

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED. ☒
2/8/2010
DATE SIGNATURE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case No: 53020/2009

In the matter between:

3/8/2010

THE LAW SOCIETY OF THE NORTHERN PROVINCES

APPLICANT

and

LOUISA ANDRI BESTER

RESPONDENT

CORAM: POTTERILL J AND EBERSOHN AJ

DATE HEARD 27/7/2010

DATE JUDGMENT HANDED DOWN: 2/8/2010

JUDGMENT

EBERSOHN AJ.

[1] The Law Society of the Northern Provinces (hereinafter referred to as "the Law Society") applied for the striking of the respondent LOUISA ANDRI BESTER from the roll of practising attorneys of the above Honourable Court in terms of the provisions of the Attorneys Act, No. 53 of 1979 ("the Act").

[2] The respondent was admitted as an attorney of this court on the 24th of April 2003 and her name still appears on the roll of practising attorneys and she practised for her own account under the style of Bester Attorneys at Suite 104, First floor, Safari Centre, No 28 Van Velden Street, Brits, North West Province, according to the Law Society's records.

[3] During August 2009 the Law Society filed an application for the suspension of the respondent from the roll of practising attorneys and this court suspended her as such on the 22nd September 2009. The respondent did not respond to that application and order and did not file an answering affidavit neither in the suspension application nor in this application and the application before this court is thus unopposed.

[4] The respondent apparently having left her practice and her whereabouts being unknown, an application for substituted service was granted on the 13th July 2010 for service of the Notice of Set Down by way of publication in the press. Publication took place.

[5] The purpose of the application was for the Law Society to submit to this court facts which the Law Society contended constituted such a deviation from the standards of professional conduct that the respondent was not a fit and proper person to continue to practice as an attorney and that she be removed from the roll of practising attorneys.

[6] It is trite law that applications such as this one, are *sui generis* and of a disciplinary nature. There is no *lis* between the Law Society and the respondent. The Law Society, as *curatos morum* of the profession, places facts before the court for consideration and the matter is left in the hands of the court to decide.

Vide: **Hassim v Incorporated Law Society of Natal** 1977(2) SA 757(A) at 767 C-G; **Law Society, Transvaal v Matthews** 1989(4) SA 389(T) at 393 E; **Cirota & Another v Law Society, Transvaal** 1979(1) SA 172(A) on 187 H; **Prokureursorde van Transvaal v Kleynhans** 1995(1) SA 839(T) on 851 E – F.

[7] The question whether an attorney is a fit and proper person in terms of section 22(1)(d) of the Act is not dependent upon a factual finding, but lies in the discretion of the court.

Vide: **Law Society of the Cape of Good Hope v C** 1986(1) SA 616(A) at 637 C – E; **A v Law Society of the Cape of Good Hope** 1989(1) SA 849(A) at 851 A – E; **Law Society, Transvaal v Mathews** *supra* at 393 I – J.

[8] In exercising its discretion, the court is faced with a three stage inquiry:

- (a) The first inquiry is for the court to decide whether or not the alleged offending conduct has been established on the preponderance of probabilities;

(b) The second inquiry is whether, as stated in Section 22(1)(d) of the Act, the practitioner concerned “in the discretion of the court” is not a fit and proper person to continue to practice. This entails a value judgment;

(c) The third inquiry is whether in all the circumstances, the practitioner in question is to be removed from the roll of attorneys or whether an order suspending her from practice for a specified period will suffice. Ultimately this is a question of degree.

Vide: **Jasat v Natal Law Society** 2000(3) SA 44 (SCA) at 51 B – I; **Law Society of the Cape of Good Hope v Budricks** 2003 (2) SA 11 (SCA) on 13E– 14.

[9] The court’s discretion must be based upon the facts placed before it and facts in question must be proven upon a balance of probabilities.

Vide: **Law Society, Transvaal v Matthews**, *supra* at 393 I – J; **Olivier v Die Kaapse Balie-Raad** 1972(3) SA 485(A) at 496 F – G and **Summerley v Law Society, Northern Provinces** 2006 (5) SA 613 (SCA) at 615 B – F.

[10] The facts upon which the court’s discretion is based should be considered in their totality. The court must not consider each issue in isolation.

Vide: **Law Society, Transvaal v Matthews**, *supra* at 420 B – D; **Law Society, Cape of**

Good Hope v Segall 1975(1) SA 95C at 99B; **Beyers v Pretoria Balie Raad** 1966(2) SA 593 (A) at 606B; **Malan and another v The Law Society Northern Provinces** [2009] 1 All SA 133 (SCA).

[11] The courts in the past regarded the failure on the part of attorneys not holding proper accounting records in a very serious light:

Vide: **Malan and another v The Law Society, Northern Provinces** [2009] 1 All SA 133 (SCA); **Law Society of the Northern Provinces v Morkel** [2003] FOL 10868 (T); **Botha & Others v The Law Society of the Northern Province** [2009] 3 All SA 293 (SCA) and **Law Society of the Northern Provinces v Setshogoe** [2009] JOL 2307 (T).

[12] The facts and circumstances which prompted the Law Society to bring this application are the following:

- a) the respondent misappropriated trust funds;
- b) there is a substantial trust deficit in the respondent's trust bookkeeping;
- c) the respondent rolled trust funds in order to conceal trust deficits in her bookkeeping;

- d) the respondent failed to keep proper accounting records in respect of her practice and contravened several provisions of the Act and the Law Society's Rules relating to bookkeeping by an attorney;
- e) the respondent failed to co-operate with the Law Society and to hand her complete accounting records to an auditor instructed by the Law Society to inspect the records; and
- f) the Law Society has received serious complaints against the respondent relating to, inter alia, the respondent's failure to account in respect of trust funds and her delay in paying trust funds to trust creditors on demand.

[13] After the Law Society received the complaints against the respondent relating to her handling of trust funds, the Law Society instructed an auditor and chartered accountant, Mr. Vincent Faris ("Faris") to visit the respondent at her practice and there to conduct an inspection of her trust accounting records and to investigate the complaints. Faris executed his mandate and reported to the Law Society in writing on 16 July 2009.

[14] The complaints will now be dealt with.

[15] MR. WOUTER VERMEULEN ("Vermeulen")

- a) Vermeulen sold his immovable property during August 2008 for an amount of R845 000.00. The amount was paid by the purchaser to the Respondent during September 2008.
- b) The transfer of the property was registered in the Deeds Office on 18 December 2008.
- c) The respondent failed to account to Vermeulen in respect of the proceeds of the sale and Vermeulen did not receive any payment from the respondent.
- d) Faris investigated the matter and found that an amount of R848 551.00 was deposited into the firm's trust banking account on 8 September 2008. An amount of R847 801.00 of the abovementioned amount related to Vermeulen's complaint.
- e) On 9 September 2008 the respondent transferred an amount of R500 000.00 from these funds electronically from her trust banking account with the following annotation:

ELEKTRONIESE BANK BETALING NA SUREF FOCUS 01 PLO5512:33

- f) The deposit received by the firm on 8 September 2008 was therefore utilised in

order to make the payment on 9 September 2008. The transfer did not relate to Vermeulen's matter. According to Faris the possibility of a trust deficit in this matter alone cannot be excluded.

- g) The documents perused by Faris reflected payments to be made to Vermeulen during January 2009 in three instalments of R100 000.00 each, one payment of R50 000.00 and one payment of R68 471.45.
- h) The abovementioned amounts, together with a business cheque issued on 21 February 2009 for an amount of R251 258.73 indicated that an amount of R669 730.18 was due to Vermeulen.
- i) The last mentioned payment, in the amount of R251 258.73, was drawn on the firm's business banking account and the cheque was returned by the respondent's bank as unpaid.
- j) The said cheque was furthermore issued to BMS Motor & Truck. The same beneficiary was referred to in respect of the three payments of R100 000.00 each and the one payment of R50 000.00, referred to above. According to Faris these payments did not relate to Vermeulen's matter.
- k) Faris perused Vermeulen's ledger account. The payments that could not be

traced on the bank statements for December 2008 did not reflect Vermeulen as a beneficiary. The three payments made by the respondent in the amount of R100 000.00 each were referred to as follows:

DEC20 ELEKTRONIESE BANK BETALING NA REGEN REGENT

DEC22 ELEKTRONIESE BANK BETALING NA REGEN REGENT

DEC24 ELEKTRONIESE BANK BETALING NA REGEN REGENT.

- l) The abovementioned facts confirmed Vermeulen's allegation that he did not receive the amount of R300 000.00 and that the funds were in fact paid to another beneficiary.
- m) With reference to the amount of R50 000.00 Faris found that there were two payments in this amount, one on 5 February 2009 and one on 9 February 2009. Both these payments were described in the bank statements as:

VER 16 BMS Motor & T.

- n) The payment was therefore duplicated.
- o) The amount of R68 471.45 was paid by cheque on 29 January 2009.

- p) On the registration of the transfer on 19 December 2008 an amount of R311 023.71 was deposited into the firm's trust banking account. This amount was utilised by the respondent in order to make the three payments of R100 000.00 each, referred to above. There were insufficient funds available in the respondent's trust banking account in order to make these payments prior to the receipt of the amount of R311 023.71.
- q) Faris concluded that the firm's trust position on this account could not be determined without further information, without access to the firm's ledger account and without the relevant office file. Faris suspected that the respondent rolled trust funds in a similar fashion as is normally found in a Ponzi scheme.

[16] REGENT BOND DISCOUNTING (PTY) LIMITED ("Regent")

- a) Regent advanced certain funds in a property transaction in respect of bridging finance.
- b) According to Regent an amount of R980 000.00 was advanced and a further amount of R220 000.00 totalling R1.2 million, would be payable upon registration of the property.

- c) Whether and when these amounts were received in the firm's trust banking account is unknown.
- d) The transfer of the property was registered during December 2008.
- e) Regent received amounts totalling R384 000.00 from the respondent, but the amount of R816 000.00, being the balance of the amount of R1.2 million, remained outstanding.
- f) According to the respondent's trust bank statements the amount of R980 000.00 was in fact paid into the respondent's trust banking account on 28 July 2008.
- g) Prior to the receipt of the abovementioned amount the balance of the trust banking account amounted to R240 873.39. With the exception of the receipt of an amount of R130 000.00 no large amounts were received in the firm's trust banking account during the period 28 July 2008 to 30 July 2008.
- h) Faris investigated the flow of funds and found that the major portion of the amount of R980 000.00 was utilised to pay the following amounts:

29 July 2008 by internet to C E Olivier	R296 317.65
29 July 2008 by electronic bank payment to C E Olivier	R500 000.00
30 July 2008 by electronic bank payment to C E Olivier	R167 930.24
	R964 247.89

i) Faris did not know if there was a direct relationship between the C E Olivier, referred to above, and Regent. It may well be that the payments to Olivier were justified at the time as part of the bridging finance facility. If the payments did not form part of the bridging finance facility, the respondent's conduct in this matter also constituted the rolling of trust funds in order to cover up a trust deficit in the firm's bookkeeping.

j) Faris was able to trace the payments referred to on the second page of the complaint with the exception of the amount of R4 000.00 which was paid on 18 January 2009.

In view of the way in which the funds were moved and without access to the firm's complete accounting records, Faris concluded that the amount of R4 000.00 was paid from the firm's business banking account.

k) The three payments of R100 000.00 each, referred to in the complaint, are the same payments referred to above in the Vermeulen matter. The allocation thereof to the Vermeulen matter and the statements made by the respondent to Vermeulen that the payments were made to him, were clearly false and did not accord with the true facts.

l) Faris scrutinised the firm's trust bank statements for December 2008. He could not find the receipt by the firm of a large amount during December 2008 in respect of the

proceeds of the sale.

- m) According to Faris it was necessary to obtain further information and access to the trust ledger account and office files in order to establish how the proceeds were handled.
- n) Faris found that there could be no doubt that an amount of R816 000.00 should have been available in the firm's trust banking account from the date of the transfer to the present and there was not such an amount available.

[17] MR MARCUS JACOB ("Jacob")

- a) Jacob, who is an investor, advanced certain funds from time to time to the respondent in terms of investment agreements.
- b) The investment agreements provided for interest on the capital amount at a fixed rate. The agreements also provided for repayment terms and the way the funds were to be utilised.
- c) Jacob advanced the following funds to the respondent:

DATE	AMOUNT	ANNEXURE	REMARKS
2008			
NOV 1	120 000.00	H(ii)	Trust receipt 02934
NOV 8	150 000.00	H(iii)	Trust receipt 02959
NOV 13	100 000.00	H(iv)	Trust receipt 02973
DEC 10	82 500.00	H(v)	Trust receipt 03206
DEC 30	117 500.00	H(v)	Trust receipt 03252
2009			
FEB 2	300 000.00	H(vi)	Trust receipt 03115
	<u>870 000.00</u>		

d) All the abovementioned amounts could be traced and have been deposited into the firm's trust banking account.

e) It was not possible for Faris to determine how the funds were utilised without access to the relevant ledger account.

f) Faris inspected the bank statements and the flow of funds and found that the funds were applied in order to sustain the rolling process of trust funds referred to above. Amounts were paid to Jacob from time to time in respect of interest on the investments.

g) The firm's bank statements also revealed that there were numerous other receipts from and payments to Jacob dating back to March 2008.

h) Faris is of the view that as the funds were deposited into the firm's trust banking account

but not applied in accordance with the provisions of the investment agreements and the balance of the unapplied funds should be available in the firm's trust banking account.

- i) Given the wording of the investment agreements, the transactions were of a business nature and therefore should have been dealt with through the firm's business banking account.

[18] KLIEK FINANCE (PTY) LIMITED ("Kliek")

- a) This complaint also relates to bridging finance and is similar to the previous complaint.
- b) Faris was unable to determine the trust liability of the firm due to the fact that the trust ledger account, files and further information relating to the matter were not furnished to him.
- c) It was however clear to Faris that amounts totalling R450 000.00 were deposited into the firm's trust banking account and that the funds should have been available in the firm's trust banking account from the dates of the deposits to the date of repayment, if indeed repaid.

[19] P A PRETORIUS("Pretorius")

- a) An amount of R503 000.00 was allegedly received by the respondent from the Road

Accident Fund in respect of the proceeds of Pretorius's third party claim. Three payments in amount of R75 000.00, R125 000.00 and R57 000.00 respectively were allegedly made to Pretorius.

- b) Faris was not provided with any of the transaction dates. He investigated the trust bank statements for the period February 2008 to March 2009, but could not find a deposit in the firm's trust banking account in an amount of R503 000.00.

- c) Faris could not find any of the abovementioned three payments allegedly made to Pretorius either. He only found one electronic payment in the amount of R125 750.00 on 29 January 2009.

[20] KLGSBRUN DE VRIES & VAN DEVENTER

- a) On 20 July 2009 the Law Society received a letter from Klagsbrun De Vries & Van Deventer (Klagsbrun) of Pretoria.
- b) In an application in the High Court, North Gauteng Division, Rohan Pieter Smit N.O.

obtained an order against the respondent to the effect that she was to pay an amount of R1 473 730.71 to the firm Le Grange Attorneys Incorporated (Le Grange) on or before 14 July 2009. A copy of the order was attached to the letter of complaint.

- c) An amount of R1 034 485.71 was to be paid from the funds by Le Grange to Klagsbrun on 14 July 2009.
- d) The respondent failed to pay any monies to Le Grange and he was therefore unable to make any payment to Klagsbrun.
- e) Due to the probability that the respondent misappropriated trust funds, Klagsbrun reported the matter to the Law Society.

[21] M J GROBBELAAR ("Grobelaar")

- a) A complaint received by the Law Society from Willem Coetzee Incorporated (Coetzee) on behalf of Maria Johanna Grobbelaar (Grobelaar) was received.
- b) Grobbelaar purchased an immovable property located in Potchefstroom from A P Bester during May 2007.
- c) The respondent was instructed to handle the registration of the transfer.

- d) The transfer was, according to the respondent, registered in the Deeds Office on 19 March 2008.
- e) Coetzee addressed letters to the respondent and requested her to furnish proof of the registration of the transfer. The respondent failed to reply to Coetzee's letters and to comply with Coetzee's request.
- f) The amount of R800 000.00, being the purchase price of the property, was paid by Grobbelaar to the respondent.
- g) Grobbelaar was unable to find any indication that the property had indeed been registered in her name. Deeds office searches reflected that the property had not been transferred and registered in Grobbelaar's name.
- h) Due to the fact that the property was not registered in Grobbelaar's name, as alleged by the respondent and due to the fact that the respondent received the purchase price in respect of the property in her trust banking account, the matter was referred to the Law Society.
- i) The Law Society referred the particulars of the complaint to the respondent on 25 November 2008 and requested her to reply thereto.

- j) The respondent failed to reply to the Law Society's letter.
- k) The Law Society addressed a second letter to the respondent on 27 January 2009, again requesting her to furnish the Law Society with her comments on the complaint.
- l) The respondent did not reply to the abovementioned letter either.
- m) The Law Society eventually decided to proceed with disciplinary steps against the respondent and notified her to appear before a disciplinary committee of the Council on 19 May 2009 in order to answer to charges relating to her contravention of the provisions of Rule 89.23, 89.25 and 89.30 of the Law Society's Rules.
- n) The abovementioned notice was delivered to the respondent by courier on 29 April 2009.
- o) One day before the proceedings of the disciplinary committee the respondent addressed a letter to the Law Society and requested a postponement of the proceedings due to ill health. According to a medical certificate, attached to the respondent's letter, she suffered from severe nausea.
- p) The proceedings were therefore postponed indefinitely.

[22] COMPLAINT: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

- a) The Law Society received a written complaint from the Master of the High Court: Bloemfontein on 24 June 2009.
- b) The Master appointed attorney Reinard Heinrich Van Onselen (Van Onselen) as the curator bonis for N L Wales on 16 November 2004.
- c) Van Onselen passed away on 25 November 2007.
- d) The respondent advised the Master on 28 July 2008 that she had taken over Van Onselen's practice.
- e) The 29th administration account in Wales's estate had been finalised and remained outstanding.
- f) Since July 2008 the Master has directed written and telephonic inquiries at the respondent. He received several undertakings to the effect that the respondent would answer his calls, but he did not hear anything from the respondent.

- g) Due to the respondent's failure the Master was uncertain as to the financial situation and the state of the administration of Wales's estate.
- h) The Law Society referred the particulars of the complaint to the respondent on 9 July 2009 and requested her to comment thereon.
- i) The Respondent ignored the Law Society's letter.

[23] Faris's investigation of the firm's bank statements reflected that there could be other instances of bridging finance arrangements and/or investment agreements. He traced receipts in amounts of R330 000.00 and R130 000.00 respectively on 13 November 2008 by or on behalf of one S.P. Barnard. The only payments Faris could find which related to this inflow were two payments of R15 000.00 each on the 13th February 2009 and the 14th February 2009 respectively.

[24] The investigations by Faris proved the existence of several trust shortages on several dates. Annexure J , which was prepared by Faris, reflected that during the period July 2008 up until February 2009 there were substantial trust deficits in the firm's accounting records at each month end. With the exception of November 2008 the trust deficit exceeded an amount of R1 million on each occasion.

[25] Faris confronted the respondent with the trust deficits. She merely denied the existence

thereof and failed to provide Faris with any information in order to support or substantiate her denial.

[26] Faris also prepared a schedule of the firm's trust positions as reflected in the information contained in the firm's accounting records for the period March 2008 to February 2009. A copy

thereof was attached to Faris's report as annexure K on page 161 of the Law Society's record. Annexure K also revealed substantial trust deficits.

[27] It is clear that :

- a) the accounting records presented by the respondent to Faris for the purposes of his investigation were incomplete and in some respects unreliable;
- b) the respondent failed to administer her trust banking account properly;
- c) the fact that the respondent issued a business cheque in the Vermeulen matter and Faris' conclusion that the investment agreements referred to above related to business transactions, evidenced that the firm's trust banking account lost its identity.

[28] The Law Society found that the respondent contravened at least the following provisions of the Act and the Rules:

- a) section 78(1) of the Act due to the fact that the respondent failed to keep sufficient funds in her trust banking account and investment accounts in order to cover the firm's obligations to trust creditors;
- b) section 78(6)(d) of the Act due to the fact that the respondent failed to keep proper accounting records;
- c) Rule 68.1 of the Rules due to the fact that the respondent failed to keep proper accounting records in respect of both trust and business transactions;
- d) Rule 69.3.1 of the Rules due to the fact that the respondent failed to keep sufficient funds in her trust banking account and investment accounts in order to cover the firm's obligations to trust creditors;
- e) Rules 68.7 and 68.8 of the Rules due to the fact that the respondent failed to account to clients in respect of trust funds and due to the fact that she delayed the payment of trust funds.
- f) and, according to Faris, the possibility of further contraventions of the Act and the Law Society's Rules could not be excluded and it was a fact that the the Attorneys Fidelity Fund was at a severe risk.

[29] It was submitted on behalf of the Law Society that the facts and allegations detailed in the founding papers constituted sufficient and satisfactory evidence that the respondent has been,

and is, guilty of unprofessional, dishonourable and unworthy conduct and, as such, was not a fit and proper person to remain on the roll of attorneys.

[30] The Council of the Law Society carefully and diligently considered all the facts available to it concerning the respondent as set out in the founding papers and concluded that whether each complaint was considered alone or all the complaints were considered cumulatively, the respondent had made herself guilty of unprofessional, dishonourable or unworthy conduct and was no longer a fit and proper person to continue to practise as an attorney or as an officer of the court and the respondent's conduct revealed character defects which could not be tolerated in a practitioner or officer of the court and did not meet the standard of behaviour and conduct and reputation which is required of an attorney and of an officer of the Honourable Court. By virtue of her conduct and behaviour the respondent had damaged and affected the good standing and reputation of the profession as a whole and consequently resolved that an application should be launched to have her name removed from the roll of attorneys. This court is in agreement with the views of the Council of the Law Society and such an order will be granted.

[31] It was also submitted on behalf of the Law Society that the respondent should pay the costs of this application on the usual attorney and client scale. The Law Society is the professional body to which all practitioners belong. On joining the Law Society practitioners undertake to

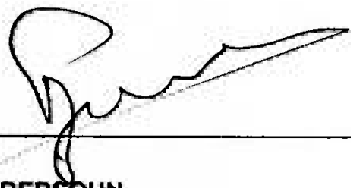
abide by the provisions of the Attorneys Act and the provisions of the Rules. The Law Society is required to monitor the acts of its members. It is vested with the power to launch an application to strike the name of a member from the roll of attorneys or to suspend a member from practise should it find that such member has acted in a dishonourable, unworthy or unprofessional manner.

[32] In these circumstances the Law Society should not be burdened with legal costs when launching an application to discipline a member, and that an attorney who has made herself guilty of dishonourable, unworthy or unprofessional conduct should pay all the Law Society's legal costs so that the Law Society did not find itself out of pocket. Furthermore, the nature of the complaints against the respondent, her unco-operative attitude and her failure to assist Faris in his task in examining her accounting records warrant an order of costs on this basis too.

[33] The following order is accordingly made:

1. The name of Louisa Andri Bester be struck off the roll of attorneys of this Honourable Court;
2. The relief set out in section A of the notice of motion paragraphs 1.3 up to including 1.11, and which was granted in the past by this court, will remain in force;
3. The respondent is hereby directed:
 - 3.1 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;
 - 3.2 to pay the reasonable fees and expenses of the curator;

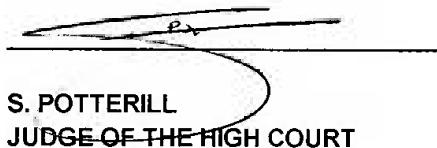
- 3.3 to pay the reasonable fees and expenses of any person(s) consulted and engaged by the curator as aforesaid;
- 3.4 to pay the costs of this application on an attorney-and-client scale;



P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

I AGREE:



S. POTTERILL
JUDGE OF THE HIGH COURT

Counsel of the applicant

Applicant's attorneys

Me Asmal

Rooth & Wessels