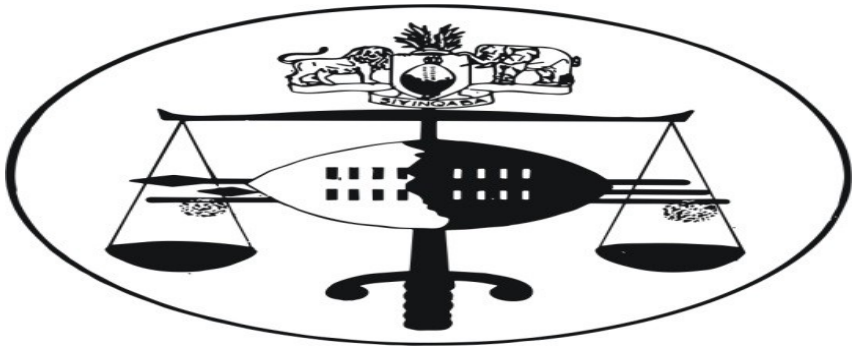


**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**HELD AT MBABANE** **CASE NO. 1821/2015**

**In the matter between:**
**MARTIN N. DLAMINI** **APPLICANT**

And

**THE LAW SOCIETY OF SWAZILAND** **1st Respondent**
**ATTORNEY GENERAL** **2nd Respondent**

**Neutral citation:** *Martin N. Dlamini v The Law Society of Swaziland, Attorney General (1821/2015) [2017] SZHC 138 (10th May, 2017)*

**Coram: MAPHANGA J**

**Heard: 10th May, 2017**

**Delivered: 12th July,2017**

**Summary**
**JUDGMENT**

***Summary:***

*Application for rescission of an order- Rule 42 and the Common Law; default judgement or order- requirements- alleged error on a matter of law-alternative basis being common law- explanation as to reason for default and bona fide defence; alleged error turning on correct construction of the Legal Practitioners Act-suspension of an attorney on grounds of professional misconduct-whether competent for court to do so on application for law society in terms of Section 27 (1)- Applicant contending Section 27 (1) ter, the applicable provision and therefore suspension in error- Section 27 of Legal Practitioners Act confirming courts power to suspend an attorney for reasonable cause- Section 27 (1) ter of the Act not applicable- application lacking in jurisdictional facts to establish proper grounds for rescission in terms of either common law or Rule 42.*

[1] This is a recission application. The applicant a practising attorney of this court brings the matter under a certificate of urgency seeking in the main the rescission of an order granted by this court on the 3rd of May 2017 suspending him from carrying on a practice

as an attorney with immediate effect pending the fulfilment by the Law Society of Swaziland (the 1st Respondent) of an order issued by **Justice M. Dlamini J** in an earlier judgement handed down on the 24th February, 2015 in separate applications proceedings. For the sake of clarity it is convenient to set the matter in the procedural context by outlining how it has come about.

*[2]* ***The Facts***

The basic circumstances of this matter are not complicated. These emerge from a series of initial proceedings that precede this interlocutory application.

It all began with an earlier application brought by the Master of the High Court concerning the present applicant's role and conduct as an executor of an estate.

*[3]* ***Background***

As the regards the origins of the matter, the Applicant had, by letters of administration issued by the Master of the High Court, been appointed as an executor of the estate late **Jericho David**

**Matsebula in 2012**. The established facts are that during the course of his handling of the affairs of the said estate it transpired that the applicant had accessed and procured certain monies from the Master of the High Court drawn from an account of the estate held by the Master. These drawings were made during the years 2010 and 2011 but these sums were never distributed by the Applicant to the beneficiaries of the Estate.

[4] Despite the lapse of of the prescribed time frame in terms of the Administration of Estates Act 1902, the applicant had failed to meet his statutory obligations to wind up the estate by filing the requisite liquidation and distribution account. Most significantly he had failed to account for the funds he had drawn from the estate account ostensibly for the benefit of the estate beneficiaries. As indicated earlier he had also failed to distribute or disburse the funds so drawn to the beneficiaries; this despite notices issued by the Master to do so.

[5] In light of these failures the Master brought an application in the matter of ***The Master of The High Court v The Executor Martin Nkululeko Dlamini (Estate Late Jericho David Matsebula*** **under case No. 1620/2012** in which application the Master sought, *inter*

*alia*, the revocation of the applicant's letters of administration and his appointment as executor in the said estate. In effect the Master in that application also sought an order terminating the applicants mandate and removing him as the executor but specifically to turn over and pay the outstanding sums drawn by him from the estate account. The Applicant opposed the application and the matter came to be heard by this court before my sister M. Dlamini J, who, in an incisive judgement made the folllowing orders at the end thereof:

***"1. The letters of administration granted to respondent on 29th January 2010 are hereby revoked and respondent is ordered to return the same to applicant forthwith;***

***2. Respondent is hereby removed as an executor of the estate of late Jericho David Matsebula.***

***3. Respondent is hereby ordered to deposit with the applicant the sums of E92, 000 and E200,091.97 with interest as per bank rate calculated from 14th July, 2010 and 6th May 2011 respectively within sixty (60) working days from date of judgment.***

***4. All benefits, commission, fees and disbursement due to respondent are hereby forfeited;***

***5. The matter is referred to the Law Society of Swaziland which is ordered to deal with respondent in accordance with the law within six months from date of this judgment and thereafter file its judgment with the Registrar of this Court.***

***6. Respondent is ordered to pay costs de bonis propriis."***

*[6] Findings Adverse to the Applicant*

In the judgment the court makes certain key adverse findings against the applicant in regard to which I can only refer to paragraph 14 of the judgment of the court in highlighting the gravity of the instances when the court says:

**"The practice procedure of executors opening bank accounts in the name of the estate, provides the Master with the opportunity to monitor and supervise the estate account as per the learned author *Meyerowitz*…….**

**The Master cannot do so where the executor who happens to be a practising attorney as in *casu*, deposits the money into his**

**trust account. This was conceded by the respondent (applicant herein) as when invited by this court to produce a statement of his trust account as proof that the said sum of about E300, 000 was still in his custody, declined to do so on the basis that he could not divulge his trust account to any other person for the reasons that there are other funds in this account. Had this amount been deposited to the estates account, it is my understanding respondent would not have objected to an inspection of this account"**

[7] To put the matter simply it is an incontrovertible fact as per the findings of the court that although invited and given ample opportunity to do so in circumstances where the matter screamed for an explanation and an account, the applicant had failed or avoided to show that he still held the funds that he had drawn as an executor from the estate account and caused to be paid into his firms account, were still intact either in full or in part.

[8] It was common cause that the applicant had requisitioned and drawn the sums of **E92, 000.00 and 200, 091. 97** from the Masters account on the 14TH July 2010 and the 6th May 2011, respectively but had not paid over, distributed or disbursed a these monies to the

beneficiaries of the trust. This was one of the critical findings of the court.

[9] Perhaps front of mind to the court, but without being prescriptive as to any specific sanction or procedures, was the key and special supervisory function of the Law Society over the applicant as a legal practitioner. It seems to me that is the reason the court *ex sua motu* made the specific order in terms of order No. 5 in which it is ordered to undertake the requisite measures in light of the circumstances under the regulatory statutory provisions of the profession and report on the outcome of the processes.

[10] I have no doubt that the court was minded specifically that the Law Society bore the responsibility in light of the emerging prima facie circumstances in the matter and especially the serious lapses of the applicant as an attorney of this court, to institute the appropriate disciplinary proceedings against the practitioner. It would not be farfetched to say that this could include steps to protect the interest of the affected parties (namely the beneficiaries of the estate) in securing the recovery of the outstanding funds.

[11] ***Application for Suspension and Removal of the Applicant***

The matter giving rise to this application comes in the wake of the judgment of this court in the matter of the Master and the applicant *in casu* referred to above.

On the 25th November, 2015 the Law Society launched an application wherein it sought the following orders:

***a) the suspension from practice of the applicant as an attorney of this court;***

***b) the removal of the applicant from the roll of practising attorneys; and***

***c) that applicant delivers his certificate of enrolment as attorney of the High Court of Swaziland to the Registrar of the court;***

***d) That with immediate effect the applicant be prohibited from administering and or operating a trust account in his name and as an attorney of the court; but also.***

***e) That the applicant forthwith surrender and deliver all information pertaining to the management and administration of the applicants trust account to the***

***Law Society and the Attorney General cited as the 2nd Respondent.***

[12] To ground the application, the 1st Respondent relies on the founding affidavit given by its then president**, Attorney Jose Rodriques** who in invoking section 27 of the Legal Practitioners Act and the powers of the Law Society in terms of that Act sets out the foundation and grounds for the application. Foremost in the said grounds, the Law Society premises the application in the applicant's failure to abide by the orders of this court in the judgment of the 24TH February 2014. The reimburse rent by the Applicant of the funds we had procured. In terms of that founding affidavit the Law Society makes reference to the order of the court directed to the applicant to pay over to the estate the sum of **E292, 091.97** and interest thereto as specified by the court.

[13] From the founding affidavit it emerges that pursuant to the order directing the applicant to pay over the sums drawn from the estate by him on the 8th July 2014 the Secretary of the Law Society addressed a letter to the applicant. In that letter he is urged to respond to the following:

***"1. Council has requested to be advised to the following:***

***1.1 whether your Martin Dlamini has deposited with the applicant the sums of E92,000.00 and E200, 091.97 with interest as per bank rate calculated from the 14th July 2010 and the 6th May 2011 respectively wihtin sixty (60) days as the judgement of the Court.***

***2. Please may we have your response within 7 working days"***

[14] It is unclear if this letter elicited any response at all but it may be presumed not for on the 21st July, 2014 the Secretary found it necessary to once again write to the applicant in the following terms:

***"1. We refer to the above matter.***

***2. Council has requested to be advised of the following:***

***2.1 whether your Martin Dlamini has deposited with the applicant the sums of E92, 000.00 and E200, 091.97***

***with interest as per bank rate calculated from the 14th July 2010 and the 6th May respectively within sixty (60) working days from the date of the judgement.***

***3. Further be advised that the Law Society will move an application to suspend you in the event you have not complied with the High Court judgment.***

***4. Please may we have your response within seven (7) working days."***

[15] It appears a considerable time elapsed without the Applicant responding to these enquiries until early 2015.

Amongst the correspondence between the Law Society and the applicant which is attached to the founding affidavit is a further letter dated 5th February 2015 in the content of which the applicant was being informed of the Council's decision to grant the applicant postponement at his instance in the awaited responses to a fixed date and time being the 24th February 2015 at 16h00 hours in the offices of its then President.

[16] It is common cause and is apparent from the correspondence in the papers that on the 5th March 2015 the applicant finally wrote to the Law Society in a letter addressed to '**The Secretary General"** which was in apparent reference to the secretary of the institution. The contents which are self-explanatory bear reference:

***"RE: MARTIN DLAMINI /SETATE LATE DAVID MATSEBULA HIGH COURT JUDGEMENT.***

***1. The above matter refers.***

***2. Following a meeting with the Law Society Council holden at the offices of the President in Manzini, Liqhaga Building on the 24th February 2015 with the author herein and on the above subject, I herein confirm the details thereto agreed in the following manner:***

***2.1 That within a period of four weeks I shall have to revert back to the council to give an update on how the remissions of monies in terms of the judgement of the court shall have proceeded.***

***2.2 That I should at present make efforts to remit the monies to fulfill the existing judgement.***

***Thanking you in advance for your cooperation in this regard"***

(sic)

[17] A subsequent response from the Law Society to this letter tells a fuller story. This is contained in a leter to the applicant dated the 12th March 2015. In it the applicant is placed on an unequivocal notice as to the status of the matter as follows:

**"1. We acknowledge receipt of your letter dated the 5th March 2015 only received by us on the 11th March 2015 at 2:35 pm.**

**2. You appeared before the Council on the 24th February 2015, whereby you admitted having invested clients monies in a foreign country without the mandate of your client.**

**3. You further admitted that to date your had neither accounted for the said amont to your client nor had you paid hmi any monies in respect thereof.**

**4. You assured the meeting that you would urgently address the issue of the outstanding monies to be remitted to the**

**estate of late Jericho David Matsebula as per the judgement of the court.**

**5. Your letter of the 5th March 2015, however does not address the issue of the remissions as per your undertaking, aimed at resolving the matter.**

**6. Your matter was deliberated by Council on the 11th March 2015 and your actions were viewed in very serious light.**

**7. As a consequence Council took the following decision:**

**i) that the Law Society refer this matter to the Disciplinary Tribunal for appropriate action.**

**ii) That the Law Society moves an application in court for your suspension pending the outcome of the disciplinary Tribunal**

**8. Council shall keep you posted of any developments"**

[18] With this letter the applicant was placed on further notice and informed of the intended action by the 1st Respondent in the unfolding circumstances of the matter in light of the lack of appropriate response from applicant to the pressure by the Society to abide by the court order.

[19] It view of these events, Mr Rodriques avers in his affidavit that the efforts of the Council of the 1st Respondent had not elicited the desired compliance by the Applicant to the order to pay the funds owed to the Estate or any part thereof. In the circumstances, Rodriques says the Council referred the matter to the Disciplinary Tribunal of the Law Society. This step was formalised in a letter dated 12th March 2015 (being a formal Complaint issued in terms of the Law Society By-laws) being a complaint against the applicant for professional misconduct in regard to his failure to account to the estate for the funds drawn by the applicant from the estate.

[20] The 1st Respondent avers that for a variety of reasons, one of which has been the applicants avoidance of the process the disciplinary proceedings have not been advanced and as such remain pending to date. There have also been administrative reasons mentioned by Mr Rodriques which have militated against finalisation of the proceedings before the Tribunal; namely the inability by the Law Society to secure a presecutor to lead the case before the tribunal.

[21] There are further equally serious additional allegations disclosed by the Law Society on the basis of which, it is averred, renders the applicant unfit to act as an attorney of this court detracting from his integrity. When the application was advanced before me, Mr Jele who appeared for the 1st Respondent, indicated that the Law Society would no longer be relying on those allegations as grounds for the relief sought but would only confine the application to the matter concerning the unaccounted for trust funds. For this reason I do not intend to go into the details of these allegations.

[22] The matter was finally set down by the 1st Respondent before me for 08h30 on the 3rd of May 2017. Neither the applicant nor his attorneys S P Mamba Attorneys were in attendance when the matter was called. However Mr Jele produced returns showing that both the attorneys and the applicant (personally) had been served with the Notice of Set Down. I nonetheless ordered that the matter be adjourned in order for the Registrar to contact the Applicant's attorneys to ascertain their whereabouts in view of the serious nature of the proceedings.

[23] When the matter resumed Mr Jele informed the court that the Registrar had in reaching the Applicant's attorneys been informed

that said attorneys did not intend to continue representing the applicant and were intent on withdrawing their services. However no Notice of Withdrawal as attorneys of record had been filed to this effect.

**Mr Jele** submitted that it was improper and highly discourteous, if not irregular, for the attorney of record to seek to register an intention to withdraw without formal notice in the manner of the applicants attorney. I agreed. The court takes a dim view of such indecorous conduct. In light of the evidence of all efforts being taken to notify the parties concerned of the hearing, and also being satisfied that the Applicant had been given an opportunity to advance his case in opposition to the application, I then ordered that the matter proceed to be heard in the applicant's absence.

It was at the onset of the 1st Respondent's submissions that the court was informed the Law Society would be confining itself to the applicant's failure to account and alleged 'misappropriation' of funds. I now turn to the application at hand.

**[24] THE APPLICATION FOR RESCISSION**

At the inception of hearing oral submissions Mr Simelane urged on behalf of the Applicant that the application was being brought in terms of Rule 42 (1) (a) and 42 (1) (b) and the common law. On reflection, he however abandoned reliance on Rule 42 (1) (b) and instead sought to rely on sub rule (a) and in the alternative, the common law. It is on that basis that the application must be dealt with and indeed on which argument by both counsel focussed.

[25] ***Rule 42***

Rule 42 (1) of the rules of the High Court caters for rescissions in instances where judgement or order has been, as the rule states, **'erroneusly granted' in the absence of the party'** concerned. This rule is one of alternative remedies for the rescission of judgement granted by defaulst where one is not proceeding either in terms of Rule 31 or the common law. Necessarily the party approaching the court has to establish the 'error' or jurisdictional basis required under the rule to succeed. In regard to sub-rule 1 (a) he has to show that there was *iustus error* or the existance of a fact or circumstance which had the court been apprised thereof or alive thereto would not have granted the order or judgment in question. I seek to paraphrase a general proposition that our courts and in

those in the region have stated time and again in considering the application of a sub-rule similar and *in pari materia* to ours.

As in ***Bakoven V G. J Holmes (Pty) Ltd 1992 (2) SA 466 at 471 E-G*** where Erasmus J summarises the position lucidly so has our court given its nod to these remarks in ***Nelisiwe Ndlangamandla v Robert Samkeliso Hadebe and Others (2148/120[2013] SZHC 57***. Here **Justice Erasmus** echoes the position that has been stated in other South African cases commenting on the scope and purpose of the rule including ***President of the Republic of South Africa v Ersenberg and Associated*** **2005 (1) SA 247 at 264 H-**J and in ***Stander and Another v ABSA Bank*** **1997 (4) SA 873 (E) AT 882 E-F** to this effect:

> "***Rule 42 (1) (a) it seems to me is a a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is erroneously granted when the court commits an error in the sense of a mistake in a matter of law appearing on the proceedingsof a court of record' It follows that a Court deciding whether a judgement is***

***erroneously granted is like a court of appeal, confined to the record of proceedings. In contradistinction to the reliefs in terms of Rule 31 (2) (b) or under the Common Law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence-……Once the applicant can point to an error in the proceedings, he is without further ado entitled to a rescission"***

[26] Thus it is contended by Mr Simelane, relying on this sub-clause that the court was led into error on a matter of law. If he is correct then applicant would be entitled to the rescission in terms of Rule 42 under this sub-rule.

On the merit of the argument he contends that, in ordering the suspension of the applicant as it did on the basis of Section 27 (1) of the Legal Practitioners Act the court erred in that it was not competent to do so on account of the pending disciplinary proceedings which renders the matter susceptible to be dealt with in terms of Section 27 *ter*. He argued that in this proposition he is

fortified as to its correctness of his construction of section in that the said proceedings have not been finalised before the tribunal of the 1st Respondent.

It was submitted in addition that this is the very scenario contemplated in Section 27 (1). This is one way of saying the suspension was premature. But there is a co-extensive argument questioning the competence of the suspension order that has been advanced by the applicant in another respect. It is that on application of Section 27 *ter* any suspension has to be time bound and limited to a period **'not exceeding three months'**. This is in reference to Section 27 ter (1) (ii).

[27] This corollary argument by Mr Simelane turns on the construction of these sub-sections. He urges that by virtue of the fact that disciplinary proceedings are contemplated and pending against the applicant by the Law Society, then the appropriate procedural provision applicable is Section 27(*ter*).

This calls for an examination of the pertinent Sections 27 (1) and 27 *ter* in turn*:*

**"Powers of the High Court**

**27 (1)** ***Upon any application by the Law Society, the Chief Justice, or in his absence, a Judge, may, for any reasonable cause shown order the suspension or removal of a legal practioner from the roll and, in the case of disciplinary proceedings for professional misconduct, he may order suspension or removal or such other lesser penaly as is provided for in section 27ter.***

***(2)*** ***The provision of this Act relating to discipline shall be without prejudice to the inherent powers of a court or other tribunal to deal with any misconduct or an offence by a legal practitioner in in the course of or in relation to proceedings before it."***

(my emphasis)

Then Section 27*ter*:

"***Powers and functions of Tribunal***

27*ter (1). <u>If after due inquiry the Tribunal decides</u> that-*

***(a) a legal practitioner has been guilty of professional misconduct; or***

***(b) it would be contrary to the public interest to allow a legal practitioner to continue to practise as such because of any mental or physical disability <u>the Tribunal shall take any of the following steps-</u>***

***(i) <u>direct the Law Society to make an application to the High Court for an order suspending the said legal practitioner from practising as such for a period not exceeding three months</u> <u>or removing him from the roll</u> and the Law Society shall comply with any such directive; but no costs shall be awarded against the Law Society unless the High Court is satisfied the Law Society has acted mala fide or unreasonably in bringing the application;***

***(ii) suspend the legal practitioner from practising as a legal practitioner for a period not exceeding three months;***

***(iii) ……”***

[28] ***Mr Simelane*** also contended that the error lies in what he terms a **‘direct violation of section 27 *ter* of the Legal Practitioners Act of 1964**’ in that he alleges the suspension order was ‘**indefinite**’ in scope. He referred me to Section 27 *ter* (1) (iii) that refers to a suspension **‘not exceeding three months’** prescribed therein as already mentioned above.

I have difficulty understanding the basis for the contention that the order in question was **‘open ended’** or **indefinite** in so far as that order concerned is qualified by the phrase **“pending the finalisation of the proceedings and procedural matters ordered by the court to be followed by the Law Society of Swaziland per paragraph 5 of the judgment of the Court of 24th February 2014”**. However that is another matter.

[29] The core issue arising from this application is whether the only basis for a competent suspension order by the court *in casu* is Section 27 *ter* (1), as contended by the Applicant. It is a matter of construction of the pertinent sections of the Legal Practitioners Act

as pertains the powers of the court *vis a vis* those of the Law Society and its tribunal.

It clear upon a reading of Section 27 (1) as read with sub-section 2 that the provision is merely confirmation of the courts inherent and ultimate supervisory powers of discipline over the profession. Section 27 (1) *ter* on the other hand deals with the competence and powers of the Law Society Disciplinary Tribunal as a distinct and separate mechanism for the discipline of errant practitioners.

The key and operative focal phrase in the construction of Section 27 (1) is the reference to **'for any reasonable cause shown'**. That phrase adverts to the jurisdictional basis for the exercise of the courts power under that section order a suspension or removal of an legal practitioner from practice.

However the section further contemplates the instance of an application brought through the recommendations of the tribunal in terms of Section 27 *ter* following a final outcome and sanction of proceedings before that body for the suspension, removal or such lesser *'penaly'* applied by that body. This becomes amply clear

when one considers in fullness the provisions and requirements for the application of Section 27 (1) *ter*.

[30] It was urged by Mr Jele in rebuttal that the applicants contentions are misconceived in that the 1st Respondent has not brought the application in terms of Section 27 *ter* in that it is not purporting to act '**on a recommendation'** of the Disciplinary Tribunal as no disciplinary proceedings have been concluded but it is invoking the power of the court to make such an order of suspension in its own right when moved to do so by the Law Society on '**reasonable cause'** shown. The sections are not capable of any other interpretation in light of the clear and distinct parameters and language.

Clearly the applicants contentions are based on a misconceived construction of the applicable provisions of the Legal Practitioners Act which is untenable in the circumstances and nature of the main application brought against the applicant. The only issue would simply be whether reasonable cause was established by the application.

[31] The factual contentions and allegations setting out the cause for the application have largely remained uncontroverted by the applicant.

***Reasonable Cause / Prima Facie Case of Misconduct***

The application by the law Society was premised on an alleged *prima facie* case of professional misconduct on the applicant's part.

The allegations surfaced by the Law Society are very serious indeed. This is so notwithstanding the fact that the Law Society have only pressed only on a fraction but no less serious aspect of the alleged transgressions attributed to the applicant. This involves an act of dishonesty attributed to the applicant on the basis of a judgment and findings of wrongdoing on the part of the Applicant who, was at all times material hereto, was an officer of the court.

From him (in both this capacity and also that of executor in an estate) was expected the utmost fiduciary standard of integrity and good faith (***uberimae fides***).

[32] It is bounden on the Law Society as ***custos mores*** of the profession to monitor and regulate the conduct of its members to ensure that the highest ethical conduct is maintained as it is to ensure that the public interest is promoted and protected in its dealings with the profession.

The applicant in opposing the main application for his suspension and removal elected to raise a series of technical contentions of law on procedural points. His is not the conventional answering affidavit but a document he styles:

***'Points of Law on Affidavit Precluding Answering Affidavit'***.

He avoids to answer the factual substance of the allegations on which the application is founded or to canvas and directly refute the factual matters placed before the court by the Law Society.

Although his answer takes the form of an affidavit, in it he mounts an attack in very scathing and disparaging terms bearing on the integrity of the intitution and its officers. The language he uses is most gratuitous and uncompromising; alleging that the officers involved have been actuated by *mala fides* in bringing the

application. He also questions the legal competence of the Law Society's governing body to institute proceedings for his suspension and removal and questions its due compliance with the procedural niceties of the Legal Practitioners Act. He contends the Law Society has usurped the functions of the Law Society Disciplinary Tribunal.

[33] In his papers opposing the Law Society application he virtually relied on the very points of law that he has invoked in this rescission application; pre-eminently turning on the application of Section 27 of the Legal Practitioners Act. That is the heart of the application before me.

However I consider that the alleged procedural irregularities relied upon by the applicant in opposing the original application were equally misconceived as it presumes reliance by the 1st Respondent on Section 27 *ter* which is not the case. There is no doubt that in light of the findings by this court of the serious act of misconduct on the part of the applicant in the handling of the estate and the maladministration thereof coupled with his failure to account for funds is sufficient cause on the basis of which the Law Society is

empowered to bring the application and seek the applicants suspenstion for the reasons I have outlined herein.

[34] Premised on the adverse findings of the Court against the applicant what cannot be doubted is that he is *prima facie* liable for very serious acts of misappropriation of funds dishonesty involving improper procurement withholding and most probably misappropriation of funds entrusted to him in the course of his professional duty to a client.

These are egregious breaches of fiduciary and ethical duty and of trust which bear moral turpitude and detract from his fitness of office. They speak to his professional integrity in a grave way.

[35] From the welter of evidence and the prima facie case against him, his failure during the original application to account or even proffer any explanations as to the security of the funds withdrawn; coupled with his failure to engage and deal with the *prima facie* substantive case against him in this application do not augur well for him.

There is no question that there are indeed circumstances where the Court, in exercise of its discretion in its remit under Section 27 that I have referred to above, has the power to intervene in the interest of the public.

An aggravating circumstance also lies the fact that the applicant remains in default of an order of the Court to pay order the runs he has withdrawn from the estate; he persists in this default and does not even offer any statement of what he has done to pay back money.

[36] The amount involved is a considerable **E 297,000.00.** In view of the lapse he caused in the provision of a valid security bond makes recovery of the outstanding monies difficult. There is however perhaps still a chance for the redemption of the bond for the recovery of the portion of the amount of **E92, 000.00** procured whilst the professional indemnity bond was still in place and valid.

This I say in reference to the facts emerging from the application before **Justice M. Dlamini J.** to the effect that the security bond, lapsed only after the applicant had caused the first tranche of funds to be withdrawn. Thus the redemption of security or cover for the

first tranche is a matter that is worth investigating in the interest of the estate from a remedial point and view.

[37] This is another aspect or lead the Law Society might have to consider pursuing. May I hasten to say it falls outside the scope of the application before us.

[38] It has been the 1st Respondents submission that in light of the findings of misconduct by this court on the applicant's part carries a taint of dishonesty, he is not a fit and proper person to continue practising as an Attorney.

This is the position it has adopted in the main application and maintains herein. That position is more fully anticulated in paragraphs 29 – 33 of the founding affidavit by ***Rose Rodrigues*** and to wit:

***"(29) It is the view of Applicant that the conduct of the 1st Respondent has brought him into disrepute and is therefore unacceptable. It is the duty of every attorney to uphold the law and steer clear of all conduct that may tarnish his reputation as an attorney and that of the legal***

***profession. Therefore it is the view of the applicant that the 1st Respondent is not fit and proper to hold office as an Attorney of the High Court of Swaziland.***

***(30) It is with respect submitted that it can no longer be said that the 1st Respondent is fit and proper to hold office as an Officer of the Court, albeit an Attorney of the High Court of Swaziland.***

***(31) The 1st Respondent has consistently failed to abide by the dictates of the judgment as aforestated despite his fiduciary obligation as an Attorney and Executor of an Estate.***

***(32) The 1st Respondent is further not an attorney of "good standing" in so far as his legal and ethical duties towards the Society and the legal profession as a whole and such the professional misconduct cannot be allowed to continue unabated.***

***(33) It is therefore inter alia, the view of the Applicant that the 1st Respondent has committed grave acts of misconduct in terms of Section 15 of the Bye Law of the Legal Practitioners Act4 wherein its states inter alia; "unprofessional or dishonourable or unworthy conduct on the part of an attorney member shall, without restricting the generality of those terms, include a breach of faith or***

***trust in relation to his client or in relation to any estate of which he is the executor, administrator, trustee, liquidator, receiver or curator; withholding the payment of the trust moneys without lawful excuse failing within a reasonable time to respond to an enquiry from a person to whom he owes a duty to reply failing within a reasonable time to render his client a detailed statement of account after being called upon so to do; failing without good cause to wind up a deceased estate without undue delay; any material breach of the provisions of the Act or of these Bye – laws," including the failure to pay an annual subscription to the Society within the period stipulated in Bye – law 19(3)***

***(34) It is the humble view of the Council charged with the affairs of the Applicant that for this Honourable Court to grant the orders prayed for in terms of the Notice of Motion, the Applicant must show that;***

***(34.1) Respondent has committed an offence or that his conduct constitutes a misconduct in terms of the Legal Practitioners' Act of 1964 and / or any other law of the land. This offending conduct must be established on a preponderance of probabilities,***

***(34.2) The Respondent is not a fit and proper person to continue to practice as an Attorney of the High Court."***

[39] On this basis Mr Jele has strongly urged that these circumstances set out "reasonable cause" as contemplated by Section 27(1).

There is however one aspect in Mr Jele submissions that has given me cause to hesitate. It relates to these averments in the 1st Respondent case as set out in paragraphs 35 – 36 in Mr Rodrigues affidavit, which read as follows:

***"(36) The act of professional conduct by the 1st Applicant remain unresolved despite him being afforded the opportunity to vindicate himself and/ or remedy his conduct; is indicative of serious problems in the manner that the 1st Respondent conducts himself as an attorney and Officer of the Court including his conduct in his private capacity that may have a bearing on his probity, name and reputation as attorney."***

[40] When the matter first came before me on the 3rd May the Law Society was substantively seeking a final order against

the Applicant quiete apart from an interim prayer for Applicant's suspension as a practising attorney. In advancing the application Mr Jele contended strongly that there was sufficient cause established by the Law Society for the prayer that the Applicant be removed from the roll of attorneys on the basis of the established facts and in light the Applicants failure to abide by the judgment and the Court on the 24th February 2014.

[41] However I have reservations with this approach in the face of the pending fulfilment by the Law Society of the directive set out in the 5th order in the very judgement of her Ladyship **Justice M. Dlamini** that the Law Socity invokes. The Law Society is yet to carry out the directive as prescribed in that order which as was directed to do within the stipulated time frame of 6 months. That matter is pending.

It may well be there have been practical difficulties in carrying it out but this is a step in the process that has been set in motion. That is the reason I considered the prayer for the Applicants removal to be pre mature and handed down the order I did, namely: the applicant's suspension pending

the outcome of the contemplated proceedings under the Legal Practitioners Act.

[42] That was the frame I had in mind in the order I pronounced on the 3rd May and this remains the case at this time.

Coming back to the central issue herein it is my view that reasonable cause was set out by the Application and it is in the interest and justice that the Applicant be suspended pending the disciplinary proceedings or any other statuary and legal mechanisms to be pursued by the Law Society pursuant to the judgement and orders on the 24th February 2014. There is therefore no error.

That being the case I am of the view that the grounds for the suspension of the applicant were adequately established by the 1st Respondent.

**CONCLUSION**

In adjudicating this matter we come to this position:

1. ***In casu the conduct of the applicant of taking money from the estate which was under his charge as an executor under the pretext that he would pay it to the beneficiaries of the estate (within a reasonable time) and his failure to turn over these sums or to account for the whereabouts or security thereof to the Master, and when called upon by the court, is not in dispute and constitute a prima facie act of dishonesty.***

2. ***In addition to that his persistent failure to date to pay the sums as directed by this court within the prescribed time without so much as an explanation for his lapse or default coupled with his brazen petition for relief presently whilst he remains in default and in delicto compounds his misconduct. His temerity aside in bringing this application, his conduct constitutes sufficiently serious misconduct and reasonable cause for his suspension. That much is well founded.***

> ***3. The misconduct attributable to the applicant in relation to his lapses as an executor of an estate bears a connection with his practice and enrolment as an attorney of this court. It thus also bears relation with the grand object of maintaining trust between the profession and the public that the Law Society is charged by law to protect and promote earnestly. The Law Society is in service of also maintaining the general intergrity and honour of the profession with this court and also with its members.***

In ***Re Hill: LR (1868) 3 Q.B.*** 543 **Cockburn CJ** said:

> ***"When an attorney does that which involves dishonesty, it is in the best interest of the suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as an attorney of the Court "***

[47] In light of the *prima facie* instance of misconduct that emerge in this case and the preceding matters linked hereto, I am certain that the application by the Law Society and the order of suspension of

the applicant in the meantime that it has attained, appeals to these sensibilities.

[48] I therefore find no merit in the application presently and are satisfied that whatever his case (in defence) that the applicant intends to put up as to his innocence or his rights, he shall be afforded sufficient and due process to bring same to bear in the contemplated disciplinary process; which are separate proceedings altogether.

[49] Finally we would be remiss in not mentioning also that the interests of the estate concerned and the parties affected in that matter should also be taken into consideration in the anticipated comprehensive report of the Law Society to be submitted to the court under **Case No. 1620/2012** in due course.

[50] In these premises the application for rescission is dismissed with costs; such costs being on an ordinary scale.

It is so ordered.

**MAPHANGA J**

For the Applicant : Mr M. Simelane

For the 1st Respondent : Mr D.N. Jele

For the 2nd Respondent : Mr N. Dlamini