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THE HIGH COURT OF SWAZILAND

IN THE *EX PARTE* APPLICATION OF

KOBLA QUASHIE

1st Applicant

SABELO GUMEDZE

2nd Applicant

And

THE LAW SOCIETY OF SWAZILAND

Respondent

Civil Case No. 3087/2002

Coram	J. P. ANNANDALE – J
For the Applicants	MR. MADAU & MR MOTSA
For the Respondent	

JUDGMENT

1st NOVEMBER 2002

Much unfinished business was left behind the closed doors of the law firm, Bhekie G. Simelane & Company, when one of the erstwhile partners disappeared from Swaziland under a cloud of suspicion. *Inter alia* it resulted in the Law Society of Swaziland stepping into the quagmire to try and salvage from the then dormant firm what it could. From the papers filed in support of the order then obtained, it appeared that the partners of the firm of attorneys had abandoned their practice, leaving behind not only a number of clients but also a trust account which reflected much less monies than what would have been expected. Suspicions and rumours abounded. Former clients were disgruntled with the situation. By all accounts the firm operated without having had its trust account audited as is required by law and no fidelity fund contributions were kept up to date with the Law Society. Whether it is the Law Society or the Attorney General's office which was to blame for allowing attorneys to practice as such without meeting minimum requirements is not the issue now to decide.

As said, in an attempt to rescue the situation, the Law Society (not the Attorney General) applied for and obtained an order on the 7th June 2002, in Case No. 1795/2002, whereby Kobla Quashie (an accountant) and Sabelo Gumedze (an attorney) were appointed by the High Court of Swaziland as *curators bonis* of the trust Account held by the law firm of Bheki G. Simelane and Company.

These two joint curators, duly appointed by the Court, took trouble to attend to the affairs of the troubled Trust Account and eventually filed their report. Therein, they report on the operation of the Trust Account, the difficulties they encountered as curators on issues of non-compliance with the law, as well as various matters incidental thereto. Serious anomalies are reported like flagrant disregard of the law and practise, like unaccounted transfers to the business account, partner's drawings, cash payments and business expenses made from the Trust Account.

As their rights, duties and powers were not detailed as terms of reference in the empowering court order, they lit their candle with the Law Society to obtain guidance and assistance. The curators could not establish and confirm that the firm complied with Section 43 of the Legal Practitioners Act of 1964 (Act 15 of 1964 and hereafter referred to as "the Act"). This part of the Act regulates establishes and regulates the

Law Society Fidelity Fund ("the Fund"). Essentially, the fund is to provide for disbursements and expenses and to pay for ..."loss sustained by any person in consequence of an Act of dishonesty by a legal practitioner..." (Section 43 (2) of the Act). The Law Society is to have the Fund underwritten by a suitable insurer and require of its members to pay their contributions to the Fund, in order to practise as legal practitioners and attorneys may not practise as such or be entitled to fees etcetera, if they are not in possession of a Fidelity Fund certificate.

Prima facie it thus flows from the report by the curators that the law firm concerned was not entitled to practise as such as they did not have the required certificate, nor could the Law Society confirm (to the curators) the contrary.

The curators not only come to the above stated conclusion but go further than that in their report, very critically so in their comments on the role of the Law Society of Swaziland, the professional body who initiated their appointments as *curators bonis* of the Trust Account. I quote *verbatim* from page 4 of their report:

> "Furthermore if it were confirmed that they (Bheki G. Simelane and Company) had no Fidelity Fund Certificates then the Law Society of Swaziland would have been deemed to have failed in its duties to administer the Fidelity Fund in that it allowed both Simelane partners to practice without a Fidelity Fund Certificate and as such prejudiced the claims of Trust creditors. On the basis of the curators investigations it would appear that the existing Law Society Fidelity Fund did not cover trust creditors of Bheki G. Simelane and Company. It is therefore their considered view that the Law Society be liable for allowing the Simelane partners to practice without the Fidelity Fund Certificate to the detriment of the public".

These are the words contained in the report if the *curators bonis* whose fees are now sought to be recovered.

Most disturbingly are the following words in the report at page 9:

> "As already pointed out, the Trust bank balance is E107 095-60 (vis-à-vis the trust creditors of E4 835 649-75) given (sic) a shortfall of E4 728 554-15".

The curators are not yet done. They say that it is still necessary, *inter alia* to confirm trust creditors and wind up the practise, secure outstanding fees etcetera. It would require a creditor to move an appropriate application. They foresee the need to attach personal assets of the partners due to the shortfall of the Trust Account. It also may require action against both the Law Society and the Attorney General for not enforcing the Legal Practitioner's Act. The curators say they will still need to approach the courts for determination of their rights, duties and powers relating to the above.

Presently however, they want to be paid for the work already done, before all is said and done.

This *ex parte* application is brought by way of a Notice of Motion, which was served on the respondent, the Law Society of Swaziland. Quite understandably, no notice has been filed wherein the Law Society opposes the relief sought, possibly for precisely the reason that they are "trying to pass the buck". The failure by the Law Society, and one might also add the office of the Attorney General, to ensure that its members, or any other person for that matter who practises as attorney, comply with the requirements of the Legal Practitioner's Act, especially so with the Fidelity Trust Fund, has lead to the events that result in this application. The application wants the court to authorise a helping from the desert, so to speak, of the trust account of Bheki G. Simelane and Company. It is the two *curators bonis* who now want their own remuneration for the work they did, to be paid for from the Trust Account they were appointed to protect and administer, and not by the Law Society who belatedly asked for their appointment in an effort to limit the losses, an exercise of damage control, after the Attorney General's office did not call for an inspection of the books. Their claim is also not against the firm or the partners, nor a surplus of the Trust Account.

The relief sought reads:

"1) Authorising the applicants to withdraw the sum of E86 500 (eighty six thousand five hundred emalangeni) from the trust account of Bheki G. Simelane and Company as payment of their reasonable fees incurred in executing their duties as *curator bonis* to the said account.

2) Costs of Suit"

The usual prayer for further/alternative relief is included, as well as a founding affidavit by the first applicant. For some reason, no affidavit, confirmatory or otherwise, by the second applicant is attached, although the notice reads that affidavits of both applicants would be used to support their application. Possibly it may be merely misfiled, but for some or other reason the applicants attached a confirmatory affidavit by one Zanele Khumalo pertaining to a rescission application in the matter wherein the *curators bonis* were appointed (Case No. 1795/02) and also a letter by Bheki G. Simelane and Company dated 7th June 2002, addressed to "To Whom It May Concern", advising the reader that the firm has closed down on the 7th June 2002. The aforementioned report by the curators is also attached, as is their statement of account.

When this matter was first brought before me on the uncontested roll of Friday the 18th October 2002, I queried the relief sought from applicant's attorney, Mr. Madau of Robinson Bertram. Even though the relief was not contested or opposed and the papers had been served on the so-called respondent, the Law Society of Swaziland, I expressed reservations about the propriety of such an order. The obvious issue I held out for a reply was whether if would be proper to direct that the Trust Account of the closed down law firm should be made liable to settle the account rendered by the *curators bonis* for their services and disbursements. As my qualms were not dispersed, the matter was postponed to attend to the query and at the same time, to properly set out how the amount sought to be paid was made up. Annexure C3, the statement of account by the curators as at 31st August 2002 is as threadbare as can be. The whole of its contents reads:

"Curators fees:	Sabelo Gumedze	25 000
	Kobla Quashie	50 000

Security Bond SRIC	5 000
Investigators fees SA	
Private Investigator	3 500
Advertising Telephone	
Calls	3 000
TOTAL	**86 500"**

Concerning the second and less important aspect of the matter, the quantum, Mr. Motsa of Robinson Bertram attended in chambers on Wednesday the 23rd October, and filed what I have marked as "exhibit A" – a bundle of documents marked "Amplified Curator's Statement of Account". It sets out the details of how the abovementioned heads of account have been calculated and encloses copies of relevant invoices etcetera and the hours of work claimed for. For the reasons hereunder, it is not necessary to determine whether the amount sought is reasonable or not. Incidentally but not of consequence, is that the amount reflected on the latter set of papers exceeds the originally claimed amount by some E3 500, and is a healthy E10 999 less than the original statement of account, rendered to the Law Society for payment, of which I informally received a copy (together with exhibit "A").

The more important aspect and the real difficulty with the application concerns the principle of trust accounts of lawyers – is it proper for courts to sanction the use of trust account monies for other purposes than what the account exists for? *In casu*, is it in order for *curators bonis* to be remunerated for their services and incidental disbursements and expenses from such a trust account, one which they were appointed for to try to protect and salvage it?

To answer this question one firstly has to look at what an attorneys trust account is and why it exists at all. Section 24 (1) of the Act states that:

> *"Every practising attorney having an office in Swaziland shall open and keep a separate trust account, at a bank lawfully established in Swaziland, in which he shall deposit all moneys held or received by him in connection with his or her practice within Swaziland, on account of any person, and he shall further*

keep proper books of account containing particulars and information as to moneys received, held or paid by him for or on account of any person" (my emphasis).

The underlined words clearly indicate that the moneys held or received on account of clients of attorneys' practices are what is paid into trust accounts. It is not monies that belong to the attorney himself, or his/her partners or the firm that goes into the account but monies that belong to the firm's clients, monies received on their behalf and kept in a trust account on their behalf. This is also the fundamental reason why such strict control has to be exercised over trust accounts.

Subsection 24 (2) of the Act provides for the inspection of trust accounts by the Attorney-General or his nominee with the attorney himself being liable for such costs where it is found that the account was not properly kept.

Subsection 24 (3) of the Act gives further confirmation of the separation of assets held by the attorney *vis-a-vis* the Trust Account. It also exempts Trust Account monies from being attached at the instance of any creditor of the attorney. Only an excess of the account forms part of the assets of the attorney.

It is thus clear from the provisions of the Legal Practitioners Act alone that the Trust Account held by an attorney in Swaziland is a separate entity altogether from the partners of the law firm, the practice itself. Monies kept in such Trust Accounts are not there for the benefit of the firm, nor can it be attached by its creditors – it is monies received and kept on behalf of clients of the firm. The Attorney General has wide ranging powers to have Trust Accounts inspected, the account is separate from assets of the firm, the attorney cannot practice without having a Trust Account and abuses or neglect of the account or failure to deposit all monies received or held by an attorney in connection with his practice on account of any person is a punishable offence (up to eighteen months imprisonment) and also is unprofessional conduct, making him liable to be struck off the roll if not suspended from practice.

The Attorney-General is empowered in Section 24 (4) (a) of the Act to move the High Court to *inter alia* appoint a *curator bonis.* In the present matter, the order to appoint

the two *curators bonis* was brought by the Law Society of Swaziland and not by the Attorney-General. Where a *curator bonis* is appointed under Section 24 (4) (b) of the Act, where, upon death, insolvency, suspension/debarment or abandoning of a practice, amongst other reasons, a *curator* is appointed by the Master to control and administer the trust account, it is "...with such of the rights, duties and powers prescribed by Regulations made under Section 33 (2) (g) (sic) as the Master may deem fit". This particular provision (33 (2) (g)) fell away in the 1988 amendment of the Act. In its former form, I am not aware of any legal notice or regulation so promulgated. In any event, as things presently stand, there is not an authoritative empowering order or legislation under which the two *curators bonis* may "dip" into the trust account they were appointed to take care of, for their own fees and disbursements.

The basic essence of a trust account is that it consists of monies held or received by an attorney on account of any person. Proper account keeping would obviously include not only the money held and received but also any monies paid from the trust account to, for, or on account of any person. Even charges levied against the trust bank account, i.e. charges and costs incurred from the operation and keeping of such account, must be charged against the business account of the attorney. This must be done because the money lodged in the trust bank account is held in trust for clients and cannot be appropriated for the purpose of paying bank charges, which should correctly be borne by the attorney himself. (see: "The Keeping of Attorneys Books" by Bobrov and Faul, 3rd ed. Butterworths, 1981 page 15, paragraph 2.3).

A useful guideline as to exactly which monies may properly be drawn from a Trust Account may be found in a practise directive, following Queens Counsel's opinion, which is contained in the so called "Red Booklet", or more formally, "Attorney's Trust Accounts", which is issued by the Cape Law Society. Although it is a ruling as old as the 3rd February 1947 and it is really only binding on members of the Cape Law Society, the principles adumbrated therein are concise, to the point and precisely correct. Rule 4 on page 11 of the "Red Booklet" reads (as is quoted by Van Blommenstein in "Professional Practise for Attorneys", Juta, 1965 at page 56):

"4. No money should be drawn from a trust account other than:

a) Money properly required for payment to or on behalf of a client for or towards payment of a debt due to the attorney from a client or money drawn on the clients authority or money in respect of which there is a liability of the client to the attorney; provided that the money so drawn should not in any case exceed the total of the money so held for the time being for such client.

b) Such money belonging to the attorney as may have been paid into the trust account under Rule 3 (c) of these Rules (which rule refers to "a cheque or draft received by the attorney representing in part money belonging to a client and in part money due to the attorney) (my insertion).

c) Money which may by mistake or accident have been paid into such account in contravention of Rule 3 of these Rules (which rule refers to the only monies that should be paid into trust accounts, i.e. money held or received on account of any person, money for replacement of other monies mistakenly or accidentally withdrawn, money belonging to the attorney himself ((b) *supra*) and deposits on account of fees and disbursements) (my insertion).

d) Deposits on account of fees and disbursements when the services in respect of which the fees have been paid, have been rendered and/or the disbursements made; provided, however, that no such withdrawals shall exceed the amount of such deposit".

The salutary practice of adhering to the above principles is more than just that which meets the eye – a flouting thereof will go against the very grain and essence of a trust account. I fail to see how the two applicants could justifiably extract their claim, however legitimate and well earned it may be, from the trust account of Bheki G. Simelane and Company. They knock on the wrong door for their money.

During the period that this unopposed matter was postponed for the two reasons mentioned above and during which their attorney filed the detailed statement of

account, I had my court interpreter/clerk contact him to open the door for a formal hearing during which argument in support of the application could be presented. This opportunity was not utilised, the invitation to argue the case for the applicants was (wisely) not accepted.

A principle of law that cannot be overlooked is that a court is not enjoined to grant (all) relief sought if it is not opposed. There is more than ample authority for that. Here it is only the Law Society of Swaziland which was cited as respondent in the *ex parte* application, presumably as it was the applicant when the appointment of the *curators bonis* was sought and granted. I neither purport nor propose to advise litigants of what proper course their matters should take to meet with judicial approval. I thus refrain from stating an opinion, which is all it could be at most, as to who the correct respondent(s) in the application should be.

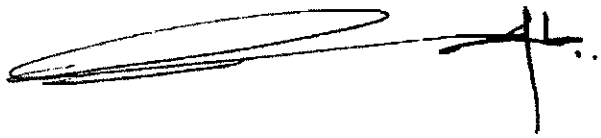
I am disinclined and adverse to grant the authorisation that the applicants seek, to plunder the trust account.

I was unable to find a precedent which is on all fours with the present matter, but **Ex *parte* Law Society, Transvaal: In re Hoppe and Visser** 1987 (2) SA 773 TPD, a full bench decision, is not too remote to be of useful guidance. Therein, orders were sought and granted (pages 778 E – F; 781 H – 782 – F) whereby the practitioners whose trust account had to be inspected were ordered to bear the costs thereof, despite the absence of a contractual obligation to do so. It would be practically the same where the *curator* is paid from any excess funds in the trust account, which would in any event have been due to the attorney or practice who operated the trust account.

In the **Hoppe and Visser** matter *supra* at 782 B reference was made to **Cape Law Society v Katz** 1958 (4) SA 444 (C) at 446 H (point 5) where, contrary to the outcome of this matter, an order was made as is sought here, namely that the fees and charges of a *curator bonis* (together with costs of the application) be paid out of the trust assets. The judgement in that matter was based on the need to appoint a curator by the court, as two different empowering Acts of parliament lacked a transitional period from one to the other, under which the curator ordinarily could have been appointed and remunerated. No *ratio* was given for the source of payments that was

ordered at all. It is not known for what reasons such an order was made, which otherwise would have been for the costs to come from an excess of the trust account, if there was one, if not from the attorney himself. The particular order features as a footnote at the end of the judgment, not from the reported reasons for the judgment itself. I do not consider it as binding authority on this court to come to any other conclusion than the inevitable, as is set out above.

In the event, it is ordered that the *ex parte* application be dismissed, with costs for account of the applicants.



J. P. ANNANDALE

JUDGE