IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO. 381/2006

In the matter between:-

LAW SOCIETY OF NORTHERN PROVINCES Applicant

(INCORPORATED AS THE LAW SOCIETY OF THE TRANSVAAL)

and

TSHEGOFATSO CHRISTOPHER MOGAMI First Respondent

NICLAS MODISE MABUSE Second Respondent

BOPHUTHATSWANA LAW SOCIETY Third Respondent

MMABATHO

GURA J.

MONAMA AJ.

DATE OF HEARING	**:**	**07 SEPTEMBER 2007**
DATE OF JUDGMENT	**:**	**25 OCTOBER 2007**
COUNSEL FOR APPLICANT	**:**	**MR A.T LAMEY**
COUNSEL FOR RESPONDENTS IN	**:**	**1ST & 2ND RESPONDENTS PERSON**

JUDGMENT

MONAMA AJ

INTRODUCTION: PARTIES

[1] The Applicant is the Law Society of the Northern Provinces which has its principal place of business in Paul Kruger Street, Tshwane, Gauteng Province. The Applicant is a juristic person existing in terms of Section 56 of the Attorneys Act, No 53 of 1979 ("the Act") and its authority is derived from its rules formulated in terms of Section 74 of the Act. Every admitted attorney and notary who has been admitted and enrolled to practise in the Provinces of Gauteng, Limpopo, Mpumalanga and certain portions of the North West Province are its members.

[2] The First and Second Respondents were practising as attorneys of this Court under the name and style Mogami Mabuse Incorporated at Suite 104, TCM Central House, Mabopane, North West Province.

[3] The Third Respondent is the Law Society of Bophuthatswana. Its principal place of business is at 5049 Zone 4, Molatlhwa Street, Ga-Rankuwa, North West Province. The Third Respondent is a juristic person and exists in terms of the provisions of the Attorneys, Notaries and Conveyancers Act No 29 of 1984 ("The Bop. Act"). It has jurisdiction in all areas that constituted the former Republic of Bophuthatswana.

AUTHORITY OF APPLICANT

[4] In terms of Section 84A of the Act, the Applicant is empowered to exercise authority in certain areas of jurisdiction of the Third

Respondent. Mabopane is an area of jurisdiction which falls within the provisions of Section 84(A) of the Act. Accordingly, the Applicant and the Third Respondent have concurrent jurisdiction over First and Second Respondents.

BACKGROUND

[5] On 20 March 2006, the Applicant launched an urgent application which consists of two parts. In Part A thereof, it sought an order suspending the First and Second Respondents from practising as attorneys pending the determination of an application for their removal from the roll of attorneys in terms of Part B thereof.

[6] On 26 May 2006, **Hendricks J,** granted an order in terms whereof both Respondents were suspended from practising as attorneys pending the finalisation of the application for their removal from the roll of attorneys.

REMOVAL OF AN ATTORNEY FROM THE ROLL

[7] The authority to remove an attorney from the roll lies with the Court. In terms of Section 22(1) (d) of the Act, the Court is empowered, either to suspend an attorney from practising or strike him or her from the roll, 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."

[8] The application of section 22 of the Act involved a three-stage inquiry, namely:

8.1 The establishment of the misconduct on a balance of probabilities;

8.2 Once misconduct has been proved, the next step is to determine whether such an attorney is not a fit and proper person to continue to practise as an attorney. The court has to exercise a discretion in order to arrive at a just decision;

8.3 Finally, the court must make a decision, in the exercise of its discretion, whether that particular attorney should be suspended or struck off.

See **Summerley v Law Society of Northern Provinces** 2006 (5) SA 613 (SCA)

[9] An application for removal, and, or suspension is a disciplinary inquiry and sui generis in nature. The Applicant is therefore obliged to put the correct facts before Court to assist it.

THE CONTRAVENTIONS FORMING THE SUBSTANCE OF THE APPLICATION

[10] The application for the removal of the First and Second Respondents is based on several grounds, including failure to submit a Rule 70 auditor's report and practising without a fidelity fund certificate.

AUDITOR'S REPORT

[11] The two Respondents had to submit their Rule 70 auditor's report for the year ending 28 February 2005 on or before 31 August 2005. They failed to submit the said report to the Applicant. Both Respondents have therefore contravened Rule 70.

PRACTISING WITHOUT A FIDELITY FUND CERTIFICATE

[12] As a result of their failure to submit the Rule 70 auditor's report as aforesaid, no fidelity fund certificates were issued to them for the year 2006, until 21 April 2006. The Respondents, however, practised without fidelity fund certificates from 1 January 2006 up to 21 April 2006. On the latter date, fidelity fund certificates were eventually issued to them.

[13] Section 41(1) of the Act provides that no attorney shall practise without a fidelity fund certificate. This is an offence in terms of Section 83(10) of the Act. The Respondents admitted that they were wrong. However, their delay in obtaining fidelity fund certificates cannot, alone, be construed as a pointer to dishonesty on their part, and accordingly the conclusion that

> "the First and Second Respondents most probably misappropriated trust funds"

is, in my view not supported by the facts. This finding is based on the fact that since 26 May 2006 to date hereof, Applicant had a free access to Respondents books but has not found any

evidence of misappropriation of funds.

OBSTRUCING MR SWART (ACCOUNTANT)

[14] On 23 May 2005 Third Respondent issued a circular to all attorneys in its area. It warned them not to deal directly with any other Law Society. In terms of the circular, all correspondence from other Law Societies to attorneys in this area and vice versa, had to be channelled through Third Respondent. On 13 June 2005, Third Respondent addressed a letter to Applicant wherein it expressed its displeasure about Applicant's conduct in bypassing it when it dealt with attorneys in its area. The contents of the circular of 23 May 2005 were reiterated to Applicant.

[15] Subsequent to these events, Applicant instructed Mr Swart to inspect books of account of both Respondents. When Mr Swart telephoned the Respondents for an appointment, he was advised by the Respondents, to contact the Third Respondent first in terms of the circular.

[16] It is Applicant's view that such behaviour, by the Respondents, was tantamount to a refusal to allow its accountant to inspect their books of account. Applicant further avers that by so doing, the Respondents unduly obstructed its investigations.

[17] I want to sound a warning to the two Law Societies. Under no circumstances should conflicting instructions be issued to attorneys. If this happens, as it did here, the whole purpose of Section 84A of the Act is paralysed. What the legislature had in mind here is co-governance and not the situation of two boxers in a ring.

[18] In the light of the above, I find that the Respondents' attitude was not obstructionistic in nature.

COMPLAINTS

MR S. G. MASHILO

[19] After he was involved in a motor vehicle collision, Mashilo instructed the Second Respondent to institute a third party claim on his behalf. After the finalisation of the matter, the Road Accident Fund (RAF) paid an amount of R55 039,50 to the firm on 28 August 2001. The First and Second Respondents failed to account to Mashilo in respect of these monies. During August 2001 the First and Second Respondents paid Mashilo an amount of R2 000,00. Later during the same month, he was furnished with a second cheque also in the amount of R2 000,00. During September 2001 the First and Second Respondents paid him a further amount of R8 500,00. The abovementioned payments were made by way of cash cheques. Upon inquiry from the RAF, Mashilo was advised that an amount of R50 000,00 together with costs in the amount of R5 039,50 was paid by the RAF to the firm of the Respondents on 28 August 2001.

[20] What follows is the Second Respondent's response. The Second Respondent received the complainant's file from his previous attorney, Ramawele. Complainant was accordingly informed of all steps taken in the matter. The following are just some of the examples. On 4 June 2001, RAF made a written offer of settlement. On 24 August 2001, complainant signed a document (Annexure GBM1) in terms whereof he instructed the Second Respondent to reject the proposed settlement amount

and further mandated him (Second Respondent) to settle only for a capital amount of not less than R55 039,50. Subsequent to that, RAF settled the claim for an amount of R55 039,50. This was on 28 August 2001.

[21] Before this matter was settled, complainant approached the Second Respondent with a request for financial advancement in the form of a loan. He was lent R16 000,00. Annexure GBM3 is an acknowledgment of debt, by the complainant. This document is dated 31 August 2001. The complainant was therefore granted the loan when Second Respondent was still busy to process his claim.

[22] When the Second Respondent drew his statement of account, as per Annexure GBM2, the amount due to Second Respondent exceeded the capital amount which had been received from RAF. He talked to complainant about this. Complainant pleaded that he had no money to settle the difference. Second Respondent then waived an amount of R8 321,85 from his account. It was agreed between him and complainant that he (complainant) should be paid R12 500,00. Complainant stated that he had no bank account and he requested Second Respondent to keep the R12 500,00 in their trust account and that he would come to withdraw it as and when the need arose. The said money was paid out to complainant on three different occasions, being R2 000,00, R2 000,00 and R8 500,00. Although Second Respondent does not remember the specific dates of payments, but he denies that it was in August 2001.

[23] It is clear that complainant denies ever borrowing money from

Second Respondent. He denies further that he signed any document acknowledging his indebtedness to Second Respondent.

[24] There are therefore serious disputes of fact between the Second Respondent and complainant. However, complainant does not deny that he signed Annexure GB1. The Court is not satisfied, due to the two conflicting versions, that Applicant has discharged its onus of proof on a balance of probabilities.

MR J. O. BUDA

[25] Buda instructed First Respondent to proceed with a civil claim on his behalf after his motor vehicle was damaged in a collision. He paid an amount of R1 000,00 to the First Respondent. The First Respondent failed to account properly to him. Buda also learnt subsequently that defendant was paying off the judgment debt in instalments of R200,00 per month. He never received a response to the inquiries which he directed to the firm of the First and Second Respondents.

[26] The Respondents insist that the complainant was apprised of the developments and that no money was received from the judgment debtor. They stated that the averment that complainant,

> "Subsequently learned that defendant in the matter was paying off the judgment debt in instalments of R200,00 per month"

is not correct because he (complainant) instructed the Respondents to accept such an arrangement. The Respondents reiterate that the complainant was informed that only one

instalment of R200,00 was received and they attached the statement of account to the papers which reflects the outstanding balance and interests.

[27] Again I am unable to see how it can even be remotely said that they did not keep the complainant informed of the status of the matter.

MR G. MAHLANGU

[28] Mahlangu instructed the Second Respondent to act on his behalf in a civil claim. Second Respondent collected certain monies on his behalf from the defendant but he failed to advise him of the amount so collected. He paid Mahlangu an amount of R4 188,20 but failed to furnish him with a statement of account. Mahlangu learnt that the matter was settled for an amount of R10 000,00. The Applicant referred the particulars of the complainant to the Second Respondent and requested him to furnish it with a copy of his statement of account. The Second Respondent failed to comply with this request.

[29] The Second Respondent's version is the following: this matter was initially handled by A. P. Ledwaba attorneys. It was then referred to Second Respondent by the Scorpions Legal Services (the Scorpion) on behalf of complainant. When Second Respondent was briefed by Scorpion to continue with the matter, a settlement on the merits had already been done by the parties. In that settlement it was agreed that damages would be

apportioned at 80/20 in favour of the plaintiff. Only the issue of quantum was still in dispute.

[30] On 26 November 2004, complainant instructed Second Respondent to "accept the offer as explained to me by my attorney and my Scorpion Legal Protection Legal adviser". On 9 December 2004 complainant, and his two witnesses, signed a document which was intended to be made a court order. This document was signed as aforesaid, at the offices of the Scorpion. On that same day, this document was made an order of court by the Magistrate of Soshanguve, Case No.1788/2002. The defendant was ordered to pay Mahlangu the sum of R4 188,20. When complainant signed the said document, he was in possession of a written offer dated 28 May 204 (Annexure GM4). After the defendant in that case paid the R4 188,20, it was paid over to complainant. The statement of account was referred to Scorpion (as per annexure GM7) to settle the account and not to complainant because he was not liable to pay legal fees.

[31] In my view, annexure GM4 sets out clearly how the amount of R4 188,20 is arrived at. When this document is read in conjunction with annexure GM1, it is clear that there is absolutely no basis for this complaint.

MS N S NHLEKO

[32] The complaint is that the Second Respondent was instructed to prosecute a pension fund claim on behalf of the complainant. The Second Respondent took her bank card and pin code and stole her money in the sum of R14 000,00 from her bank account. A printout from the bank in relation to this account has been attached to the papers. A case of theft of R14 000 has

been reported to the police by complainant.

[33] The Second Respondent states that the complainant instructed both respondents in three different matters. She did not pay any deposit for any of these. Her mandate was executed despite that she had not paid in any fee. When the matters were finalised, she was debited for an amount of R14 216,84. An account was accordingly forwarded to her on 5 May 2005.

[34] The complainant needed to open two bank accounts; one for herself and one for her son. She needed an amount of R50,00 to open each account. She then borrowed R100,00 for that purpose from Second Respondent.

[35] After she received her statement of account, she made arrangements with the Second Respondent that once the funds become available in the bank account, he should debit it for the amount due. She filled in a form wherein she authorised Second Respondent to make these transactions in her bank account. She even furnished her bank details to him. The Second Respondent therefore debited her bank account with R10 000,00 and subsequent to that, with four separate instalments of R100,00 each. An amount of R216,84 remained unpaid up to the present moment.

[36] It is apparent from the print out that an amount of R10 500,00 was drawn in cash from inside the Bank and not on the ATM. Until the offence has been fully investigated it is premature to state as a fact that the Second Respondent is the culprit. Such approach is flawed and accordingly I am not convinced that the Second Respondent has transgressed any rule.

MS M J MOLEFE

[37] The complainant alleges that she instructed the First

Respondent to prosecute a motor vehicle compensation claim on behalf of the minor child during 2003 at the First and Second Respondents' office. She alleges that she is the aunt to the injured minor child and also its guardian. Her complaint is that the First Respondent never accounted to nor communicated with her.

[38] The First Respondent denies ever being instructed by the complainant but by the Late Emmelyn Masombuka who was the mother of the injured child. The said late Emmelyn Masombuka died in the middle of the litigation and her brother, Jan Mohau Masombuka, applied to the High Court in Pretoria for the appointment of a curator ad litem.

[39] Adv Themba Skhosana was appointed curator ad litem for the child. The court ordered that any money paid as compensation from RAF be paid into the Guardian's Fund. The matter was settled and the capital was paid in December 2004, and the taxed costs were paid in May 2005. The money due to the injured was paid over to the Guardian's Fund on 27 June 2005.

[40] The present complaint was lodged well after the First Respondent had paid the capital amount which was recovered, over to the Guardian's Fund, and having handed the undertaking letter to the minor injured child.

[41] I have great difficulty in understanding the basis of the complaint. First, the complainant stated that she is the aunt and guardian to the injured child. She demanded the money to be paid into her personal account. There is no evidence, other than

her allegation, that the complainant is indeed the aunt and guardian to the injured minor.

[42] The two versions of the complainant and the First Respondent are mutually destructive and the First Respondent acted reasonably. In my view, there was no basis for the relief that the Applicant sought.

MS P S KUNENE

[43] Kunene instructed the First Respondent to assist her in the winding up of the estate of her late husband, Mr D H Seoketsa. The First Respondent failed to handle the instruction properly and since March 2001 Kunene did not receive any progress reports from the First Respondent. Kunene then instructed another firm of attorneys to assist her. The attorneys attempted to assist her, but did not receive any co-operation from the First Respondent.

[44] The First Respondent denies ever acting for the complainant. He states that the complainant is not the wife of the late D. H. Seoketsa. The executor and executrix in the said estate, who have been appointed by the Master, are Moffat Seoketsa and Joyce Lebeloane.

[45] The Applicant has not assisted this Court in proving the complainant’s authority to and entitlement in the estate. The bare allegation is insufficient and the Court expected the Applicant or the complainant to have produced some evidence before launching these proceedings. Consequently the Court

finds that Applicant has failed to discharge its onus.

MS D. S. MOTSHEPHE

[46] Ms Motshephe alleges that she instructed the firm of both Respondents to institute an action for damages against Mr J. Molepo. The Court, subsequently, gave judgment in complainant's favour in the amount of R100 350,00. Thereafter, the Respondents instructed Molepo to pay an amount of R163 173,40. According to complainant, an amount of R163 173,40 and not only R100 350,00 should be paid over to her by Respondents.

[47] Her complaint is that as at 26 March 2004, she had been paid only R53 350,00. She last received money from the Respondents on 25 March 2004. She tabulated all the amounts which she received as follows:

Date	Amount
10.10.2003	R 5 000,00
12.12.2003	R 6 000,00
18.12.2003	R 7 000,00
04.02.2004	R 7 350,00
10.03.2004	R 8 000,00
25.03.2004	R20 000,00
TOTAL	R53 350,00

[48] The Second Respondent admitted that he acted on behalf of the complainant in a matter in which judgment for her (complainant) in the amount of R100 350,00 was granted; together with

interest, costs, collection commission and Sheriff's fees.

[49] In his first answering affidavit, Second Respondent stated that this matter was being handled by Third Respondent. He attached Annexures SNM2 and SNM3, which he had retrieved from Third Respondent because at the time of preparing his first answering affidavit, complainant's file was still with his bookkeeper. Due to the urgency of the matter, he stated, he could not access complainant's file. He however denied that he had paid complainant only R53 350,00.

[50] After Applicant filed a supplementary affidavit, Second Respondent filed a further answering affidavit. He maintained his innocence and averred that complainant was informed by means of a letter after judgment was granted. He stated that apart from the payment of R53 350,00 to complainant, further payments were made to her. He attached Annexure SNM3 being copies of returned cheques which were paid to complainant. These are the purported cheques:

Date of Payment	Amount	Payee
18.12.2003	R 3 000,00	Sana Motshephe
08.06.2004	R15 000,00	Sana Motshephe
22.07.2004	R 5 000,00	Sana Motshephe
08.08.2004	R10 000,00	Sana Motshephe
TOTAL	R33 000,00	

[51] Second Respondent submitted that apart from the above amount of R86 350,00 (R53 350,00 + R33 000,00) he made further payments to complainant. He could not say how much was actually

paid nor could he produce any documentary proof thereof. According to him, he does not have this information at his disposal because his records were seized in terms of the court order before he prepared his further answering affidavit.

[52] In a letter dated 9 December 2003 (page 73 of the paginated papers), the Respondents wrote the following letter to the then defendant (Mr Joel Molepo) in this matter.

> "Judgment for payment of R100 350,00 with costs which has been taxed the amount of R6 018,65, and instructions have been granted against you (sic). Your debt is as follows:

Judgment Debt (Quantum)	R100 350,00	
Costs of judgment		R 6 018,65
Interest (25/08/00 – 25/08/01)		
(25/08/02 – 25/08/03)	R 46 662,75	
10% Collection Commission	R 10 035,00	
Sheriff's fees (non-service)		R 107,00
Sheriff's fees (attachment)		?
TOTAL		R163 173,40 "

[53] It is clear from the evidence that complainant was incorrect in stating (on 26 April 2005) that the Respondents have paid her only R53 350,00. There is sufficient documentary proof that she was paid a further R33 000,00. Her averment that the original amount which was owed to her by the Respondents was R163 173,40 is ridiculous. It is interesting to note that Applicant is silent on all these allegations which have been made by the Second Respondent.

[54] In my view, the Second Respondent has shown that the complainant was not altogether honest in her complainant. Consequently, Applicant has failed to discharge its onus of proof on a

balance of probabilities.

SANCTION

[55] The Respondents have not been found guilty of any misdemeanour which involves misuse of trust funds. If they were to be removed from the roll of attorneys, that would be a severe punishment. It is worthy to note that they practised without fidelity fund certificates for a relatively short period, almost four months. Before a court order which suspended them was issued, fidelity fund certificates were already issued to them. They would, therefore, have practised lawfully, from 22 April 2006 up to 31 December 2006 but for this application. As at the date of the hearing of this application, 7 September 2007, they had been on suspension for fifteen months. It is my considered view that due to the length of the period in which they remained on suspension, they have already served far more than what their punishment ought to have been. A warning or at worst a suspension from practice as attorneys for a period not exceeding four (4) months would have been appropriate in this case. Accordingly, I am of the view that the First and Second Respondents should not be made to suffer for their misconduct any more than they have already suffered.

COSTS

[56] The Applicant has attained substantial success in that it was able to prove that the First and Second Respondents had contravened the law by practising as attorneys for about four (4) months without a fidelity fund certificate. On the other hand the two Respondents managed to demonstrate to this Court that

there was no substance in the other eight (8) charges levelled against them. This is substantial success. In the exercise of our discretion, we are of the view that an appropriate order for costs is that each party pays its or his own costs.

ORDER

[57] In the premises, the following order is made:

1. No punitive action is taken against the First and Second Respondents;

2. The First and Second Respondents are free to commence their practise as attorneys of this Court with immediate effect; and

3. Each party is to pay its or his own costs.

_____
R. E. MONAMA
ACTING JUDGE OF THE HIGH COURT

I agree.

_____
SAMKELO GURA
JUDGE OF THE HIGH COURT