

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-MOT-GEN-2022/00328

In the matter between:

**THE LAW SOCIETY OF NAMIBIA**

**APPLICANT**

and

**RICARDO MUKONDA**

**1<sup>ST</sup> RESPONDENT**

**MUKONDA LEGAL PRACTITIONERS**

**2<sup>ND</sup> RESPONDENT**

**DISCIPLINARY COMMITTEE**

**3<sup>RD</sup> RESPONDENT**

**THE LEGAL PRACTITIONERS FIDELITY FUND**

**BOARD OF CONTROL**

**4<sup>TH</sup> RESPONDENT**

**Neutral Citation:** *The Law Society of Namibia v Mukonda* (HC-MD-CIV-MOT-GEN-2022/00328) [2023] NAHCMD 149 (28 March 2023)

**Coram:** UEITELE, J

**Heard:** 7 October 2022, 8 December 2022 & 9 February 2023

**Delivered:** 28 March 2023

**Flynote:** *Legal practitioner* – Application for suspension of legal practitioner – Application relating to the suspension and striking of legal practitioner *sui generis*

*Legal practitioner* – Application to appoint *curator bonis* – Failure to keep proper books of account – Serious offence – Renders a legal practitioner liable to be struck off the roll of practitioners or liable for suspension

*Legal practitioner* – Procedure to appoint *curator bonis* laid down in s 28 of Legal Practitioners Act 15 of 1995 – Contravention of s 26 of the Legal Practitioners Act 15 of 1995 – Bringing legal practitioners' profession into disrepute

**Summary:** The Law Society of Namibia, on an urgent basis, on 28 July 2022 approached this court seeking the temporary suspension of the first respondent, Mr Mukonda, from practice pending the determination of the complaint lodged with the Disciplinary Committee against him in terms of s 35(1) of the Legal Practitioners Act 15 of 1995. The Law Society further sought the appointment of the Director of the Law Society as the *curator bonis*, duly assisted by an agent, to be appointed for this purpose, to control and administer Mr Mukonda and Mukonda & Co Inc's trust account ....2070900, held at First National Bank of Namibia; Mr Mukonda and Mukonda & Co Inc's business account ....2070778, held at First National Bank of Namibia; and all client files of Mukonda & Co Inc's firm, insofar as it pertains to its trust account, pending the determination of the complaint lodged with the Disciplinary Committee.

The application was not opposed by the first and second respondents and on 28 July 2022 the court heard the matter on an urgent basis and granted the relief sought by the Law Society and temporarily (until 05 September 2022) suspended Mr Mukonda, from practicing as a legal practitioner pending the determination of the complaint lodged with the Disciplinary Committee against him. The court furthermore temporarily appointed Ms Margaretha Steinmann (the former Director of the Law Society), assisted by an agent to be appointed, as the *curator bonis* to take control and administer Mukonda & Co Inc's trust and business accounts held at First National Bank of Namibia and all client files of Mr Mukonda and Mukonda & Co Inc's firm insofar as the files pertain to the trust account pending the determination of the complaint lodged with the Disciplinary Committee. The suspension of Mr Mukonda was on 05 September again extended until 7 October 2022.

On 7 October 2022 the Law Society again approached the court on an urgent basis, seeking a further extension of the temporary suspension of Mr Mukonda from practicing as a legal practitioner and the appointment of the Director of the Law Society as the *curator bonis* in respect of the trust and business accounts of Mukonda & Co Inc and the files relating to that trust account. Mr Mukonda, on 14 October 2022, indicated that he on his own behalf and on behalf of Mukonda & Co Inc will oppose the application for the extension of the orders granted on 5 September 2022.

In opposition, Mr Mukonda raised four points *in limine* namely, that the court is *functus officio* and cannot grant the relief sought by the Law Society, secondly, the Law Society failed to comply with rule 32(9) & (10) when it launched the application on 7 October 2022 and such failure is fatal to the application, thirdly Mr Mukonda alleges that the Law Society failed to exhaust internal remedies available to it before it launched the present application and fourthly, Mr Mukonda contended that the Law Society impermissibly launched a group action.

*Held that*, with regard to the first point *in limine*, the statutory right which entitles the Law Society to approach this court for the temporary suspension of a legal practitioner is contained in s 32(3) of the Act. The court is satisfied that despite the fact that the court made a final order which would in general render the court *functus officio*, s 32 of the Act itself empowers the Law Society to approach the court for an extension of the suspension of a legal practitioner. The point *in limine* is meritless and is dismissed.

*Held that*, with regard to the second point *in limine*, in *Di Savino v Nedbank Namibia Ltd*, the Supreme Court found that a wide meaning is to be accorded to interlocutory orders and to include all orders upon matters '*incidental to the main dispute, preparatory to, or during the progress of the litigation*'. In the court's view, the application by the Law Society is not incidental or preparatory to a main dispute. It is also not in the progress of litigation. The application by the Law Society to appoint the Director of the Law Society as *curator bonis* is thus not an interlocutory

proceeding and rule 32(9) & (10) therefore does not find application. The second point *in limine* is dismissed.

*Held further*, with regard to the third point *in limine*, that firstly, Mr Mukonda demonstrates his utter ignorance of the role of the Law Society *vis-a-vis* legal practitioner's generally and the nature of these proceedings. Secondly, the Law Society first approached this court on 28 July 2022. In the affidavit filed in support of that application the Law Society refers to a letter dated 10 May 2022, in which it informed Mr Mukonda of Mr Ndabeni's complaint against him and invited him to provide his version. Mr Mukonda did not only ignore that letter, he ignored subsequent letters (the letter of 23 May 2022 and 1 June 2022) addressed to him. He also did not file any affidavit to contradict the allegations levelled against him when this application was launched. The third *point in limine* is thus meritless and is dismissed.

*Held further*, with regard to the fourth point *in limine*, that the Law Society allegedly instituted impermissible group action, is startling. The point he raises clearly demonstrates that he has no understanding or conception of the role of the Law Society nor does he have any appreciation of his obligations towards the Law Society, the public and this court. In view of what the court has said in this judgment on the nature of these proceedings and the obligations of legal practitioners to their clients and the public in general, the fourth point *in limine* is dismissed.

*Held furthermore* that the evidence and facts placed before court point to the fact that Mr Mukonda displays an untenable attitude towards the legal profession's regulatory framework. Instead of inspiring and maintaining the unconditional confidence of the community in the administration of justice, his conduct erodes and destroys the public's confidence in the institution administering justice in this land. His conduct is contrary to what that of a legal practitioner ought to be.

*Held furthermore* that the court is of the view that the conduct of Mr Mukonda is dishonourable, unprofessional and unworthy of a practitioner. As such and given the seriousness of the alleged infractions and the multitude of these infractions, the court

is of the view that he cannot be entrusted with the responsibility of handling funds of members of the public. The only appropriate remedy is to appoint the Director of the Law Society as a *curator bonis* to control and administer such trust account and the files of the Mr Mukonda and Mukonda & Co Inc. Any other order will send the wrong message to the general public that any alleged misconduct of such a grievous nature is condoned by the courts.

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### ORDER

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1. The Director of the Law Society of Namibia (Ms Neliswa Tjahikika) is appointed as the *curator bonis*, duly assisted by an agent to be appointed for this purpose, to control and administer –
  - 1.1 Mukonda & Co Inc's trust account ....52070900, held at First National Bank of Namibia;
  - 1.2 Mukonda & Co Inc's business account ....52070778, held at First National Bank of Namibia; and
  - 1.3 All client files of Mukonda & Co Inc's firm insofar as it pertains to its trust account pending the determination of the complaint lodged with the Disciplinary Committee.
2. For purposes of order 1, the powers of the *curator bonis* are annexed to this judgment as "Annexure A".
3. Mr Mukonda and Mukonda & Co Inc must pay the Law Society of Namibia's costs of this application on a scale as between attorney and own client.
4. The matter is regarded as finalized and is removed from the roll.

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## JUDGMENT

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UEITELE J:

### Introduction and background facts

'The law exacts from an attorney *uberrima fides* - that is, the highest possible degree of good faith. He must manifest in all business matters an inflexible regard for truth; there must be a vigorous accuracy in *minutiae*, a high sense of honour and incorruptible integrity; he must serve his client faithfully and diligently'<sup>1</sup>

[1] This matter is concerned with the question of whether or not the conduct of a legal practitioner meets the standard expected from legal practitioners.

[2] The applicant is the Law Society of Namibia, a corporate body established in terms of s 40 of the Legal Practitioners Act 15 of 1995<sup>2</sup> ('the Act'). It is capable of suing and being sued in its own name, and some of its objects, as contained in s 41 of the Act, are:

(a) to maintain and enhance the standards of conduct and integrity of all members of the legal profession;

(b) to present the views of the legal profession;

(c) . . .;

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<sup>1</sup> Per Cillié J quoting from Van Zyl in his work *Judicial Practice of South Africa* 4th ed in: *Goodriche & Son v Auto Protection Insurance Co Ltd (In Liquidation)* 1967 (2) SA 501 (W) at 504.

<sup>2</sup> Legal Practitioners Act, 1995 ( Act 15 of 1995).

(g) to define and enforce correct and uniform practice and discipline among members.’

[3] The management and control of the Law Society of Namibia (‘the Law Society’) is vested in a Council, whose body of members exercises the powers conferred on the Law Society.

[4] The first respondent is a registered legal practitioner who is the sole director of a legal firm, namely Mukonda & Co Inc, which is the second respondent in this matter. The third respondent is a statutory body established in terms of s 34 of the Act for purpose of exercising disciplinary control over legal practitioners and candidate legal practitioners in accordance with the provisions of the Act. The fourth respondent is also a statutory body established by s 53 of the Act, which amongst other functions, has its purpose to reimburse persons who may suffer pecuniary loss as a result of-

‘(a) theft committed by a legal practitioner or a candidate legal practitioner attached to, or a person employed by such a legal practitioner, of any money or other property entrusted by or on behalf of such persons to the legal practitioner or to such a candidate legal practitioner or a person employed in the course of the legal practitioner's practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity; and

(b) theft of money or other property entrusted to an employee referred to in paragraph (A) of the definition of "estate agent" in section 1 of the Estate Agents Act, 1976 (Act 112 of 1976), or a legal practitioner referred to in paragraph (d) of that definition, and which has been committed by any such person under the circumstances, and in the performance of an act, contemplated in those paragraphs, respectively.’<sup>3</sup>

[5] The third and fourth respondents have not participated in these proceedings. I will therefore, for ease of reference, refer to the applicant as the Law Society, the first respondent as Mr Mukonda, the second respondent as Mukonda & Co Inc and where I need to refer to both Mr Mukonda and Mukonda & Co Inc, I will refer to them as the respondents and the third respondent as the Disciplinary Committee.

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<sup>3</sup> Section 54(1) of the Legal Practitioners Act, 1995 (Act 15 of 1995).

[6] The background facts which led to the present matter are in a nutshell these: During September 2017 a certain Mr Ndabeni approached Mr Mukonda for the latter to assist him with a legal dispute that he (Ndabeni) had with Katima Mulilo Town Council. Mr Mukonda accepted the request. Mr Ndabeni and Mr Mukonda thus orally agreed that Mukonda & Co Inc would render legal services to Mr Ndabeni. Mr Mukonda quoted Mr Ndabeni an amount of N\$89 000 for the legal service to be rendered. Mr Ndabeni alleges that on 26 October 2017 Mr Mukonda asked him to pay a deposit of N\$59 000 which he alleges he, on the same day (that is on 26 October 2017) paid in two tranches by electronic fund transfer to Mukonda & Co Inc. On 2 November 2019 Mukonda & Co Inc instructed Mr Ndabeni to pay an additional N\$30 000 which Mr Ndabeni alleges he paid also on the same day.

[7] In pursuance of the oral agreement between Mr Ndabeni and Mukonda & Co Inc, Mr Mukonda instituted legal proceedings against the Katima Mulilo Town Council under case number HC-MD-CIV-ACT-CON-2017/03358. On 8 March 2018 Mukonda & Co Inc obtained a default judgment against the Katima Mulilo Town Council in favour of Alfred Ndabeni t/a Highlight Catering and Tents. Upon obtaining the default judgment, Mr Ndabeni instructed Mukonda & Co Inc to recover the amount which the Katima Mulilo Town Council was ordered to pay to Mr Ndabeni together with the legal costs incurred as a result of the institution of the legal proceedings.

[8] During December 2020 Mukonda & Co Inc issued a writ of execution for the amount of N\$1 411 545,13 in respect of the judgment granted by the High Court on 8 March 2018. Pursuant to the default judgment of 8 March 2018 and the writ of execution, the Katima Mulilo Town Council, on 13 April 2021, paid an amount of N\$650 000 into Mukonda & Co Inc's trust account for the benefit of Alfred Ndabeni t/a Highlight Catering and Tents. On 16 November 2021 the Katima Mulilo Town Council paid another amount of N\$761 645,13 into Mukonda & Co Inc's trust account for the benefit of Alfred Ndabeni t/a Highlight Catering and Tents. On 18 November 2021, Mukonda Inc paid the amount of N\$761 645,13 over to Mr Ndabeni.



[9] The Law Society in its affidavit filed in support of its application of 28 July 2022, however alleges that by 30 September 2021 Mukonda & Co Inc's trust account reflected a credit balance of only N\$31,66.

[10] Mr Ndabeni, alleging that by April 2022 (that is twelve months after the Katima Mulilo Town Council had paid the amount of N\$650 000 to Mukonda & Co Inc) and despite demands addressed to the respondents, he had not been paid the amount of N\$650 000. During May 2022 he then instituted legal proceedings under case number HC-MD-CIV-ACT-CON-2022/01877 against the respondents. In the particulars of claim in that action, Mr Ndabeni amongst other allegations, alleged that the respondents breached the oral agreement between him and them in that they failed to pay the amount of N\$650 000 over to him. He thus *inter alia* claimed payment from the respondents in the amount of N\$650 000, plus interest at a rate of 20% per annum as from 13 April 2021 until date of payment.

[11] The respondents did not defend the action instituted against them by Mr Ndabeni. In the absence of a notice by the respondents to defend, this court, on 10 June 2022 amongst other orders, ordered the respondents to jointly and severally, the one paying the other to be absolved, pay Mr Ndabeni the amount of N\$650 000 plus interest on that amount at a rate of 20% per annum as from 13 April 2021 until date of full and final payment.

[12] In addition to instituting legal proceedings against the respondents, Mr Ndabeni on 29 April 2022 laid a complaint of misappropriation of trust funds and overcharging by the respondents with the Law Society. It is that complaint that led the Law Society to, through its Legal Officer, on 10 May 2022 address a letter to Mr Mukonda in which letter it stated the following:

**'RE: COMPLAINT OF ALLEGED UNPROFESSIONAL, UNETHICAL OR UNTOWARD CONDUCT.**

This office received a complaint from Mr. A Ndabeni about alleged unprofessional, unethical or untoward conduct by you. A copy of the aforesaid complaint is attached hereto for your information.

However, to enable the Legal Ethics and Investigatory Committee to make a recommendation to Council as to whether any *prima facie* grounds exist for onward referral to the statutory Disciplinary Committee, it shall be appreciated if you could provide this office with your reply (in affidavit form) containing your version of the facts, your point of view as well as any arguments or documentary proof in support thereof. All of these should please be received by this office within 5 (five) days of receipt of this letter.

**In addition please provide us with your bank statements as from 01 April 2021 to 31 August 2021...'**

[13] The Law Society alleges that it did not receive a response to its letter of 10 May 2022 from Mr Mukonda nor was it provided with the bank statements as it requested. In the absence of a response from Mr Mukonda, the Law Society on 23 May 2022 addressed another letter to Mr Mukonda wherein the following is captured:

**'RE: COMPLIANCE INSPECTION BY THE LSN.**

The LSN's letter dated 10 May 2022, emailed to you on 10 May 2022 and delivered to you via the Messenger of Court/Deputy Sheriff on 13 May 2022, dealing with the complaint against you received from Mr A Ndabeni, refers.

1. The complaint alleged misappropriation of trust monies.
2. The LSN has to consider whether there has been compliance with the duty to keep complete and accurate records of all financial transactions conducted through the trust account of the law firm Mukonda & Associates Incorporate, which necessitates an inspection in accordance with section 25(2) of the Legal Practitioners Act.
3. Council, at its meeting on 20 May 2022, resolved as follows:

“Cloete and E Engelbrecht are mandated to conduct an urgent compliance inspection on the trust account of Mukonda & Co Inc as soon as possible at your office in Rundu. This investigation is authorised with due consideration of the provisions of section 25(2) of the Legal Practitioners Act (LPA), Act 15 of 1995 and Rule 22(3) of the Law Society.”

Your written response is still required.

Irrespective of whether you submit a written response, this inspection will continue to *inter alia* establish if there has been compliance with your duty to keep complete and accurate records of all financial transactions conducted through the trust account of the law firm Mukonda & Co. Incorporated ...'

[14] In addition to what is recorded above, the Law Society in its letter of 23 May 2022 informed Mr Mukonda that in order for the Law Society to conduct a proper compliance inspection and in preparation of the compliance inspection, Mr Mukonda must submit to the Law Society the following documents by close of business on 24 May 2022, namely:

- a) Bank statements of the trust account of Mukonda & Co Inc from 1 April 2021 up until 17 May 2022;
- b) Trial Balance as at 31 March 2022;
- c) Matter Balance/Creditors Age Analysis as at 31 March 2022; and
- d) Bank reconciliation as at 31 March 2022.

[15] Mr Mukonda was furthermore requested to, in terms of s 25(5)(b) of the Act, provide the Law Society with all the estate accounts and all the bank statements (up to May 2022) in respect of each account.

[16] The Law Society further alleges that Mr Mukonda equally ignored this letter and did not respond to the letter. The law Society addressed another letter dated 1 June 2022 to Mr Mukonda in which he was informed that the Law Society will visit Rundu on 6 June 2022 to conduct a compliance inspection. In execution of its promise the Law Society dispatched its compliance Officer, a certain Mr Engelbrecht, to Rundu to conduct an inspection on Mukonda & Co Inc.

[17] Mr Engelbrecht's report to the Council of the Law Society, with respect to the inspection he conducted did not make pleasant reading. He, *inter alia*, reported that

he scrutinized the bank accounts of the respondents and found them to be in disarray since no distinction was made between trust account and business account nor were they grouped in monthly order. He further reported that the trust account bank statements were only up to and until 28 February 2022 while the business account statements were only up until 4 December 2021.

[18] In so far as it pertains to the payments relating to Mr Ndabeni, Mr Engelbrecht reported that he established that Katima Mulilo Town Council made a payment totaling N\$1 411 645,13 to Mukonda & Co Inc for the benefit of Mr Ndabeni and of that amount only N\$ 761 645,13 was paid to Mr. Ndabeni, leaving a balance of N\$650 000 still due to Mr Ndabeni. He furthermore reported that he requested Mr Mukonda to explain the payments to Mr Ndabeni but Mr Mukonda could not give him any explanation or proof of the payments effected to Mr Ndabeni.

[19] Mr Engelbrecht furthermore reported that he noticed transfers from the respondents' trust account to the respondents' business account referencing Mr A Ndabeni. The transfers from the respondents' trust account to the respondents' business account were made during the period 14 April 2021 to 23 September 2021 totaling N\$352 500. In view of these discoveries, Mr Engelbrecht reports that he then requested Mr Mukonda to provide him with invoices relating to the transfers made between 14 April 2021 and 23 September 2021. Mr Engelbrecht reported that Mr Mukonda only provided him with three invoices; one dated 20 January 2021 (Invoice Number 2021-001 for N\$ 20 180,35) and one dated 20 September 2021 (Invoice Number 2021-052 for N\$19 837,55) totaling N\$40 017. These two invoices in Mr Engelbrecht's view related to other matters and not to the matter of Ndabeni v Katima Mulilo Town Council. The third invoice was invoice number RM/050/2017-RU-01 dated 18 September 2017 for the amount of N\$20 341,10.

[20] In view of Mr Engelbrecht's report, the Law Society resolved to report the matter to the Disciplinary Committee and to, in terms of s 35 (1) of the Act approach this court. It is against that background that on 28 July 2022 the Law Society, on an

urgent basis and by notice of motion, approached this Court seeking the following relief:

‘1 Condoning the applicants non-compliance with the forms and service provided for by the Rules of the above honourable Court and hearing this application on an urgent basis as envisaged by rule 73 of the Rules of this honourable Court;

2 Temporarily suspending the first respondent from practice pending the determination of the complaint lodged with the Disciplinary Committee against the first respondent in terms of Section 35(1) of the Legal Practitioners Act, 1995 (Act 15 of 1995);

3 Appointing the Director – **Mrs. MARGARETHA STEINMANN** - of the applicant as the *curator bonis*, duly assisted by an agent to be appointed for this purpose, to control and administer –

3.1 the first and/or second respondents’ trust account ....2070900 held at First National Bank of Namibia;

3.2. the first and/or second respondents’ business account ....2070778 held at First National Bank of Namibia; and

3.3. all client files of the first and/or second respondents’ firm insofar as it pertains to its trust account; pending the determination of the complaint lodged with the Disciplinary Committee;

4 Costs of suit;

5 Further and/or alternative relief.’

[21] The Law Society, on 20 July 2022, caused the application (that is the notice of motion, the founding affidavit and the annexures to the founding affidavit) to be served on Mr Mukonda, but the application was instead served on a certain Ms Elina Emanuel who is allegedly the secretary to Mr Mukonda. None of the respondents, this includes Mr Mukonda and Mukonda & Co Inc, opposed the application.

[22] On 28 July 2022 the court heard the matter on an urgent basis as envisaged by rule 73 of the Rules of Court and granted the relief sought by the Law Society and temporarily (until 5 September 2022) suspended Mr Mukonda, from practicing as a

legal practitioner pending the determination of the complaint lodged with the Disciplinary Committee against him.

[23] The court furthermore temporarily appointed Ms Margaretha Steinmann (the former Director of the Law Society), assisted by an agent to be appointed, as the *curator bonis* to take control and administer Mukonda & Co Inc's trust and business accounts held at First National Bank of Namibia and all client files of Mr Mukonda and Mukonda Co & Inc's firm insofar as the files pertain to the trust account pending the determination of the complaint lodged with the Disciplinary Committee.

[24] The Law Society again on an urgent basis, on 5 September 2022, approached the court seeking an extension of the orders that the court granted on 28 July 2022. Mr Mukonda and Mukonda & Co Inc again did not oppose the extension of those orders and the court accordingly extended the orders it granted on 28 July 2022 for a further 30 days to 7 October 2022.

[25] On 7 October 2022 the Law Society for the third time approached the court on an urgent basis, seeking a further extension of the temporary suspension of Mr Mukonda from practicing as a legal practitioner and the appointment of the Director of the Law Society as the *curator bonis* in respect of the trust and business accounts of Mukonda & Co Inc and the files relating to that trust account. The application for extension was served on a friend of Mr Mukonda at his (Mr Mukonda's) residence on that same day (that is 7 October 2022). I accordingly set the matter down for hearing on 18 October 2022.

[26] In the meantime, Mr Mukonda on 14 October 2022 indicated that he on his own behalf and on behalf of Mukonda & Co Inc will oppose the application for the extension of the orders granted on 5 September 2022. He subsequently filed his answering affidavit. At the hearing of the matter on 18 October 2022, I enquired from the Law Society whether the Act empowers me to further extend the suspension of Mr Mukonda. After making that enquiry, the Law Society indicated that it will abandon the relief seeking the further suspension of Mr Mukonda, but will persist with the relief relating to the appointment of the Director of the Law Society as the

*curator bonis* in respect of the trust account and the active files of the respondents. Mr Mukonda indicated that he will still oppose the relief.

[27] I granted the parties an opportunity to talk and see whether they would amicably resolve the issues. I accordingly postponed the matter to 8 December 2022 to enable the parties to engage in settlement talks. On 8 December 2022 the parties informed me that they did not settle the matter between them and that the Law Society would persist with its application for the Director of the Law Society's appointment as a *curator bonis* to the respondents' trust account and the active files of respondents' clients to be revived and extended.

Basis for seeking the revival of the appointment of the *curator bonis* and grounds of opposition

[28] After chronicling what the Law Society did after it obtained the first order on 28 July 2022, the deponent to the Law Society's founding affidavit states that the Law Society has established that the respondents' trust account books were not kept in accordance with the Act, as amended. Furthermore, Mr Mukonda did not keep a proper filing system and records and because not all documents are in the files, it is almost a frustrating process to get sufficient and correct information from the files, thus resulting in the delay in administering the files.

[29] Consequently, and due to the voluminous files now in the possession of the Law Society, it could not properly administer and control all of the respondents' client files within the extension period granted by the court on 7 September 2022. A further ground advanced is the fact that the Disciplinary Committee had not yet commenced with disciplinary proceedings against Mr Mukonda. Consequently, the Law Society asked for a further extension of 30 days. It furthermore transpired that Mr Mukonda did not apply for a fidelity fund certificate for the year 2023.

[30] As I indicated earlier, Mr Mukonda opposed the application to extend his suspension and for the appointment of the Director of the Law Society as *curator bonis* to the trust account of the respondents and the respondents' active client files.

In opposition, Mr Mukonda raised four points *in limine* namely, that the Court is *functus officio* and cannot grant the relief sought by the Law Society, secondly the Law Society failed to comply with rule 32(9) & (10) when it launched the application on 7 October 2022 and such failure is fatal to the application, contended Mr Mukonda, thirdly Mr Mukonda alleges that the Law Society failed to exhaust internal remedies available to it before it launched the present application and fourthly, Mr Mukonda contended that the Law Society impermissibly launched a group action.

[31] As regards the merits of the application, Mr Mukonda denies the allegation that he did not keep a proper filing system and records of his books of account. He alleges that the application is not urgent and if there is any urgency that urgency is self-created. He further contends that the Law Society is simply on a witch-hunt exercise and has already presumed him guilty. He further contends that the Law Society is abusing the court process and is subjecting the respondents to unfair proceedings and thus implored the court to dismiss the Law Society's application.

[32] Before I consider the points in limine raised by Mr Mukonda, I find it appropriate to make some general comments relating to the nature of the application before me and how the application must be approached and the obligations of legal practitioners towards their clients and the public.

#### The nature of the application before court

[33] Applications relating to the suspension and striking of legal practitioners from the roll are not the ordinary, 'run of the mill' opposed civil disputes between parties. Applications of this nature are unique, *sui generis* and of a disciplinary nature. There is no *lis* between the Law Society and the respondents. The Law Society as the *custos morum* (the guardian of the morals) of the legal profession merely places facts before the court for the court to consider them and exercises its supervisory authority.<sup>4</sup> In *Solomon v Law Society of the Cape of Good Hope*<sup>5</sup>, the following was said regarding the nature of disciplinary proceedings:

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<sup>4</sup> *Hassim v Incorporated Law Society of Natal* 1977(2) SA 75 (A) at 767C-G. *Law Society Transvaal vs Matthews* 1989 (4) SA 389 (T) at 393 E. *Cirota & Another v Law Society Transvaal* 1979 (1) SA 172 (A) on 187H.

<sup>5</sup> *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 408 – 9.



'Now in these proceedings the Law Society claims nothing for itself ... It merely brings the attorney before the Court by virtue of a statutory right, informs the Court what the attorney has done and asks the Court to exercise its disciplinary powers over him... The Law Society protects the interests of the public in its dealings with attorneys. It does not institute any action or civil suit against the attorney. It merely submits to the Court facts which it contends constitutes unprofessional conduct and then leaves the Court to determine how it will deal with this officer.'

[34] The statutory right which entitles the Law Society to approach this court for the temporary suspension of a legal practitioner is contained in s 32(3) of the Act.

[35] In *Disciplinary Committee for Legal Practitioners v Murorua and Another*<sup>6</sup> this court opined that s 32 of the Act gives the court the discretion to suspend a legal practitioner from practice. The discretion is, however, not an absolute discretion, it is a guided discretion. This discretion must be exercised based upon the facts placed before the court.<sup>7</sup> The facts in question must be proved upon a balance of probabilities. This court further held that the application under s 32 contemplates a three-stage enquiry:

(a) First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry.

(b) Second, it must consider whether the person concerned '*in the opinion of the court*' is not a fit and proper person to continue to be a legal practitioner. This involves a weighing up of the conduct complained of against the conduct expected of a legal practitioner and to this extent, is a value judgment.

(c) Third, the court must inquire whether, in all the circumstances, the person in question is to be removed from the roll of legal practitioners or whether an order of suspension from practice would suffice.<sup>8</sup>

### The obligations of a legal practitioner

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<sup>6</sup> *Disciplinary Committee for Legal Practitioners v Murorua and Another* 2012 (2) NR 481 (HC) at 491.

<sup>7</sup> See *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 637D - E.

<sup>8</sup> *Disciplinary Committee for Legal Practitioners v Murorua and Another* (above, footnote 6).

[36] In light of the fact that the exercise of the court's discretion involves a weighing up of the conduct complained of against the conduct expected of a legal practitioner, I will now briefly look at the obligations of a legal practitioner towards his or her clients and the public and in particular the obligations relating to trust funds.

[37] In *Law Society, Transvaal v Matthews*<sup>9</sup> the court stated that a legal practitioner is a person from whom the highest standards are exacted by the profession and the court. If a legal practitioner wishes to digress from that standard he may do so but he must then first cast aside his profession by resigning and then pursue his chosen course. He cannot serve two masters. The Court said:

'An attorney is a professional man whose independence and freedom in the conduct of his practise are recognised and preserved. Within the limits of the law and the rules of professional conduct an attorney conducts, and in fact should so conduct, his practice with a high degree of independence. The profession itself is not a mere calling or occupation by which a person earns his living. An attorney is a member of a learned, respected and honourable profession and, by entering it, he pledges himself with total and unquestionable integrity to society at large, to the courts and to the profession ... only the very highest standard of conduct and repute and good faith are consistent with membership of the profession which can indeed only function effectively if it inspires the unconditional confidence and trust of the public. The image and standing of the profession are judged by the conduct and reputation of all its members and, to maintain this confidence and trust, all members of the profession must exhibit the qualities set out above at all times.

The attorneys' profession can only fulfil its obligations to the community and comply with its role in the administration of justice in the land if it inspires and maintains the unconditional confidence of the community and if its members devote their absolute integrity to the conduct of their profession and to the fulfilment of all the requirements demanded of the profession and its members.

The integrity of an attorney should *inter alia* manifest itself in a situation where he must prefer the interests of his client above his own. It is required of an attorney that he observes scrupulously, and complies with, the provisions of the Attorneys Act and the rules ....

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<sup>9</sup> *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T).

In pecuniary matters the attorney must be most punctual and diligent. He must not retain money belonging to his client longer than is absolutely necessary and must account to his client for moneys received by him in a proper and diligent manner.<sup>10</sup>[My emphasis]

[38] To the sentiments expressed by the authorities quoted in this judgment, I add the words of the late Mr Justice Davis in the foreword to the fifth edition of *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*<sup>11</sup>, that:

'The precepts of the law are these" says Justinian at the beginning of the *Institutes*, "to live honourably, to injure no one and to give everyone his due". It is obviously impossible for anyone, who is not himself prepared at least to try to order his life in accordance with those precepts, to make even a pretence of practising law.'

[39] Having briefly outlined the conduct that is generally expected from a legal practitioner, I now return to the obligations of a legal practitioner as it relates to money matters.

[40] Section 26(1) of the Act in mandatory terms obliges a legal practitioner who holds or receives moneys for or on behalf of any person, to open and keep a separate trust banking account at a banking institution in which he or she shall deposit all such moneys. Where trust money is paid to a legal practitioner it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that a legal practitioner must at all times have available liquid funds in an equivalent amount. In *Incorporated Law Society, Transvaal v Visse and Others; Incorporated Law Society, Transvaal v Viljoen*<sup>12</sup> the court said:

'The very essence of a trust is the absence of risk. It is imperative that trust money in the possession of an attorney should be available to his client the instant it becomes payable. Trust money is generally payable before and not after demand ... An attorney's

<sup>10</sup> See in this regard Rule 17(9) of the Law Society's Rules.

<sup>11</sup> A D Cilliers, C Loots & H C Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at xv.

<sup>12</sup> *Incorporated Law Society, Transvaal v Visse and Others; Incorporated Law Society, Transvaal v Viljoen* 1958 (4) SA 115 (T) at 118F – H.

duty in regard to the preservation of trust money is a fundamental, positive and unqualified duty. Thus neither negligence nor willfulness is an element of a breach of such duty. ...'

[41] Rule 17(1) of the Rules of the Law Society obliges every legal practitioner who, in terms of the Act, is required to hold a fidelity fund certificate, to keep his or her books of account in the official language of Namibia and in such a manner as to fairly present, in accordance with generally accepted accounting practice, the state of affairs and business of the firm and to explain the transactions and financial position of the firm. Rule 17(2) provides that:

'In determining what is meant by "generally accepted accounting practice" regard shall be had inter alia to any rulings of the council published to members.'

[42] Rule 17 of the Law Society's Rules thus obliges legal practitioners to keep proper records and books of account in accordance with generally accepted accounting practice and procedure containing a full and accurate record of all financial transactions and distinguishing in readily discernible manner between trust account and business account transactions.

[43] Rule 18(5) of the Rules of the Law Society provides that a firm shall ensure that withdrawals from its trust banking account are made only:

- a) to or on behalf of a trust creditor; or
- b) as transfers to its business banking account, but only in respect of money claimed to be due to the firm.

[44] The courts<sup>13</sup> in South Africa have observed that the rule requiring legal practitioners to keep proper books of accounts is an absolute rule; it has to be so - the public is at risk. It is so that the particulars and information of trust moneys must be contained in the narrative of the entries of the books of account and it must not be necessary to resort to documents and files to obtain such information.<sup>14</sup> The courts have further commented that the requirements relating to the proper keeping of

<sup>13</sup> *Incorporated Law Society, Transvaal v S* 1958 (1) SA 669 (T) at 675; *Incorporated Law society, Transvaal v Goldberg* 1964 (4) SA 301 (T) at 303 G - 4.

<sup>14</sup> See *Incorporated Law Society, Transvaal v Visse and Others* 1958 (4) SA 115 (T) at 123B - F.

books of accounts contemplates proper books of account which must be kept in such a way as, in a business sense, to show the true state of affairs as regards the trust account.

[45] In *Cirota and Another v Law Society, Transvaal*<sup>15</sup> the court observed that failure to keep proper books of account is a serious contravention and renders a legal practitioner liable to be struck off the roll of practitioners or liable to suspension; and the courts have repeatedly warned practitioners of the seriousness of such a contravention.

[46] Having outlined the nature of the proceedings before court and the obligations of legal practitioners, I now return to the facts of this matter to, on the approach outlined in *Disciplinary Committee for Legal Practitioners v Murorua and Another*,<sup>16</sup> determine whether the Law Society has placed facts before me entitling me to exercise the discretion given to me by the Act.

### Discussion

[47] The point of departure in the discussion are the points *in limine* raised by Mr Mukonda. The first point *in limine* is that this court is allegedly *functus officio*. Mr Mukonda argued that in its order of 28 July 2022 this court gave a final order which reads as follows, ‘. . . the matter is removed from the Roll and is regarded as finalized’. He thus argued that the court is *functus officio* and has no authority to entertain the Law Society’s application.

[48] In *Hashagen v Public Accountants’ and Auditors’ Board*<sup>17</sup> the Supreme Court opined that:

‘[27] An administrative decision is deemed to be final and binding once it is made. Once made, such a decision cannot be re-opened or revoked by the decision maker unless

<sup>15</sup> *Cirota and Another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 193F - G.

<sup>16</sup> *Supra* footnote 6.

<sup>17</sup> *Hashagen v Public Accountants’ and Auditors’ Board* 2021 (3) NR 711 (SC) at para [27]. Also *Pamo Trading Enterprises CC & another v Chairperson of the tender Board of Namibia & others* 2019 (3) NR 834 (SC).

authorised by law, expressly or by necessary implication. The animating principle for the rule is that both the decision maker and the subject know where they stand. At its core, therefore, are fairness and certainty'.

[49] I earlier on indicated in this judgment that the statutory right which entitles the Law Society to approach this court for the temporary suspension of a legal practitioner is contained in s 32(3) of the Act. That section reads as follows:

**32 Removal from Roll or suspension from practice of legal practitioners**

(1) The Court may, on application made to it in accordance with subsection (2), order that the name of a legal practitioner be struck off the Roll or that a legal practitioner be suspended from practice-

(a) if he or she no longer conforms to any of the requirements of section 4(1)(c); or

(b) if he or she is guilty of unprofessional or dishonourable or unworthy conduct of a nature or under circumstances which, in the opinion of the Court, show that he or she is not a fit and proper person to continue to be a legal practitioner.

(2) An application in terms of subsection (1)-

(a) on any of the grounds mentioned in paragraph (a) thereof, shall be made by the Law Society;

(b) on the grounds mentioned in paragraph (b) thereof, shall be made by the Disciplinary Committee.

(3) Notwithstanding subsections (1) and (2), if a complaint has been lodged with the Disciplinary Committee against a legal practitioner in accordance with section 35(1), the Court may, on application of the Law Society, make an order for the temporary suspension of that legal practitioner from practice pending the determination of the complaint, if the Court is satisfied-

(a) that there are reasonable grounds to believe that the legal practitioner is guilty of unprofessional or dishonourable or unworthy conduct; and

(b) that the alleged conduct of the legal practitioner is of such serious nature that it is in the public interest or the interest of the legal practitioner's clients that the legal practitioner should be prevented from carrying on his or her practice until the disciplinary proceedings against the legal practitioner have been finalised or until further order.

(4) The Court may grant an order of temporary suspension under subsection (3) subject to such conditions as the Court may consider appropriate.

(5) An order of temporary suspension lapses upon expiry of a period of 30 days from the date on which the order was granted, but the Court may, upon application by the Law Society and upon good cause shown, extend that period for a further period not exceeding 30 days.'

(My emphasis)

[50] I am therefore satisfied that despite the fact that the court made a final order which would in general render the court *functus officio*, the section (that is s 32 of the Act) itself empowers the Law Society to approach the court for an extension of the suspension of a legal practitioner. The point in limine is in my view therefore meritless and is dismissed.

[51] The second point in limine is the allegation that the Law Society did not comply with rule 32(9) and (10) prior to launching the application for extension of Mr Mukonda's suspension and for the appointment of a *curator bonis*. Mr Mukonda argued that rule 32(9) and (10) is peremptory and non-compliance with the rule 'renders the Applicant's application invalid and prone to be dismissed'.

[52] Rule 32(9) and (10) of this court's rules has been the subject of discussion in this court in a number of matters. That rule provides that, in relation to interlocutory proceedings, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court. The question in my view is whether the Law Society's application for extension and appointment of a *curator bonis* is an interlocutory application.

[53] In *Di Savino v Nedbank Namibia Ltd*<sup>18</sup> the Supreme Court, after a detailed survey and analysis of authorities on interlocutory orders, found that a wide meaning is to be accorded to interlocutory orders and to include all orders upon matters 'incidental to the main dispute, preparatory to, or during the progress of the litigation'. In my view, the application by the Law Society is not incidental or preparatory to a main dispute. It is also not in the progress of litigation. The application by the Law Society to appoint the Director of the Law Society as *curator bonis* is thus not an interlocutory proceeding and rule 32(9) and (10) therefore does not find application. The second point in limine is therefore dismissed.

[54] The third point in limine is based on Mr Mukonda's contention that the Law Society has not exhausted the statutory internal remedies provided for in the Act, which allegedly lays out the procedure the Law Society has to follow before it brings an application to court. Mr Mukonda, relying on a letter which the Law Society addressed to an unidentified person, contends that the proper procedure which the Law Society should have followed was for it to refer Mr Ndabeni's complaint to Mr Mukonda for him to reply to that complaint.

[55] Firstly, with this point, Mr Mukonda demonstrates his utter ignorance of the role of the Law Society *vis-a-vis* legal practitioner's generally and the nature of these proceedings. Secondly, the Law Society first approached this court on 28 July 2022. In the affidavit filed in support of that application the Law Society refers to a letter dated 10 May 2022, in which it informed Mr Mukonda of Mr Ndabeni's complaint against him and invited him to provide his version. Mr Mukonda did not only ignore that letter, but ignored subsequent letters (the letter of 23 May 2022 and 1 June 2022) addressed to him. He also did not file any affidavit to contradict the allegations levelled against him when this application was launched. The third *point in limine* is thus meritless and is dismissed.

[56] The fourth point in limine, namely that the Law Society allegedly instituted impermissible group action, is startling. The point he raises clearly demonstrates that he has no understanding or conception of the role of the Law Society nor does

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<sup>18</sup> *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC).



he have any appreciation of his obligations towards the Law Society, the public and this court. I have earlier in this judgment set out the nature of these proceedings and the obligations of legal practitioners to their clients and the public in general. In view of what I have said in that regard, I dismiss the fourth point *in limine*.

[57] As regards Mr Mukonda's allegations that the Law Society embarked on a witch hunt exercise and is abusing the court process, I can say nothing but express utter shock. The deponent to the founding affidavit of the Law Society, lists the following alleged infractions which prompted the Law Society to launch these proceedings: Mr Mukonda has not kept proper books of account as required under rule 17 of the Rules of the Law Society, he contravened rule 18 of the Rules of the Law Society, he appears to have misappropriated N\$650 000 of trust money, and further appears to have overcharged his client.

[58] It also transpired at the hearing of this matter that Mr Mukonda did not apply and was not issued with a fidelity fund certificate for the period 1 January 2023 to 31 December 2023. From the pleadings before me it also came to light that Mr Ndabeni instituted proceedings in this court against the respondents to recover the money (N\$650 000) which is due to him. As indicated earlier this court on 10 June 2022 ordered Mr Mukonda to pay Mr Ndabeni the amount of N\$650 000 plus interest. Mr Mukonda has, however, not paid heed to that court order nor does he explain to this court why he has not or cannot comply with the court order of 10 June 2022. Mr Mukonda has also not under oath, explained or replied to the allegations made against him by the Law Society. In the absence of a denial, the Law Society's version stands.<sup>19</sup>

[59] The nearest explanation that Mr Mukonda provided as regards the money he is accused of having misappropriated is contained in a letter (dated 17 August 2022) he addressed to Ikanga Legal Practitioners (these are the legal practitioners who initially represented the Law Society when it commenced these proceedings). In that letter he, amongst other matters, writes the following (I quote verbatim):

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<sup>19</sup> See: *O'Linn v Minister of Agriculture, Water and Forestry and Others* 2008 (2) NR 792 (HC) para 29.

'6 The first compliance officer from your client who came to Rundu to meet me was clearly informed that Mr. Ndabeni was not truthful in relation to the complaint he had instructed us in three matters and in all he owes us some money that is the reason why we are holding on the money in issue. However, he was accusatory minded and failed to appreciate my expatiation.

7 The last two compliance officers, the female one was open minded but the male one was accusatory also and threatening.

8 In light of Mr. Ndabeni's aforesaid conduct and attitude and in light of the fact that the LSN's management has become passionate about this complaint and previous complaints against myself and had previously placed a hold on our trust and business accounts, we transferred the N\$ 650,000.00 from our trust account for safe keeping for the purpose that once the three matters were finalised the client can be invoiced accordingly and the legal fees set-off from the said amount. We were to embark on this exercise after the judgment in the appeal was made in January 2022.'

[60] What is baffling about Mr Mukonda's letter of 17 August 2022 is this: this letter was written more than two months after this court ordered the respondents to pay Mr Ndabeni the amount of N\$650 000 which was paid to Mukonda & Co Inc for the benefit of Mr Ndabeni, yet he does not even attempt to explain why he has not complied with the court order of 10 June 2022. He further more does not state where he gets the authority to *set-off* his legal fees from the amount of N\$650 000 he is accused of having misappropriated. Mr Mukonda admits that he, in total disregard of rule 18(5), paid or transferred trust moneys from a trust account without the authority and instruction of the trust creditor (Mr Ndabeni) to an undisclosed and unknown account. Mr Mukonda himself also admitted that he did not apply for a fidelity fund certificate for the period 1 January 2023 to 31 December 2023, yet he does not explain how he will deal with trust moneys and clients' files. This conduct of Mr Mukonda raises the question whether Mr Mukonda is fit and worthy to be a legal practitioner.

[61] Section 20 of the Act prohibits a legal practitioner to, on his or her own account or in partnership, practice without a fidelity fund certificate or is exempted from holding a fidelity fund certificate by virtue of the provisions of s 67. The section

makes it a criminal offence punishable with a fine not exceeding N\$200 000 or imprisonment for a period not exceeding 10 years if found guilty of practicing without a fidelity fund certificate.

[62] The evidence and facts placed before me point to one conclusion only, namely that unless Mr Mukonda can contradict (unfortunately Mr Mukonda did not seize that opportunity to place his evidence before court) the evidence before court, he is not fit and worthy to be a legal practitioner. The question that stands out like a tall tree in a field of shrubs is how this court can allow Mr Mukonda to deal with funds of members of the public if they are at risk and when Mr Mukonda has no regard for the Law Society and this court. It appears that Mr Mukonda is law unto himself.

[63] Given the totality of what has been placed before me, it is clear that Mr Mukonda does not want to take responsibility for his errant behaviour and seems to blame anyone and everyone but himself. He continues to display an untenable attitude towards the legal profession's regulatory framework and repeatedly has demonstrated his disdain for the institution of the Law Society. Given the conspectus of evidence placed before me, I am of the view that Mr Mukonda's conduct instead of inspiring and maintaining the unconditional confidence of the community in the administration of justice, actually erodes and destroys the public's confidence in the institutions administering justice in this land. His conduct is contrary to what that of a legal practitioner ought to be.

[64] In exercising this court's discretion, I am of the view that the conduct of Mr Mukonda is indeed dishonourable, unprofessional and unworthy of a legal practitioner. As such and given the seriousness of the alleged infractions and the multitude of these infractions, I am of the view that Mr Mukonda cannot be entrusted with the responsibility of handling funds and issues of members of the public. The only appropriate remedy until the Disciplinary Committee has completed its statutory functions is to, as contemplated in s 28 of the Act, wrest control of Mukonda & Co Inc's trust account from Mr Mukonda and to place it in the hands of the Director of the Law Society as a *curator bonis*, who must control and administer such trust account and the files of the respondents' clients until when the Disciplinary

Committee has finalised its statutory obligations. Any other order will send the wrong message to the general public that any alleged misconduct of such a grievous nature is condoned by the courts.

### Costs

[65] As to the appropriate costs to be awarded by this court, it is now well established that in applications of this nature, there is no *lis* between the Law Society and Mr Mukonda. The Law Society before court is performing its statutory function of placing facts before the court for it to exercise its disciplinary powers over truant legal practitioners.

[66] In this matter, Mr Mukonda accuses the Law Society of witch hunt, abuse of the court process and other dishonourable conduct. The allegations and accusations of Mr Mukonda against the Law Society are entirely unjustified in the sense that the primary facts upon which they are based have not been placed before me. I certainly consider that a punitive cost order is warranted in the circumstances of this case as a mark of disapproval of the unsubstantiated allegations of witch hunt and dishonourable conduct levelled by Mr Mukonda against the Law Society.<sup>20</sup> I agree and endorse the sentiments expressed by Smuts J (as he then was) in the case of *The Prosecutor-General v Xinping*<sup>21</sup> namely that:

‘... Unsupported allegations of abuse of process and of engaging in vexatious activities directed at a repository of public functions in exercising public powers itself in my view constitute an abuse and warrant censure. They are to be discouraged by appropriate costs orders when this form of this abuse occurs. All too often I encounter a resort to unsupported and unwarranted allegations of dishonesty or moral turpitude or abuse by a deponent in affidavits when dealing with the approach taken or allegations made by a public

<sup>20</sup> See the cases of *Zaahl v Swabou Limited and Others*, unreported 23 November 2006, case A 35/2006 para [46] to [49]; *Jewish Colonial Trust Limited v Estate Nathan* 1940 AD 163 and 184; *Nel v Waterberg Landbouers Ko-Op* 1946 AD 597 at 604; *Herold v Sinclair and Others* 1954 (2) SA 531 (A) at 539C-E.

<sup>21</sup> An unreported judgment of this court, Case No. (POCA 4/2013) [2013] NAHCMD 300 (delivered on 24 October 2013).

official. These unfounded attacks upon integrity are to be discouraged and in my view warrant a special order as to costs.'

[67] In light of what I said in the preceding paras, I am of the view that the Law Society must be in the position to *recoup* all the expenses it has incurred in the process of exercising its statutory obligations. The court must equally mark its disapproval of Mr Mukonda's conduct.

[68] For the reasons that I have set out in this judgment, I make the following orders:

1. The Director of the Law Society of Namibia (Ms Neliswa Tjahikika) is appointed as the *curator bonis*, duly assisted by an agent to be appointed for this purpose, to control and administer –
  - 1.1 Mukonda & Co Inc's trust account ....52070900, held at First National Bank of Namibia;
  - 1.2 Mukonda & Co Inc's business account ....52070778, held at First National Bank of Namibia; and
  - 1.3 All client files of Mukonda & Co Inc's firm insofar as it pertains to its trust account pending the determination of the complaint lodged with the Disciplinary Committee.
2. For purposes of order 1, the powers of the *curator bonis* are annexed to this judgment as "Annexure A".
3. Mr Mukonda and Mukonda & Co Inc must pay the Law Society of Namibia's costs of this application on a scale as between attorney and own client.
4. The matter is regarded as finalized and is removed from the roll.

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SFI Ueitele  
Judge

## APPEARANCES:

APPLICANT: U Katjipuka-Sibolile  
Of Nixon Marcus Public Law Office, Windhoek

1<sup>st</sup> & 2<sup>nd</sup> RESPONDENTS: R Mukonda

## “Annexure A”

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**POWERS OF THE CURATOR BONIS**

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1. Appointing the Director of the Applicant as the *curator bonis*, duly assisted by an agent to be appointed for this purpose, to take control of the first and second respondents’ trust account 62252070900 held at First National Bank and the first and second respondents’ business account 62254070778 held at First National Bank pending the finalisation of the complaint before the Disciplinary Committee, with the following rights, duties and powers:
  - 1.1 to control, operate and administer all the funds in the trust account and any investment accounts with the requisite rights and duties and powers in relation thereto;
  - 1.2 to take delivery of all the first respondent’s accounting records, files, correspondence, documents and the like which are directly or indirectly relevant or which contain particulars and/or information relating to:
    - (i) any monies received, held or paid by the first and second respondent for or on account of any person;
    - (ii) any monies invested by the first and second respondent in terms of any provision of the Act;
    - (iii) interest on monies so invested;
    - (iv) any estate of a deceased person or any insolvent person or any estate placed under curatorship of which the first respondent is (or is acting on behalf of) an executor, trustee or curator of such estate;
  - 1.3 to write-up of the trust books of account and make the necessary corrections of entries based on the latest information obtained from the files and/or proof of payments and/or receipts submitted by clients;



- 1.4 to obtain a list of clients, detailing file numbers and trust balances (if available);
  - 1.5 to extract a trust balance, together with the addresses for each trust creditor (if available);
  - 1.6 to ensure and safe-guard the best interest of the first and second respondents' clients, the general public and the profession;
  - 1.7 to ensure the full and proper accounting to the clients in respect of monies paid into the trust account on account of any person;
  - 1.8 to ensure the proper hand over of all client files to new legal practitioners, where necessary, alternatively ensure proper closing of client files;
  - 1.9 to ensure that if a file is handed over to a new legal practitioner, that an indemnity form is completed and signed for the record;
  - 1.10 to ensure that the clients have a free choice to which firms their files should be referred for finalization;
  - 1.11 to allocate fees and disbursements to which the first and second respondents are entitled;
  - 1.12 to cause a closing audit to be conducted and the firm closed;
  - 1.13 to report to the applicant in due course, but within a reasonable time on the affairs of the first respondent's firm in order to ascertain inter alia;
    - (i) whether any monies are due to be paid to a client or other person but not available for payment to said client or other person;
    - (ii) any irregular transfer of trust funds;
    - (iii) any other matter which she deems necessary;
  - 1.14 present the closing audit report and its findings to the applicant.
-