

IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO. 1251/07

In the matter between:-

LAW SOCIETY OF NORTHERN PROVINCES

Applicant

and

MARTHA MMASEFAKO MOTLHAKE

First Respondent

LAW SOCIETY OF BOPHUTHATSWANA

Second

Respondent

JUDGMENT

MONAMA AJ:

INTRODUCTION

[1] This is an application by the Law Society of the Northern Provinces (hereinafter referred to as the “Applicant”). The Applicant regulates the affairs of all admitted and enrolled attorneys, notaries and conveyancers in its area of jurisdiction. The Applicant’s area of jurisdiction includes Gauteng,

Mpumalanga and Limpopo Provinces. It also has jurisdiction in certain sections of the North West Province, like Lichtenburg, Rustenburg, Ga-Rankuwa, etc.

- [2] The First Respondent is an adult female attorney who was admitted and enrolled by the Court on 26 August 1999. At the time of the institution of these proceedings, the First Respondent was practising as an attorney of this Court for her own account under the name and style Motlhake-Kopedi attorneys at First Floor, Uncle Nat's Shopping Centre, 1403 Zone 16, Ga-Rankuwa, North West.
- [3] The Second Respondent is a statutory body established in terms of the Bophuthatswana statute known as Attorneys, Notaries and Conveyancers Act, No. 29 of 1984. Its principal place of business is in Ga-Rankuwa. The Second Respondent controls and regulates all admitted and enrolled attorneys, notaries and conveyancers in the areas which constituted the territory of the former Republic of Bophuthatswana.
- [4] In terms of Section 84A of the Attorneys Act 53 of 1979 the Applicant has concurrent jurisdiction with the Second Respondent over the attorneys, notaries and conveyancers whose practices are situated in the area which formerly constituted the Republic of Bophuthatswana. Ipso facto, the First Respondent is a member of both the Applicant and the Second Respondent.

FACTUAL BACKGROUND

- [5] During September 2006, the Applicant launched an application against the First Respondent. In the application an order is sought for the removal of the First Respondent's name from the roll of attorneys and related reliefs.
- [6] During 18 May 2007, the First Respondent was suspended from practising as an attorney pending the final determination of this application.
- [7] The facts constituting the essence of this application are divided into two parts. First, it is the complaint by Ditodi and secondly, the Applicant's complaint about the fidelity fund certificate.
- [8] I deal first with the Ditodi complaint.
- [9] In August 2005 Ms Mosima Ruth Ditodi (hereinafter referred to as "Ruth"), lodged a complaint with the Applicant to the effect that the First Respondent had failed to account to her about monies recovered from the Road Accident Fund (hereinafter referred to as "RAF"). The claim against RAF was for the loss of support by the claimant and her children as a result of the death of Ntshatshane Esrom Ditodi (hereinafter referred to as "the deceased"). At the time of initiating the claim against RAF, Ruth alleged that she was the wife of the deceased.
- [10] During June 2003 Ruth terminated the First Respondent's mandate. Another attorney was instructed to take over the prosecution of the claim. Further investigations, revealed that Ruth was not the wife of the deceased. The real wife was Manaila Salome Ditodi (hereinafter referred to as "Salome").

The said Salome then instructed the First Respondent to act on her behalf in respect of the same claim against RAF for compensation and the administration of the estate of the deceased.

[11] I now turn to consider the matter relating to the fidelity fund certificate.

[12] During November 2002, the Applicant challenged the validity of the report submitted by the First Respondent's accountant. Accordingly no fidelity fund certificate was issued for the financial year 2003. Notwithstanding the absence of the fidelity fund certificates for the years 2003 to 2007, the First Respondent continued to practise until her suspension on 18 May 2007.

[13] On 6 December 2005 a disciplinary hearing against her was held. The charges against her may conveniently be summarised as follows, namely:

13.1 Failure to provide the Applicant with a report from her accountant for the financial year ending 28 February 2004 and 28 February 2005.

13.2 Practising without a fidelity fund certificate for the period 2003 to 2005.

The First Respondent pleaded guilty.

[14] The disciplinary committee of the Applicant did not impose any sanction but referred this matter to the council of the

Applicant.

[15] On 28 March 2006 the First Respondent was invited to submit written representation in respect of the report of the disciplinary committee. She was also invited to attend a meeting which was scheduled for 19 June 2006.

[16] Written representations were made by her indicating the problems which she encountered with her accountant and she requested an extension of time in order to remedy the breach in regard to the accountant's reports. The First Respondent failed to attend the meeting scheduled for 19 June 2006.

[17] At this meeting, the council of the Applicant resolved to apply to Court for her removal from the roll of attorneys.

THE APPLICATION

[18] On 13 September 2006, the Applicant launched this application which was heard on 18 May 2007.

[19] On 18 May 2007, Mr Lamey appeared for the Applicant and Adv Bokaba for the First Respondent. There was no appearance for the Second Respondent. There was no explanation for non appearance on behalf of the Second Respondent who is a regulatory body and who was served with the papers.

[20] **Hendricks J** granted an order in terms of the draft order. The order is quite extensive and runs into some thirteen pages. In terms of the order, the First Respondent is suspended from her

practice as an attorney pending the final determination of the application for striking her from the roll of attorneys.

THE DITODI COMPLAINT

[21] It is common cause that the First Respondent was instructed to prosecute a loss of support claim against the RAF and to administer the estate of the late Ntshatshane Ezrom Ditodi, the deceased, who was married to Salome Ditodi. However, these instructions were given by Ruth who purported to be the widow of the deceased. Later it was established that Ruth is not the real wife of the deceased. She included children who were not the dependants of the deceased in the claim against the RAF.

[22] In due course and for reasons not apparent from the papers, Ruth terminated the mandate held by the First Respondent. She engaged another set of lawyers. The new lawyer demanded the payment of the proceeds of the claim which were recovered from the RAF. In the meantime, Salome instructed the First Respondent to finalise the matter relating to the estate of the deceased and the RAF claim.

[23] Ruth and the Applicant do not dispute that Salome is the real wife of the deceased and that the money from RAF is held in the estate account by First Respondent. The Applicant submits that the First Respondent acted in a conflict of interest situation. However, Salome indicated that she preferred the First Respondent to act for her because she was familiar with the history of the matter. Salome has filed an affidavit confirming her insistence that the First Respondent must act for her.

[24] At the hearing on 10 August 2007 Mr Lamey appeared for the Applicant. There was no appearance for the Respondents nor were the heads of argument filed. Nonetheless, the Court will determine the matter on the basis of the documents filed of record.

THE ISSUES

[25] There are only two questions which call for decision in this matter, they are:

25.1 Did the First Respondent act improperly in dealing with trust funds relating to the Ditodi family?

25.2 Did First Respondent practise without a fidelity fund certificate?; and

25.3 If any of these questions is answered in the affirmative, the next stage is to determine whether or not she is a fit and proper person to practise as an attorney and the appropriate sanction.

STATUTORY REQUIREMENTS TO PRACTISE

[26] In terms of Section 41 of the Attorneys Act every practising attorney in the Republic of South Africa must be in possession of a valid fidelity fund certificate. The fidelity fund certificate is issued annually. The fidelity fund certificate constitutes the

authority to practise and its purpose is, inter alia, to protect the public against misuse of trust money by practising attorneys. The issuing of the fidelity fund certificate is dependent upon the Applicant being satisfied that an attorney has kept the proper books of account.

- [27] An attorney who practises without the fidelity fund certificate commits an offence. He or she also commits misconduct in terms of Rules of the Applicant and the Second Respondent.

APPLICATION OF SECTIONS 22 (1)(d) OF ACT 53 OF 1979

- [28] In terms of Section 22(1)(d) of Act 53 of 1979 the Court may strike off the roll of attorneys or suspend from practice any admitted and enrolled attorney if such attorney, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney. The authority to strike off or suspend lies with the courts (**Law Society of Cape of Good Hope vs Budricks** 2003 (2) SA 11 SCA). The words “fit” and “proper” are not defined in the Attorneys Act. The Applicant has a set of rules which govern the Attorneys profession. These rules are always used as guidelines by the courts to determine or establish whether or not an attorney is a fit and proper person to practise. It remains the discretion of the court to make a finding in that regard. See **A v Law Society of Cape of Good Hope** 1989 (1) SA 849 (A).

- [29] It is trite law that the application of Section 22 involves a threefold inquiry, namely:

29.1 The establishment of misconduct on the balance of

probabilities;

29.2 Once misconduct has been established, the next step is to determine whether such an attorney is not a “fit and proper person to continue to practise as an attorney”. This step requires the court to exercise a discretion.

29.3 Finally, the court must make a decision, in the exercise of its discretion, whether to strike off or suspend the attorney concerned.

[30] The above approach is now settled in case law – see **Summerley vs Law Society of Northern Provinces** 2006 (5) SA 613 (SCA) at page 615 (B-F) and cases referred to therein. The court has a discretion which sometime is referred to as a “value judgment” as held in the decision of **Law Society of Good Hope vs Budricks** 2003 (2) SA 11 (SCA) at page 14 (A-B).

[31] On 10 August 2005, when Ruth lodged a complaint with the Applicant, she wanted the Applicant to
 “instruct the First Respondent to pay out proceeds of the MVA claim and furnish her statement of account in respect of her costs.”

[32] The First Respondent paid the proceeds of the MVA claim into the Estate Account. This will be for the benefit of the beneficiaries as determined in accordance with the law.

[33] When this application was lodged, Salome had already been appointed as executrix of the estate of the deceased. It may

be advisable for the First Respondent not to act for either Ruth or Salome but I am not convinced that she acted in a conflict of interest situation, strictly speaking. Accordingly her conduct is excusable.

[34] Under the circumstances, in my view, the above complaint is without merit. The complainant is not the lawful wife of the deceased. She cannot, therefore, legally claim the benefits arising from the passing on of the deceased.

[35] On the contrary the complainant has committed fraud against the RAF. The First Respondent's explanation is, under the circumstances, reasonable and should be accepted. She stated that the money is kept in the estate account. Mr Lamey conceded that the Applicant has not established any theft of trust monies by the First Respondent.

THE FIDELITY FUND CERTIFICATE

[36] The First Respondent has not denied that she practised without the necessary fidelity fund certificate and that she failed to submit her annual auditor's reports for a considerable period. She pleaded guilty. On these facts, the Court is satisfied that she is not a fit and proper person to practise as an attorney.

SANCTION

[37] Practising without a fidelity fund certificate is a serious transgression but cannot be equated with theft or dishonesty.

The First Respondent's explanation is less convincing. However, she pleaded guilty at the disciplinary hearing. Her plea demonstrates remorse. She pleaded that she should not be removed from the roll of attorneys because her "profession is the only source of income and livelihood" that she has.

[38] The real issue is to determine whether she should be struck from the roll or whether an order of suspension from practice is a suitable sanction. Mr Lamey submitted that these transgressions warrant the ultimate and severe penalty of striking off the roll alternatively the sanction of suspension from practice.

[39] The facts in casu, are materially different from the facts in the **Law Society of Northern Provinces vs Mothoagae and the Law Society of Bophuthatswana** [unreported decision of this Division case no 1460/2005]. In the cases of the **Law Society of Cape of Good Hope vs Peter** 18 [2006] SCA 37 (RSA), **Summerely vs Law Society of Northern Provinces** 2006 (5) SA 613 (SCA) and **Law Society of Northern Provinces vs Mahlangu & 2 Others** [unreported decision of the Transvaal Provincial Division case no 20901/03] the transgressions involved misappropriation of trust funds but the attorneys were not struck off the roll but suspended on certain conditions.

[40] The fact that the Applicant was aware that the First Respondent did not have the fidelity fund certificate in December 2002 and that the report by Mr De Leeuw indicated that

“certain of the new rewritten accounting records of the firm . . . were made available at the office [of the First Respondent], but still had a few error”

weigh heavily in favour of the First Respondent.

[41] As held in the matter of **Summerely** and **Peter**, this matter does not merit the order sought by the Applicant. Her transgressions do not involve the misappropriation of trust funds. The alternative order as suggested by Mr Lamey is, in my view, more appropriate in the circumstances of this case, namely a suspension order on certain conditions.

[42] In the circumstances I propose the following order:

- (1) The First Respondent is suspended from practice as an attorney for a period of six months from 18 May 2007;
- (2) The First Respondent is precluded from practising as an attorney for her own account, either as principal or in partnership or in association for a period of six months from the expiration of the suspension referred to in (1) above;
- (3) Should the First Respondent, after the period referred to in (2) above, elect to practise for her own account or in a manner stipulated in that paragraph, she shall satisfy the High Court within the area of which she then practises that she should be permitted to practise for her own account;
- (4) The Respondent is ordered to pay the costs of this

application.

R E MONAMA

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

SAMKELO GURA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 10 AUGUST 2007
DATE OF JUDGMENT : 11 OCTOBER 2007

COUNSEL FOR APPLICANT : MR A. T. LAMEY
COUNSEL FOR RESPONDENT : NO APPEARANCE

ATTORNEYS FOR APPLICANT : MINCHIN & KELLY INC.
ATTORNEYS FOR RESPONDENTS : KGOMO MOKHETLE & TLOU ATT.