REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 76614/2015

2/2/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

02/02/2017
SIGNATURE DATE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES Applicant

versus

CARLINE SUSANNE OSBORNE (VAN WYK) 1st Respondent

MICHAEL SELAELO MATHEKGANA 2nd Respondent

JUDGMENT

MPHAHLELE J

[1] This is an application by the Law Society of the Northern Provinces to have the names of the first and second respondents struck off the roll of attorneys. The first and second respondents were admitted as attorneys of this court on 12 March 2007 and 27 January 2004 respectively and practised for their own account under the style Osborne attorneys. They practised at Pretoria North and Modimolle respectively.

[2] The transgressions and offences committed by the first and second respondents are fully set out and summarized in paragraph 9 of the founding affidavit, read with paragraph 21 thereof. It is alleged that the first and second respondents failed to submit their Rule 70 auditor's reports for the 2013 and 2014 years to the Law Society timeously; practised as attorneys without being in possession of fidelity fund certificates during 2013, 2014 and 2015; shared their offices and also shared fees to which they were entitled with their client, a non-attorney to whom they relinquished control over their firm and their trust banking account. They further failed to account to clients in respect of services rendered to them and to keep proper accounting records in respect of their practice.

[3] It is alleged that the first respondent further failed to attend and satisfactorily complete a practice management course as prescribed by the Attorneys' Act; Failed to provide the Law Society with proof that she had complied with the Financial Intelligence Center Act; failed to pay her annual membership fees for the 2014 and 2015 years to the Law Society; failed to cooperate with the Law Society in a proposed inspection of her accounting records and practice affairs; paid her practice expenses from her trust banking account and made irregular withdrawals from her trust account in rounded amounts. The second respondent also failed to pay his annual membership fees for the 2014 year to the Law Society.

[4] This application was preceded by a disciplinary enquiry into the misconduct of the first and second respondents. The first and second respondents appeared before a disciplinary committee of the Council of the Law Society on 27 May 2015.

[5] During the proceedings before the disciplinary committee, the first and second respondents pleaded guilty to all chargers (excluding two charges relating to a failure to reply to correspondence and a failure to pay a fine imposed by the Law Society, to which the second responded pleaded not guilty).

[6] The first and second respondents' Rule 70 auditor's reports for the 2013 and 2014 years had to be submitted to the Law Society on or before 31 August 2013 and 31 August 2014 respectively, which they failed to submit timeously. They appeared before a disciplinary committee of the Council of the Law Society on 13 November 2013 on a charge relating to their failure to submit their Rule 70 auditor's report for the 2013 year. They pleaded guilty to this charge and a fine of R3000.00 was imposed by the Law Society, payable within 30 days.

[7] The Rule 70 auditor's reports filed by the first and second respondents, when compared with the trust bank statement previously submitted to the Law Society by the first respondent revealed that an amount of R255 495.95 was held in the trust banking account of the firm on 31 August 2012 whilst the Rule 70 auditor's report however reflected that the firm had no trust creditors on 31 August 2012. The first respondent made several payments in rounded amounts from her trust banking account to herself, Botes and Leshole, the main client of the practice. The first respondent paid practice expenses directly from her trust banking account and Botes and Leshole channelled monies through the firm's trust banking account.

[8] Both the first and second respondents pleaded guilty to a contravention of the provision of Rule 70 in relation to the outstanding auditor's report for the year 2014 during the Law Society's disciplinary enquiry held on 27 May 2015.

[9] The purpose of the Rule 70 auditor's report is to satisfy the Council of the Law Society that a practitioner has complied with the Rules relating to proper accounting, especially in respect of trust funds held by a practitioner on behalf of his clients.

[10] The first and second respondents were not issued with fidelity fund certificates for the 2013, 2014 and 2015 years. Both the first and second respondents however continued practising from 1 January 2013 to 2015 without such certificates. The first respondent only submitted her application forms for fidelity funds certificates for the 2013, 2014 and 2015 years to the Law Society on 27 May 2015, the day of the disciplinary enquiry.

[11] Both the first and second respondents pleaded guilty to a contravention of the provisions of Section 41(1) and 41(2) of the Attorneys' Act during the Law Society's disciplinary enquiry held on 27 May 2015. Section 41(1) of the Attorneys' Act provides that a practitioner must be in possession of a fidelity funds certificates in order to act as a practitioner for his own account or in partnership.

[12] By contravening the provisions of Rule 70 and the peremptory requirements of Section 41(1) of the Attorneys Act, the first and second respondents made themselves guilty of unprofessional, dishonourable or unworthy conduct in terms of the provisions of Rule 89.11.

[13] All practising attorneys are accountable institutions in terms of Section 1, read with schedule 1, of FICA. Section 43B of FICA requires registration by every accountable institution with the Financial Intelligence Centre. The Law Society is the supervisory body tasked

with supervising and enforcing compliance with the provisions of FICA by practising attorneys. A failure to register in terms of Section 43B of FICA constitutes an offence. Despite numerous enquiries directed at the first respondent from 27 May 2013, the first respondent only on 27 May 2015 during the proceedings of a disciplinary committee satisfied the Law Society that she had in fact duly registered as required by FICA.

[14] The first respondent pleaded guilty to a charge of unprofessional, dishonourable or unworthy conduct relating to her failure to provide the Law Society with proof of her FICA registration during the Law Society's disciplinary enquiry held on 27 May 2015.

[15] The first respondent was required to complete a practice management course to the satisfaction of the Law Society and to submit a certificate of her compliance to the Law Society by 31 December 2012. The first respondent was granted an extension to submit her certificate to the Law Society by 31 December 2013. The first respondent however failed to submit the certificate and the certificate is currently still outstanding.

[16] During the proceedings of the disciplinary enquiry held on 27 May 2015, the first respondent admitted that she had only submitted one of the assignments which she had to complete and conceded that she was not in possession of any proof that she had attended and completed the practice management course. The first respondent also pleaded guilty to a charge of unprofessional, dishonourable or unworthy conduct relating to her failure to complete the prescribed practice management course. The completion of a practice management course is a mandatory requirement for each attorney issued with a fidelity fund certificate subsequent to 14 August 2009.

[17] The first respondent failed to pay her membership fees for the year 2014 and the second respondent failed to pay his membership fees for the 2014 and 2015 years. Both respondents only paid their

arrear membership fees on 29 April 2015, shortly before the scheduled disciplinary proceedings of the Law Society.

[18] The second respondent pleaded guilty to a charge of unprofessional, dishonourable or unworthy conduct relating to his failure to pay his membership fees for the 2014 year at the disciplinary enquiry held on 27 May 2015. In terms of Rule 104, the first and second respondents were obliged to pay their membership fees to the Law Society by 1 September 2014 respectively.

[19] The Law Society instructed a management consultant and forensic investigator to conduct an inspection of the first and second respondents' accounting records and practice affairs due to the first and second respondents' failure to submit their Rule 70 auditor's report for the 2013 year.

[20] The Law Society's investigator made several attempts to arrange an inspection. The first respondent failed to cooperate with the Law Society's investigator. During the disciplinary enquiry held on 27 May 2015, respondent pleaded guilty to a charge of unprofessional, dishonourable or unworthy conduct relating to her failure to cooperate with the Law Society's proposed inspection.

[21] By failing to cooperate with the Law Society in proposed inspection of the first and second respondents' accounting records and practice affairs, the first respondents contravened the provisions of Rule 89.25. The first respondent's contravention amounts to unprofessional, dishonourable or unworthy conduct in terms of Rule 89.11. The first respondent's failure to cooperate with the Law Society further amounts to a contravention of Section 70(1) and 70(2) of the Attorneys' Act.

[22] The fine imposed by the disciplinary committee of the Law Society against the first and second respondents had to be paid within 30 days from 13 November 2013. The first and second respondents

only paid the fine on 29 April 2015. The fine was paid 18 months late by the first and second respondents' client, namely Botes of Leshole.

[23] During the disciplinary enquiry proceedings held on 27 May 2015, the first respondent admitted that she never kept any accounting records in respect of her practice, that she was not involved in her firm's financial affairs and that she administered clients' moneys negligently. The first respondent testified that she was employed by Leshole, a client of the firm, operated by Botes, a non-attorney, and was paid a retainer. Botes appointed the second respondent as her partner in the firm. Leshole was allowed to pay all her accounts, her salary and office expenses; and to handle the administration of her practice. The first respondent was only serving Leshole's clients. The first respondent trusted Botes to attend to her responsibilities during her absence from the office and Botes had complete control over her practice. Botes has access to her trust banking account and operated on it.

[24] The first respondent never notified the Law Society that the second respondent was her partner. The second respondent was in charge of the firm's Modimolle branch office. Despite alleging that she did not utilise a trust banking account and that she never received monies in her trust banking account, the first respondent conceded that payments to Leshole's clients were channelled through her trust banking account. The first respondent testified that she did not have access to her trust banking account, but that Botes of Leshole operated on the account.

[25] The second respondent testified that he was in control of the firm's Modimolle branch office and that the head office and the branch office did not have separate sets of accounting records. He confirmed that he was paid a "retainer" by Leshole and that Leshole made payment to the firm in respect of the firm's salaries. He conceded that he received compensation from Leshole in the form of a salary and that the firm shared offices with Leshole. He indicated that Leshole

was the firm's only client and that he appeared in Court on behalf of Leshole's clients and that the firm was on record for such clients.

[26] The manner in which they conducted their firm as well as the involvement of Botes of Leshole amounts to a contravention of Section 83(6) of the Attorneys' Act, Rule 71, Rule 72 and Rule 89.2.

[27] It is expected of an attorney to scrupulously observe and comply with the provisions of the Attorneys' Act and the Rules promulgated thereunder. It is required of an attorney to carry out their duties with a high degree of skill, care and attention and to act honestly at all times.

[28] The Court and the applicant has a duty to act where an attorney's conduct falls short of what is expected and to curb the erosion of values in the profession. The protection of the public against unscrupulous legal practitioners goes hand in hand with the court's obligation to protect the integrity of the courts and the legal profession. Public confidence in the legal profession and in the courts is undermined when the strict requirements for membership to the profession are diluted. I agree with the applicant that the first and second respondents can no longer be considered fit and proper persons to practise as attorneys of this court.

[29] The respondents displayed lack of appropriate training and supervision to practise as attorneys. From the inception of the practice the respondents displayed total lack of appreciation of the Attorneys Act and the rules of the applicant. This is clearly demonstrated, amongst others, by the first respondent's failure to attend the practice management course offered by the applicant as well as the manner in which Botes of Leshole was involved in the practice.

[30] Under the circumstances the draft order marked X is made an order of court,

S S MPHAHLELE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree,

2/1/17

A J BAM

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, GAUTENG

Case number: 76614/2015

PRETORIA THIS 21ST DAY OF APRIL 2016

BEFORE THE HONOURABLE JUSTICE MPHAHLELE

BEFORE THE HONOURABLE JUSTICE BAM

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES	Applicant
and	
CARLINE SUSANNE OSBORNE (VAN WYK)	1st Respondent
MICHAEL SELAELO MATHEKGANA	2nd Respondent

~~DRAFT~~ ORDER

Having heard counsel for the applicant and respondents and having read the papers filed of record

IT IS ORDERED

1. That **CARLINE SUSANNE OSBORNE (VAN WYK)** (1st respondent) and **MICHAEL SELAELO MATHEKGANA** (2nd respondent) be suspended from practise as attorneys of this Honourable Court, on the following conditions:

1.1 That the suspension of the first and second respondents shall be for an indefinite period and until such time as they have satisfied the Court that they are fit and proper persons to resume practice as attorneys;

1.2 That the first and second respondents satisfactorily attend and complete the full time Practical Legal Training Course offered by Legal Education and Development ("LEAD"), the legal education division of the Law Society of South Africa;

1.3 That the first and second respondents rewrite and pass all four papers of the Attorneys Admission Examinations as prescribed in Section 14(1) of the Attorneys Act, No. 53 of 1979;

1.4 That the first and second respondents satisfactorily attend and complete the Legal Practice Management Course as prescribed in Section 13A of the Attorneys' Act, read with Rule 21.16 of the Rules for the Attorneys' Profession.

2. That first and second respondents immediately surrender and deliver to the registrar of this Honourable Court their certificates of enrolment as attorneys of this Honourable Court.

3. That in the event of the first and second respondents 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 certificates are, be authorised and directed to take possession of the certificates and to hand them to the Registrar of this Honourable Court.

4. That first and second respondents be prohibited from handling or operating on their 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 first and second respondents, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with the first and second respondents' practice as attorneys and including, also, the separate banking accounts opened and kept by first and second respondents 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 sub-sections 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 the first and second respondents' 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 the first and second respondents were 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 first and second respondents in respect of monies held, received and/or invested by first and second respondents 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 first and second respondents were 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 first and second respondents' accounting records the names of all persons on whose account respondents appears to hold or to have received trust monies (hereinafter referred to as trust creditors); to call upon first and second respondents 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 first and second respondents 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 first and second respondents 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 first and second respondents, 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 first and second respondents 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 the first and second respondents, if they are solvent, or, if first and second respondents are insolvent, to the trustee(s) of the first and second respondents' insolvent estate;

5.8 in the event of there being insufficient trust monies in the trust banking account(s) of first and second respondents, 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 first and second respondents' 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 first and second respondents immediately deliver their accounting records, records, files and documents containing particulars and information relating to:

6.1 any monies received, held or paid by first and second respondents for or on account of any person while practising as an attorney;

6.2 any monies invested by first and second respondents 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 the first and second respondents;

6.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by the first and second respondents, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;

6.5 any insolvent estate administered by the first and second respondents as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;

6.6 any trust administered by the first and second respondents as trustees 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 first and second respondents 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 first and second respondents as or on behalf of the liquidator; and

6.9 first and second respondents' 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, first and second respondents shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.

7. That should first and second respondents fail to comply with the provisions of the preceding paragraph of this order on service thereof upon them or after a

return by the person entrusted with the service thereof that he has been unable to effect service thereof on first respondent or second respondent or both (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 the first and second respondents and/or first and respondents' clients and/or fund in respect of money and/or other property entrusted to first and second respondents provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;

8.3 publish this order or an abridged version thereof in any newspaper he considers appropriate; and

8.4 wind-up of the first and second respondents' practice.

9. That first and second respondents be and are hereby removed from office as-

9.1 executor of any estate of which first and second respondents have 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; and

9.7 administrator appointed in terms of Section 74 of the Magistrates Court Act, No 32 of 1944.

10. That first and second respondents be and are 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 first and second 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;

10.5 to pay the expenses relating to the publication of this order or an abbreviated version thereof; and

10.6 to pay the costs of this application jointly and severally on an attorney-and-client scale.

11. That if there are any trust funds available the first and second respondents 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 them (first and second respondent) in respect of their former practice, and should they fail to do so, they shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as they 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.

13. That the first and second respondents pay the costs of this application on an attorney and client scale.

BY ORDER OF COURT
REGISTRAR

ROOTH & WESSELS INC/ A Bloem/es/MAT25646