not been concluded at the date when this Act came into operation, must be continued and concluded as if that law had not been repealed. This application was instituted on 23 March 2018 and therefore the provisions of the now repealed Attorneys Act still apply to this application.

[2] The application is opposed by the first respondent. No relief is sought against the second respondent or its directors at this stage. The first respondent raised various points *in limine* which came before Raulinga J on 8 May 2018. On 17 May 2018 all the points *in limine* were dismissed with costs. Thereafter the first respondent applied for leave to appeal, but that application was dismissed on 13 June 2018. We were given the assurance by both counsel that no other procedure is pending and therefore this application can now be finalised.

[3] The first respondent was admitted as an attorney on 20 August 1998 and his name still appears on the Roll of Attorneys. It is common cause that during the period 1 September 2006 to 30 August 2014 he practised as a director of the second respondent in Johannesburg. He commenced practising for his own account as a single practitioner on 17 January 2017.

[4] The facts and circumstances which caused the applicant to bring this application are, *inter alia*, the first respondent's alleged misappropriation of trust funds which, according to the applicant, resulted in a trust deficit of more than R11 million, his failure to keep proper accounting records and practising as an

attorney since 1 January 2018 without being in possession of a Fidelity Fund Certificate.

BACKGROUND:

[5] After the applicant had received a qualified auditor's report for the second respondent in respect of the period ending 28 February 2017, a legal official in the employ of the applicant was instructed to conduct an inspection of the second respondent's accounting records and practice affairs.

[6] The legal official executed her mandate and reported to the applicant in writing on 12 January 2018. In her report she refers to the second respondent's auditor's report for the period 1 March 2016 to 28 February 2017 which was qualified to the effect that the second respondent's trust account had a deficit of R11 683 404.44.

[7] Attached to the auditor's report was a statement by attorney A L Mkhabela, a director of the second respondent, in which he informed the applicant of a trust deficit in the second respondent's bookkeeping in exactly the same amount as referred to by the auditor. According to him the trust deficit was the result of the misappropriation of trust funds by the first respondent.

[8] In his statement the said attorney explains that one of the longstanding clients of the second respondent is the Kwezi Group of Companies. Kwezi instructed the second respondent to invest an amount of R20 million in an interest-bearing account and to disburse the monies in accordance with its instructions. The first respondent was in charge of this account. On 8 Decem-

ber 2014 Mr Mkhabela became aware of the misappropriation of trust funds by the first respondent in the amount of R17 210 290.87. He then confronted the first respondent who accepted responsibility for the misappropriation. The first respondent undertook to reimburse the monies misappropriated, but only repaid an amount of R6 million. On 30 August 2017 the outstanding amount in respect of misappropriated trust funds was R11 683 404.44. The Kwezi Group of Companies subsequently instituted legal action against the second respondent in order to recover the monies misappropriated by the first respondent.

[9] It is also pointed out by the applicant that, as a result of the alleged irregularities committed by the first respondent, he did not qualify for and was not issued with a Fidelity Fund Certificate for 2018. Such a certificate is mainly issued on the strength of an unqualified auditor's report. The purpose thereof is to protect the general public. According to the applicant the first respondent continued to practise as an attorney from 1 January 2018 without a Fidelity Fund Certificate.

[10] In his answering affidavit the first respondent explains that he had been issued with a Fidelity Fund Certificate for the year ending 31 December 2017. He points out that since 1 January 2018 *"I have not been practising as an attorney as I have not applied for nor being issued with a Fidelity Certificate"*. However, further on in the same affidavit the first respondent admits that *"I have been practising without a Fund Certificate, as I have not yet submitted my trust account audit"*.

[11] The first respondent denies that he was involved in the misappropriation of trust funds. He gives the following explanation:

"I deny and do not recall Mr Mkhabela ever confronting me about the misappropriated funds and, I further deny and do not recall taking responsibility for the misappropriation of the funds or undertaking to reimburse the monies misappropriated. The amount of R6 million I paid represented payments that have been made to my personal account or accounts of entities I control which were done at the instructions of client. I then paid a sum of R5 million and R1 million to the second respondent's trust account as per the client's instructions and not as an admission of any liability."

[12] It is admitted by the first respondent that he was in charge of the Kwezi account whilst being a director of the second respondent. According to him a representative (Mr Mahamba) of the Kwezi Group of Companies had given him a special power of attorney *"to deal with the funds in accordance with instructions of Kwezi"*. A copy of this special power of attorney is attached to the answering affidavit. The first respondent then states, with reference to this special power of attorney, that *"all payment requisitions were made under proper instructions and authority of Kwezi"*.

SUBMISSIONS IN THIS COURT:

[13] Counsel for the applicant submitted that if a Court finds that an attorney is not a fit and proper person to continue to practise as an attorney, that attorney must be removed from the roll. If the Court however has grounds to assume that after a period of suspension the attorney will be fit to practise as an attorney in the ordinary course of events, it would not remove the attorney from

the roll but order an appropriate suspension. It was contended that in this case an order suspending the first respondent from practising as an attorney would not be an appropriate order and that his name should be struck from the roll.

[14] Counsel for the first respondent submitted there is a dispute of fact on the affidavits filed and therefore there is not sufficient proof that the first respondent misappropriated trust funds as alleged. The matter should therefore be referred back to the applicant to conduct a further investigation as regards all the attorneys who were directors of the second respondent during the relevant period. It was contended in the alternative that the first respondent's name should not be removed from the Roll of Attorneys, but that he should be suspended from practising as an attorney for a considerable period.

DISCUSSION:

[15] Section 22(1)(d) of the Attorneys Act provides that an attorney may on application by the society concerned be struck off the roll or suspended from practice by the Court if he or she, in the discretion of the Court, is not a fit and proper person to continue to practise as an attorney. In exercising its discretion, the Court is faced with a three stage enquiry. The Court first decides as a matter of fact whether the alleged offending conduct has been established. If the answer is yes, a value judgment is required to decide whether the person concerned is not a fit and proper person as envisaged in section 22(1). If the answer is again in the affirmative, the Court must decide in the exercise of its discretion whether, in all the circumstances of the case, the person in question is to be removed from the roll or merely suspended from practice (Law Society of

the Cape of Good Hope v Budricks 2003 (2) SA 11 (SCA) at 13J - 14A). The facts upon which the Court's discretion is based, should be considered in their totality, and the Court must not consider each issue in isolation (Beyers v Pretoria Balieraad 1966 (2) SA 593 (A) at 606B).

[16] In deciding on whichever course to follow, the Court is not first and foremost imposing a penalty. The main consideration is the protection of the public (Malan v The Law Society of the Northern Provinces [2009] 1 All SA 133 (SCA) par 7). The Court in the *Malan* also pointed out (in par 8) the following:

"Second, logic dictates that if a Court finds that someone is not a fit and proper person to continue to practise as an attorney, that person must be removed from the roll. However, the Act contemplates a suspension. This means that removal does not follow as a matter of course. If the Court has grounds to assume that after the period of suspension the person will be fit to practise as an attorney in the ordinary course of events it would not remove him from the roll but order an appropriate suspension ... (I)t is implicit in the Act that any order of suspension must be conditional upon the cause of unfitness being removed. For example, if an attorney is found to be unfit of continuing to practise because of an inability to keep proper books, the conditions of suspension must be such as to deal with the inability. Otherwise the unfit person will return to practice after the period of suspension with the same inability or disability."

[17] An attorney is a member of a learned, respected and honourable profession and, by entering it, pledges himself with total and unquestionable integrity to society at large, to the Courts and to the profession. The law expects from an attorney the highest possible degree of good faith in his dealings with his

client, the public and the Court. This implies that an attorney's conduct, submissions and representations must at all times be accurate, honest and frank.

[18] The first question now to be considered is whether the alleged offending conduct has been established? It relates to the allegation that the first respondent was practising without a Fidelity Fund Certificate and that he misappropriated trust funds. The contention that there is a dispute of fact and that the matter should be referred back to the applicant for further investigation is for two reasons without any merit. First, the issue about a dispute of fact has already been considered and dealt with by Raulinga J on 8 May 2018. Before dismissing it as one of the points *in limine* raised by the first respondent, the learned Judge said the following in this regard:

"In essence, the first respondent does not raise a real, genuine and bona fide dispute which can fit the guidelines in Plascon Evans. He makes bare denials without making an explanation of the facts in dispute."

[19] Second, the first respondent has given an explanation with regard to the alleged offending conduct and has made certain admissions in this regard which cannot be ignored. Put differently, this application can be considered on the first respondent's own version, also taking into account the manner in which he presented his case.

[20] There appears to be no dispute that the first respondent was practising as an attorney since 1 January 2018 without being in possession of a

Fidelity Fund Certificate. Although he attempted to give a different version initially, he later conceded that *"I have been practising without a Fund Certificate"*. Section 41(1) of the Attorneys Act provides that a practitioner shall not practise or act as a practitioner for his own account or in partnership unless he is in possession of a Fidelity Fund Certificate. The first respondent failed to comply with this statutory requirement and therefore the alleged offending conduct has been established.

[21] The second issue to be considered is whether it has been demonstrated that the first respondent had misappropriated trust funds. Notwithstanding his denial in this regard, the first respondent has admitted that payments in the amount of R6 million had been made *"to my personal account or accounts of entities I control"*. According to his own explanation he later paid R5 million and also R1 million to the second respondent's trust account. No doubt, this amount of R6 million which he had in his personal account or accounts of entities under his control was trust money belonging to his client, the Kwezi Group of Companies. This clearly appears from his own explanation and the special power of attorney on which he relies.

[22] The special power of attorney was granted by Kwezi Group (Pty) Ltd as represented by Mr Mahamba, a director. It clearly stipulates that an amount of R20 million was to be received *"into the trust account of MHA (Mkhabela Huntley Attorneys Incorporated)"*. This special power of attorney did not authorise the first respondent to receive any trust money into his personal account or that of entities under his control. There is a general clause authorising *"other payments from the funds as we shall direct from time to time in*

writing". No direction in writing has been produced by the first respondent authorising him to accept trust money in his personal account and that of entities under his control. His explanation that the amount of R6 million was paid into his personal account or that of entities under his control "*at the instructions of client*" is a bald and unsubstantiated statement which should be rejected.

[23] The fact that R6 million was repaid is a further indication that trust money had been misappropriated by the first respondent. His explanation that "*I deny and do not recall Mr Mkhabela ever confronting me about the misappropriated funds*" is incomprehensible. I find it strange that an attorney who has been confronted about the misappropriation of trust funds will not be able to recall such an allegation. The first respondent's version in this regard is so improbable that it can safely be rejected. No doubt, it was this confrontation about the misappropriation of trust funds which motivated the first respondent to repay the amount of R6 million.

[24] I also take into account the manner in which the first respondent has presented his case. Needless to say, his explanation is extremely vague and he has failed to respond meaningfully with regard to the allegations of the misappropriation of trust funds. Attorneys are expected to respond meaningfully and to furnish a proper explanation of financial discrepancies and a failure to do so, may count against them. (*Hepple & Others v Law Society of Northern Provinces*, 2014 JDR 1078 (SCA) par 9).

[25] Section 78 of the Attorneys Act makes provision for trust accounts. It provides in sub-section (1) that an attorney shall open and keep a separate trust

banking account *“at a banking institution in the Republic and shall deposit therein”* the money held or received on account of any person. Sub-section (2) makes provision for the investment *“in a separate trust savings or other interest-bearing account opened by him or her with any banking institution or building society”* of trust money which is not immediately required for any particular purpose. Sub-section (2A) makes provision for the opening of a *“separate trust savings or other interest-bearing account”* for the purpose of investing trust money therein. In both instances the account concerned shall contain a reference to the applicable sub-section which means that the money so deposited shall remain trust money. Section 78 does not authorise an attorney to deposit or invest trust money in his personal account or that of entities under his control. Having regard to all these considerations, I am satisfied that the alleged offending conduct with regard to the misappropriation of trust funds in at least the amount of R6 million has been established.

[26] I now have to consider whether the first respondent is not a fit and proper person as envisaged in section 22(1) of the Attorneys Act. A valued judgment is required taking into account all the proven facts and relevant circumstances. Looking at them holistically, the following can be inferred from the conduct of the first respondent:

- (a) He unlawfully and deliberately paid trust money into his personal account and that of entities under his control;
- (b) He misappropriated trust funds in the amount of at least R6 million and in doing so he was dishonest;

- (c) At the time of filing his answering affidavit he refused to accept that he was acting in a dishonest manner;
- (d) His conduct indicates that he failed to maintain a professional standard with regard to his practice and his duty towards his client.

[27] An attorney is a member of a learned, respected and honourable profession. The law expects from an attorney the highest possible degree of good faith in his dealings with his clients, the public and the Court. If I compare this requirement with the conduct of the first respondent, I am of the view that he is not a fit and proper person as envisaged in section 22(1) of the Attorneys Act.

[28] That brings me to the final question whether, in all the circumstances of this case, the first respondent is to be removed from the roll or merely suspended from practice. To exercise my discretion properly, and as a starting point, I take into account the following facts and circumstances:

- (a) The first respondent was dishonest;
- (b) There was a trust deficit of at least R6 million;
- (c) He was practising without a Fidelity Fund Certificate;
- (d) The fact that he refused to admit that he had misappropriated trust funds.

[29] Taking into account the relevant facts and circumstances it does not appear to me that the first respondent's dishonesty can be regarded as a lapse, or that there are exceptional circumstances justifying an order that the first respondent should be suspended from practising as an attorney. In my view the opposite is true. The facts indicate that the first respondent's character is inherently flawed. This conclusion justifies an order that his name should be removed from the Roll of Attorneys.

ORDER:

I therefore make the following order:

1. In terms of section 22(1)(d) of the Attorneys Act, No 53 of 1979 the first respondent's name is struck from the Roll of Attorneys.
2. The first respondent shall immediately deliver his certificate of enrolment as an attorney to the Registrar of this Court;
3. In the event of the first 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 certificate is, is authorised and directed to take possession of the certificate and to hand it to the Registrar of this Court;
4. The first respondent is prohibited from handling or operating his trust accounts as detailed in prayer 5 hereof and this order will also apply to the firm Adekeye Attorneys;

5. Johan van Staden, the Head: Members Affairs of applicant or any person nominated by him, is appointed as *curator bonis* (curator) to administer and control the trust accounts of the first respondent, including accounts relating to insolvent and deceased estates and any estate under curatorship connected with the first respondent and the first respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by first respondent at banks 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 subsections 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:

5.1. immediately to take possession of the first 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 first 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 first respondent in respect of monies held, received and/or invested by the first respondent in terms of section 78(1) and/or section 78(2) and/or section 78(2A) 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 first respondent was and may still have been concerned and to receive such monies and to pay the same to the credit of the trust accounts;
- 5.3. to ascertain from first respondent's accounting records the names of all persons on whose account first respondent appears to hold or to have received trust monies (hereinafter referred to as "trust creditors) and to call upon first 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 monies in the trust accounts of first 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 accounts of the first 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 of the creditors of the first respondent, the costs, fees

and expenses referred to in paragraph 12, or such portion thereof as has not already been separately paid by the first to sixth respondents to 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 first respondent, if he is solvent, or, if first respondent is insolvent, to the trustee(s) of the first respondent's insolvent estate;

5.8. in the event of there being insufficient trust monies in the trust banking accounts of the first 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 accounts 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 her 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 accounts of the first respondent have been dealt with, until such time as the board notifies them that they may regard his duties as curator as terminated.

6. The first respondent shall immediately deliver his accounting records, records, files and documents containing particulars and information of his practice relating to:

6.1. any monies received, held or paid by the first respondent for or on account of any person while practising as an attorney;

6.2. any monies invested by the first 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 first respondent;

6.4. any estate of a deceased person or an insolvent estate or an estate under curatorship administered by the first respondent, whether as executors or trustees or curators or on behalf of the executor, trustee or curator;

6.5. any insolvent estate administered by the first 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 first respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;
 - 6.7. any company liquidated in terms of the Companies Act, No 61 of 1973, administered by the first 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 first respondent as or on behalf of the liquidator; and
 - 6.9. the first respondent's practice as an attorney of this honourable Court, to the curator appointed in terms of prayer 5 hereof, provided that, as far as such accounting records, records, files and documents are concerned, the first respondent shall be entitled to have reasonable access to them, but always subject to the supervision of such curator or his nominee.
7. Should the first respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him or after a return by the person entrusted with the service thereof that he/she has been unable to effect service thereof on the first respondent (as the case may be), the sheriff for the district in which such accounting records, records, files and documents are, is empowered and directed to search

for and to take possession thereof wherever they may be and to deliver them to such curator.

8. The curator shall be entitled to:

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 first respondent and/or first respondent's clients and/or in respect of money and/or other property entrusted to the first 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; and

8.4. wind-up the first respondent's practice.

9. The first respondent is hereby removed from office as:

- 9.1. executor of any estate of which first 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);
 - 9.2. curator or guardian 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. liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973;
 - 9.4. trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;
 - 9.5. liquidator of any close corporation appointed in terms of section 74 of the Close Corporations Act, No 69 of 1984; and
 - 9.6. administrator appointed in terms of section 74 of the Magistrates Court Act, No 32 of 1944.
10. If there are any trust funds available the first respondent shall within six (6) 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 him (first respondent) in respect of his former practice, and should he fail to do so,

he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof;

11. A certificate issued by a director of the Attorneys Fidelity Fund shall constitute *prima facie* proof of the curator's costs.

12. The first respondent is hereby directed:


12.1. 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 first respondent;

12.2. to pay the reasonable fees and expenses of the curator;

12.3. to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;

12.4. to pay the expenses relating to the publication of this order or an abbreviated version thereof; and

12.5. to pay the costs of this application on an attorney and client scale.



D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA ~~29/1/19~~ 2/5/19

I agree.



W HUGHES
JUDGE OF THE HIGH COURT
PRETORIA

APPEARANCES:

For the applicant: L Groome

For the first respondent: J O Rabaji-Rasethaba