

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED. ✓

17/6/2010

DATE SIGNATURE



17/6/2010

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION)

Case No 42111/08

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES
(Incorporated as the Law Society of the Transvaal)

Applicant

and

SEGOGOBANE NAPHTATI JOHN LETLHAKA

Respondent

CORAM: MATOJANE J et EBERSOHN AJ

DATE HEARD: 11/6/2010

DATE JUDGMENT HANDED DOWN 17/6/2010

JUDGMENT

EBERSOHN AJ.

[1] The applicant is the Law Society of the Northern Provinces. The respondent is one Segogobane Naphthali John Letlhaka, an admitted attorney of this Court. In the notice of motion the Law Society originally sought an order that respondent be suspended in his

practice as an attorney of this Court but after considering the approach by the respondent in his answering affidavit in which he attacked the Law Society and accused it of impropriety and of improperly bringing the application, the Law Society in its replying affidavit invited the Honourable Court in exercising its discretion to consider an order that the name of respondent be struck from the roll of attorneys.

[2] **GENERAL PRINCIPLES:**

- 2.1 The question whether an attorney is no longer a fit and proper person to practise as such lies in terms of section 22(1)(d) of the Attorneys Act, no 53 of 1979 (hereinafter referred to as the “Attorneys Act”), in the discretion of the Court.

See: Law Society of the Cape of Good Hope v C, 1986(1) SA 616 (A);
Vassen v Law Society of the Cape of Good Hope, 1998(4) SA 532 (SCA);
Jasat v Natal Law Society, 2000(3) SA 44(SCA);
Law Society of the Cape of Good Hope v Budricks, 2003(2) SA 11 (SCA).

- 2.2 The appropriate sanction, namely a suspension from practice or striking from the roll, also lies within the discretion of the Court.

See: A v Law Society of the Cape of Good Hope, 1989(1) SA 849(A) at 851 A – F;
Jasat v Natal Law Society (*supra*).

- 2.3 The Court also has inherent jurisdiction to determine the fitness of attorneys to practise over and above the provisions of the Attorneys Act.

See: Prokureursorde van Transvaal v Kleynhans, 1995(1) SA 839(T) on 851 E – F;
Law Society of the Cape of Good Hope v C, (*supra*) 638 C – 639 F;
Law Society of the Transvaal v Tloubatla, [1999] 4 ALL SA 59(D) at 63 G – I; and
Law Society of the Transvaal v Machaka and Others (No 2) 1998(4) SA 413 (TPD).

- 2.4 An application of this nature to the Court is in itself a disciplinary inquiry and *sui generis* of nature and not a *lis* between the Law Society and the practitioner. The Law Society, as *custos morum* of the profession, places facts before the Court for consideration.

See: Solomon v The Law Society of the Cape of Good Hope, 1934 AD 401 at 407;
Cirota and Another v Law Society, Transvaal, 1979(1) SA 172(A) on 187 H; and
Prokureursorde van Transvaal v Kleynhans (*supra*) at 851 G – H.

- 2.5 From the nature of disciplinary proceedings it follows that a respondent is expected to co-operate and provide where necessary information to place the full facts before the Court to enable the Court to make a correct decision.

Broad denials and obstructionism have no place in disciplinary proceedings.

See: Prokureursorde van Transvaal v Kleynhans (*supra*) op 853 G – H.

2.6 The facts on which a court exercises its discretion are to be established on a balance of probabilities.

See: Prokureursorde van Transvaal v Kleynhans (*supra*) on 853 I – J; and Law Society, Transvaal v Matthews, 1989(4) SA 389(T) on 393 I – J.

2.7 The opinion or conclusion of the Law Society that a practitioner is no longer a fit and proper person to practise as an attorney carries great weight with the court, although the court is not bound by it.

See: Kaplan v Incorporated Law Society, Transvaal, 1981(2) SA 762(T) at 781 H; and Die Prokureursorde van die Oranje Vrystaat v Schoeman, 1977(4) 588(O) on 603 A – B.

2.8 It has been repeatedly stated by our courts that the failure to keep proper accounting records is a serious contravention and that an attorney who fails to comply with this requirement is liable to be struck off the roll or to be suspended from practice.

See: Cirota and Another v Law Society, Transvaal, 1979(1) SA 172(A) at 193;
Law Society, Transvaal v Matthews (*supra*) at 395;
Incorporated Law Society, Transvaal v Visse and Others, 1958(4) SA 115(T);
Law Society, Transvaal v Behrman, 1981(4) SA 538(AD) on 559 E – F;
Prokureursorde van Transvaal v Landsaat, 1993(4) SA 807(T) on 814 E – G;
Holmes v Law Society of the Cape of Good Hope and Another 2006(2) SA 130 (CPD) on 152 B – F.

2.9 Kirk-Cohen, R in Law Society, Transvaal v Matthews (*supra*) on 395 said the following regarding the keeping of proper accounting records by a practitioner:

*“Failure to keep proper books of account is a serious contravention and renders an attorney 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. See Cirota and Another v Law Society, Transvaal (*supra* at 193 F – G). The seriousness is again underlined in rule 89 read with rule 89(11) of the applicant’s rules which provides that it is unprofessional or dishonourable or unworthy conduct on the part of the practitioner to contravene the provisions of the Attorneys Act or the applicant’s rules”.*

See also: Malan v The Law Society of the Northern Provinces [2008] ZA SCA 90 (12 September 2008) at paragraphs [10] to [11].

[B] **MERITS**

3.1 Points *in limine* raised by respondent

3.1.1 The respondent raised and argued three points in limine in the matter. The first was that there was an irregularity in the application in that Rooth & Wessels, the firm of attorneys who has handled applications of this nature on behalf of the Law Society for decades, should not have been appointed by the Law Society as, according to him, they in the past acted improperly in matters involving him. He in fact attacked the firm of attorneys in very strong language. During argument in Court the respondent, however, conceded that there was no merit in this point and he abandoned it. The second point in limine was that an affidavit attached to the founding paper was not properly before the Court as the day on which it was sworn to and signed, was not filled in on the affidavit. The respondent in fact served a notice of an irregular process on the attorneys of the Law Society and this omission was rectified timeously. During argument the respondent also conceded that there was no merit in this point. The third point in limine raised by the respondent was the alleged failure on the part of the Law Society to respond to the respondent's notice to furnish it with certain transcripts of proceedings and that there was not a proper quorum of councillors present when it was resolved to bring this application against the respondent. During argument the respondent conceded that there was no merit in either of

the two aspects and he abandoned this point too. It must be stated in the respondent's favour that he was absolutely candid with this Court during the hearing of this matter and he readily conceded that he erred and he expressed his regret in this regard.

3.1.2 The Law Society in any case has replied to the points *in limine* in full in the replying affidavit.

3.1.3 It was submitted by Mr. Lamey, who appeared on behalf of the Law Society, that in general the respondent's answering affidavit evidenced a lack of insight as to the seriousness and unacceptability of his conduct. His answer also evidenced that he has no respect for his professional body and that his allegations regarding the Law Society were contemptuous in the extreme, without merit and inappropriate in proceedings of this nature. This in itself, so went Mr. Lamey's argument, forms an additional factor and ground to consider whether his name should not be struck from the roll of attorneys instead of the initial relief sought namely a suspension. The Court has to agree with Mr. Lamey in this regard as it appears that the respondent unfortunately did not grasp the seriousness of the situation.

3.2 **Other conduct**

3.2.1 The respondent last filed his rule 70 auditor's certificate regarding his trust

account for the year ending 28 February 2006 and did not file such a certificate for any subsequent year up to the present with the Law Society. He conceded in Court during argument that he was still practising as an attorney and conceded that he was practising without a fidelity fund certificate. By failing to submit the rule 70 auditor's reports, respondent contravened the provisions of rule 70 and in terms of rule 89.11 he made himself guilty of unprofessional, dishonourable and unworthy conduct.

3.2.2 For this contravention he appeared before a disciplinary committee and pleaded guilty to the charge. A fine in the amount of R3 000.00 was imposed. The total fine of R3 000.00 was suspended for a period of three years on condition that he was not found guilty of a similar charge during the period of suspension. All these averments were admitted by respondent. After his appearance before the Law Society he, however, continued practising as an attorney without a fidelity fund certificate.

3.2.3 Apart from the fact that respondent failed to submit his rule 70 auditors report for the year ending 28 February 2007, and the subsequent years, respondent was not issued with a fidelity fund certificate for 2008 or any following year. Respondent continued to practise as an attorney without such fidelity fund certificate from 1 January 2008 and at the time of the bringing of the application he was still practising as such. These facts were admitted by the respondent during argument in Court.

- 3.2.4 An inspection of the accounting records of respondent by a forensic investigator appointed by the applicant revealed that respondent did not keep proper accounting records in accordance with section 78 (4) read with rules 68.1 and 68.2. Furthermore, there was no proper system for the transfer of fees in contravention of rules 69.3.3. The transfers from the trust bank account were not deposited in the business bank account as required by rule 69.5.
- 3.2.5 The respondent withdrew funds from his trust banking account by way of a bank card. This was admitted to the auditor appointed by the Law Society to investigate the books of the respondent, one van Rooyen, during his investigation and he admitted this during argument before Court. Respondent's denial in his answering affidavit that he contravened rule 69.5 thus not true and without substance.
- 3.2.6 Although respondent was found guilty by the Law Society for his failure to submit a rule 70 auditors report, he did not subsequently submit such a report after 2006. His explanation for his failure during argument in Court was that he could not afford to pay an auditor to do the work for him as they were expensive and wanted payment up front. The legislation places the onus on the attorney to employ an auditor and not having the funds to pay an auditor is no excuse for his failure to file his auditor's reports.
- 3.2.7 With reference to the averment of respondent that he replied to van Rooyen's

report in a letter addressed to applicant, although he attempted to challenge the findings of Van Rooyen, he did not do so with reference to his own auditors. His challenge was therefore unsubstantiated.

- 3.2.8 The Court was referred to the reply of the Law Society, namely that with the exception of the withdrawal of monies by way of a bank card, respondent did not deny any of Van Rooyen's findings in the letter.

[4] CONCLUSION

- 4.1 A proper case has been made out in the papers to the effect that respondent is no longer a fit and proper person to continue to practise as an attorney. He persisted for several years practising on his own, wilfully transgressing the applicable legislation, and for some unknown reason he did not join another firm of attorneys as a partner or as a professional assistant to tide him over his obvious financial woes.
- 4.2 Taking into account the serious transgressions of the respondent and the contents of his answering affidavit and the scandalous allegations made therein, including referring to the Law Society as corrupt, it is clear that the respondent is no longer a fit and proper person to continue to practise as an attorney and if this Court does not strike the respondent's name from the roll of attorneys this Court would be failing in its duty.

4.3 The Court decided against a mere suspension for a few years as there was no proof placed before the Court that the applicant would rehabilitate himself within the period of suspension and the public cannot be placed at risk.

4.4 It is clear that the usual costs order should be made namely on an attorney and client scale.

[5] The following order is accordingly made:

1. The name of **SEGOGOBANE NAPHTALIJOHN LETLHAKA** be struck from the roll as an attorney of this Honourable Court.
2. That respondent immediately surrender and deliver to the registrar of this Honourable Court his certificate of enrolment as an attorney of this Honourable Court.
3. That in the event of the respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate and to hand it to the Registrar of this Honourable Court.
4. That respondent be prohibited from handling or operating on his trust accounts as

detailed in paragraph 5 hereof.

5. That Johan van Staden, the head : members affairs of applicant or any person nominated by him, be appointed as *curator bonis* (curator) to administer and control the trust accounts of respondent, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by respondent at a bank in the Republic of South Africa in terms of section 78(1) of Act No 53 of 1979 and/or any separate savings or interest-bearing accounts as contemplated by section 78(2) and/or section 78 (2A) of Act No. 53 of 1979, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said subsections or in which monies in any manner have been deposited or credited (the said accounts being hereafter referred to as the trust accounts), with the following powers and duties:

5.1 immediately to take possession of respondent's accounting records, records, files and documents as referred to in paragraph 6 and subject to the approval of the board of control of the attorneys fidelity fund (hereinafter referred to as the fund) to sign all forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which respondent was acting at the date of this order;

- 5.2 subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against respondent in respect of monies held, received and/or invested by respondent in terms of section 78(1) and/or section 78(2) and/or section 78 (2A) of Act No 53 of 1979 (hereinafter referred to as trust monies), to take any legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions, if any, in which respondent was and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);
- 5.3 to ascertain from respondent's accounting records the names of all persons on whose account respondent appears to hold or to have received trust monies (hereinafter referred to as trust creditors) and to call upon respondent to furnish him, within 30 (thirty) days of the date of service of this order or such further period as he may agree to in writing, with the names, addresses and amounts due to all trust creditors;
- 5.4 to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of, the board of control of the fund, to determine whether any such trust creditor has a claim in respect of monies in the trust

account(s) of respondent and, if so, the amount of such claim;

- 5.5 to admit or reject, in whole or in part, subject to the approval of the board of control of the fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;
- 5.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the board of control of the fund;
- 5.7 in the event of there being any surplus in the trust account(s) of respondent after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce (as the case may be), firstly, any claim of the fund in terms of section 78(3) of Act No 53 of 1979 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of respondent, the costs, fees and expenses referred to in paragraph 10 of this order, or such portion thereof as has not already been separately paid by respondent to applicant, and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the board of control of the fund, to respondent, if he is solvent, or, if respondent is insolvent, to the trustee(s) of respondent's insolvent estate;

- 5.8 in the event of there being insufficient trust monies in the trust banking account(s) of respondent, in accordance with the available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which may be available in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the Attorneys Fidelity Fund;
- 5.9 subject to the approval of the chairman of the board of control of the fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and
- 5.10 to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of respondent has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.
6. That respondent immediately deliver his accounting records, records, files and documents containing particulars and information relating to:
- 6.1 any monies received, held or paid by respondent for or on account of any

person while practising as an attorney;

- 6.2 any monies invested by respondent in terms of section 78(2) and/or section 78 (2A) of Act No 53 of 1979;
- 6.3 any interest on monies so invested which was paid over or credited to respondent;
- 6.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by respondent, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;
- 6.5 any insolvent estate administered by respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;
- 6.6 any trust administered by respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;
- 6.7 any company liquidated in terms of the Companies Act, No 61 of 1973, administered by respondent as or on behalf of the liquidator;
- 6.8 any close corporation liquidated in terms of the Close Corporations Act, 69 of 1984, administered by respondent as or on behalf of the liquidator;

6.9 respondent's practice as an attorney of this Honourable Court,

to the curator appointed in terms of paragraph 5 hereof, provided that, as far as such accounting records, records, files and documents are concerned, respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.

7. That should respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on respondent (as the case may be), the sheriff for the district in which such accounting records, records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator.

8. That the curator shall be entitled to:

8.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the

firm;

8.2 require from the persons referred to in paragraph 8.1 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or respondent and/or respondent's clients and/or fund in respect of money and/or other property entrusted to respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof.

9. That respondent be and is hereby removed from office as -

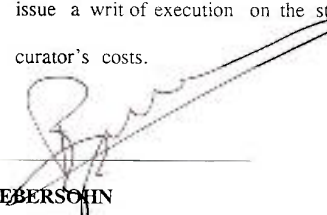
9.1 executor of any estate of which respondent has been appointed in terms of section 54(1)(a)(v) of the Administration of Estates Act, No 66 of 1965 or the estate of any other person referred to in section 72(1);

9.2 curator or guardian of any minor or other person's property in terms of section 72(1) read with section 54(1)(a)(v) and section 85 of the Administration of Estates Act, No 66 of 1965;

9.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;

- 9.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973;
- 9.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;
- 9.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984.
- 10. That respondent be and is hereby directed:
 - 10.1 to pay, in terms of section 78(5) of Act No. 53 of 1979, the reasonable costs of the inspection of the accounting records of respondent;
 - 10.2 to pay the reasonable fees of the auditor engaged by applicant;
 - 10.3 to pay the reasonable fees and expenses of the curator, including travelling time;
 - 10.4 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid; and
 - 10.5 to pay the costs of this application on an attorney-and-client scale.

11. That if there are any trust funds available the respondent shall within 6 (six) months after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, shall satisfy the curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to him (respondent) in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof;
12. That a certificate issued by a director of the Attorneys Fidelity Fund shall constitute *prima facie* proof of the curator's costs and that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.



P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

I AGREE:



K.M. MATOJANE

JUDGE OF THE HIGH COURT

Applicant's counsel

A.T. Lamey

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