IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 5501/2016

In the matter between:

THE LAW SOCIETY OF THE FREE STATE Applicant

and

VERNON HILSON NEUMAN Respondent

CORAM: RAMPAI, J *et* LEFENYA, AJ

HEARD ON: 12 OCTOBER 2017

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 19 OCTOBER 2017

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[1] The matter came to court by way of motion proceedings. The main relief sought by the applicant is the removal of the respondent's name from the roll of the practising attorneys of this division. The alternative relief sought is the suspension of the respondent. The

finer details of the ancillary relief sought by the applicant are fully set out in the notice of motion as amended. Initially the application was opposed.

[2] The respondent's attorney withdrew before the answering affidavit was filed. Since then the respondent appeared in this court on previous occasions. The application was postponed on a few occasions at the request of the respondent and at the insistence of the court to enable the applicant to amend and supplement its papers. The respondent neglected to file the answering affidavit despite the opportunities he was afforded. Although he always appeared in person in the past, on the last hearing of this application he did not attend the court proceedings. Therefore, we proceeded to hear the matter on an unopposed basis.

[3] The purpose of this application is to have the name of the respondent permanently removed from the provincial roll of practising attorneys. That is the main relief sought by the applicant. The alternative relief sought is to have the respondent temporarily suspended from practising as an attorney of this court until he has satisfied this court that he is a fit and proper person to resume practising law as an attorney. The applicant also seeks ancillary relief. I deem it unnecessary to burden this judgment with details of the ancillary relief. I shall revert to that part of the relief at the end of this judgment.

[4] The applicant launched this application on the respondent. He signalled his intention to oppose the relief sought by filing the

required notice. The matter was subsequently postponed on the following dates:

- 8 December 2016, 16 February 2017, 11 May 2017
- 15 June 2017 and 31 August 2017

[5] Firstly, the application was brought in an endeavour to promote the execution and furtherance of the objectives of the applicant in terms of section 58 Attorneys Act 53 of 1979. Secondly, the application was also brought in an endeavour to promote the applicant's domestic rules relating to professional misconduct. The relevant facts show that there are two types of complaints levelled against the respondent. The first type is a statutory transgression lodged by the applicant itself. The second type concerns professional transgressions. There are four of such complaints lodged by the members of the public.

[6] I need to give some background to the statutory demeanours complained of. The respondent has not been issued with a fidelity fund certificate. However, he has been practising without such a certificate for a few years. We were given to understand, by counsel for the applicant, that on the previous occasion the respondent indicated to our colleagues that he was on suspension and that since his suspension he has not been practising as an attorney. As far as we are aware this court has not suspended the respondent in the meantime. It may well be that a disciplinary hearing was held and that the respondent was internally suspended. However, we cannot comment any further about the

matter. It was not ventilated in the founding affidavit or the supplementary affidavit filed by the applicant.

[7] The respondent's statutory demeanour revolves around his failure to apply for the fidelity fund certificate. The applicant's deponent made the following averments against the respondent in this regard:

7.1 The respondent submitted an audit report for the accounting year which ended on 28 February 2014 but did not submit the prescribed application form for the requisite fidelity certificate;

7.2 The respondent did not submit the required audit report for the auditing period which ended on 28 February 2015;

7.3 The respondent did not submit the required audit report for the audit year ending 29 February 2016;

7.4 The respondent knew, or ought to have known, that such audit reports had to be submitted to the applicant every year by no later than 31 August, in other words 6 months, after the end of the accounting year concerned;

7.5 The respondent did not ask for any extension of time in order to submit the required audit reports to the applicant or to give the applicant any reason why the required reports were not submitted as and when they became due.

[8] On 26 February 2016 the law council of the applicant resolved that all members with outstanding audit reports should appear before the council on the 17 March 2016 to give reason why the applicant should not proceed with court applications against them on account of their failure to submit the required fidelity certificates. The

resolution in question was brought to the attention of the defaulting members including the respondent.

[9] On 28 March 2016, approximately a month later, the law council of the applicant resolved to grant an extension of time to all defaulting members, including the respondent, to submit their applications for the fidelity certificates. That resolution was brought to the attention of the respondent on 4 March 2016. Notwithstanding that extension of time, the respondent remained in default. The applicant did not receive the required application from him for the issue of the fidelity certificate.

[10] On 6 June 2016 the applicant addressed a letter to the respondent. The respondent was called upon to take all necessary steps within 14 days to ensure that the required fidelity certificate was issued in his favour. Moreover, he was warned that an application would be made to have his name struck off the roll should he fail to act in accordance with the letter. The applicant caused the letter to be served on the respondent by the sheriff. However, the sheriff did not find the respondent and, therefore, could not personally serve the letter on him. Instead the sheriff served the letter on the respondent's spouse. The respondent did not respond to the letter. The 14 day deadline came and went. The respondent did not contact the applicant in any manner whatsoever.

[11] The aforegoing completes my summary as regards the statutory transgression complained of. I also deem it necessary to give some background to the professional misdemeanours complained of. The applicant received four such complaints from four different

members of the public. Each one of them was a client of the respondent at some stage.

[12] The first professional misdemeanour was a complaint which the applicant received from Mr Johannes Hermanus Boonzaaier. The applicant received his complaint on 22 February 2013. He averred that the respondent was appointed as an executor of his late mother's deceased estate. He complained that the respondent kept him in the dark. He did not give him regular progress reports relating to administration of the deceased estate. There was an immovable property involved in the deceased estate. He was aware that the executor had sold the property. However, the respondent did not give him satisfactory explanation of what happened to the property. He turned to the applicant for assistance.

[13] The applicant requested the respondent on various occasions to respond to the first complaint. Notwithstanding those various requests, the respondent neglected to provide any acceptable response or explanation to the applicant.

[14] The second complaint came from Mr Timoleon Augoustides. The respondent received that second complaint on 23 July 2014. He averred that he wanted to register a trust. For that purpose, he approached and instructed the respondent to assist him. However, the respondent failed to do so. He received no progress reports from the respondent. He went to the respondent's office on a number of times to seek an update. Despite his numerous efforts,

he could receive no progress report from the respondent. He then decided to turn to The Law Society for assistance.

[15] The respondent was requested to answer the complaint. However, the applicant received no response from the respondent. Despite various requests by the applicant, the respondent neglected to provide any response or explanation. The applicant's various requests or inquiries were disregarded.

[16] The third complaint came from Mrs Matshipe Rosinah Makosholo. The applicant received a complaint on 13 April 2015. The respondent advertised a house for sale. Mrs Makosholo became interested in the residential property in question. She regarded the respondent as the seller on behalf of the executor. She bought the immovable property from him. She paid to him the sum of R222 782.25. The figure she paid included the purchase price as well as the transfer costs. She bought the property in the year 2011. Pending the registration of the property in her name, she took immediate occupation thereof and paid occupational rent as the respondent demanded from her, notwithstanding the fact that she had already paid the purchase price in full. The respondent took a considerable time to effect the transfer of the property. She made several enquiries about the matter and the delay. She made numerous attempts to contact the respondent because she was not receiving any regular progress reports. She called the respondent on countless occasions but the respondent did not take her calls. She left messages for the respondent to revert to her but he did not. Ultimately, after many years of frustration and delays she approached the applicant for assistance.

[17] The applicant took the matter up with the respondent. The respondent was called upon to respond to the complaint but he did not. He neglected to provide the applicant with any response whatsoever let alone an acceptable explanation, notwithstanding various requests by the applicant.

[18] The fourth complaint came from Mrs CD Vader. The applicant received her complaint on the 5 August 2015. She averred that she instructed the respondent to assist her with the winding up of a trust known as the Bavistock Trust Fund in favour of beneficiary. The essence of the complaint was that the respondent did not keep her informed. She received no regular progress reports from him concerning the matter. She addressed letters to him. She attended his offices. She telephoned him. Notwithstanding all her attempts, the respondent did not attend to her instructions. He neglected the instructions she gave to him. He refused to provide her with documentation in his possession to enable her to appoint another attorney. She too turned to the applicant to alleviate her frustrations.

[19] The applicant took the matter up with the respondent. The respondent was called upon to answer the complaint. He did not. Notwithstanding various request made by the applicant, the respondent simply neglected to provide any response whatsoever let alone any acceptable explanation to the complaints. This completes my summary of the factual background to each of the professional misdemeanours complained of.

[20] **In the first place** I deal with the statutory misconduct relating to the duty of an attorney to obtain an annual fidelity certificate. The applicant is a creature of a statue. It statutory obligations are set out in section 58 Act No 53 of 1979. The section provides as follows:

"The object of a law society shall be:

(a) to maintain and enhance the prestige, status and dignity of the profession;

(b) to regulate the exercise of the profession;

(c) to encourage and promote efficiency in and responsibility in relation to the profession;

(d) to deal with all matters relating to the interests of the profession and to protect those interests;

(e) to uphold the integrity of practitioners;

(f) to uphold and improve the standards of professional conduct and qualifications for practitioners;

(g) to provide for the effective control of the professional conduct of practitioners;

(h) to promote uniform practice and discipline among practitioners;

(i) to encourage the study of the law;

(j) to initiate and promote reforms and improvements in any branch of the law, the administration of justice, the practice of the law and in draft legislation;

(k) to represent generally the views of the profession;

(l) in the interests of the profession in the Republic, to co-operate with such other societies or bodies of persons as it may deem fit."

[21] I now turn to the law and the applicable principles. Section 41(1) provides that a practitioner shall not practise or act as a practitioner unless he is in possession of a fidelity fund certificate. Section 41(2) provides that any practitioner who practices or acts in

contravention of subsection 1 shall not be entitled to any fee or reimbursement in respect of anything done by him while so practising or acting.

[22] Section 83(10) provides that any person who directly or indirectly purports to act as a practitioner on his own account or in partnership without being in possession of a fidelity fund certificate shall be guilty of an offence.

[23] Every attorney knows that a fidelity fund certificate is not there for the asking. An essential requisite for the issue of such a certificate is an audit certificate. Again every attorney knows that an audit certificate can only be issued once an auditor has audited an attorneys trust books of account. It is the basic obligation of an attorney and not his law society to see to it that his trust books of accounts are annually audited. Although appointed by an attorney an auditor is a *de jure* representity of a law society. A law society depends on the unqualified audit certificate in order to issue a fidelity certificate to an attorney. The audit certificate is an assurance by an auditor to the law society that an attorney properly complies with his accounting obligations to his clients. The latter is a promissory note by a law society to the public that an attorney is a man of integrity who can be trusted by the public. I cannot elucidate the importance of the two certificates better than this. It follows therefore that an uncertificated attorney cannot objectively be regarded as a lawyer if integrity who can be trusted to render professional services to the public.

[24] It was held at the turn of the century that an attorney who practices without the requisite fidelity certificate commits a serious criminal offence in a serious breach of an attorney's duty. **Law Society of the Northern Provinces v Mamatho** 2003 (6) SA 467 SCA. The gravity of such a criminal offence was subsequently stressed a decade later in the **Law Society of the Cape of Good Hope v Adams** 2013 ZAWCHC 87. That then is the law as relates to the statutory duty of an attorney to be licensed in order to practice law.

[25] As regards the statutory duty of an attorney to account to clients the law is also clear. The law obliges an attorney to maintain a separate trust account and to deposit therein money held or received in trust by him on account of any person – Section 76, and section 78(1). The law criminalises contravention of the provisions relating to these trust accounts held in terms of section 78(1). The law also provides that a practitioner who contravenes the provisions of the section as regards the investment of trust money would be guilty of unprofessional conduct and liable to be struck off the roll or suspended from practice – section 83(13).

[26] *"Failure to keep proper books of account is 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 contravention"* see **Law Society of Transvaal v Matthews** 1989 (4) SA 389 (TPD) at 395E. It can, therefore, be appreciated that the duty of an attorney to account is not just important. It is more than that. In essence it is fundamental to the honour of being a lawyer. See **Cirota and Another v Law Society of Transvaal**

1979 (1) SA 172 (A) at 193f-g as well as **Law Society of the Northern Provinces v Moima** 2013 ZAGPPHC 213.

[27] Any person who has been admitted and enrolled as an attorney may, on application by the law society, be struck off the roll or suspended from practice by the court in whose jurisdiction he practices if, in the discretion of the court, he is no longer a fit and proper person to continue to practise as an attorney – section 22 (1)(d). The section provides the sanction for delinquent attorneys. The fitness or otherwise of a practising attorney to continue practising as such has been considered in many decisions in the past.

[28] In **Nyembezi v the Law Society Natal** 1981 (2) SA 752 (A) at 756H – 757A the court held per Cillie JA:

> "When a law society applies for an attorney to be struck off the roll, it places before the Court facts which, in its submission, show that the respondent is no longer a fit and proper person to continue in practice as an attorney. The respondent replies with explanations and other facts to show the contrary. The Court, after considering the facts and hearing argument, decides on a balance of probability whether the respondent's alleged offending conduct or acts have been established and, if so, whether they show that, by reason of his character or otherwise, the respondent is or is not a fit and proper person to practise as an attorney. Although that may sometimes necessitate making a value judgment to some extent, the Court's function is, in essence one of making an objective finding of facts, and not the exercise of a discretion."

Therefore, the test as to whether an attorney is a fit and proper person to practise as such is an objective one. It is factual and not discretionary in a narrow sense.

See **<u>Law Society of the Eastern Cape v Qoboshiane</u>** 2013 (ZAECGHC) 35.

[29] The structure of the judicial inquiry into the fitness or otherwise of an attorney to continue holding that office was authoritatively described and ventilated in the year 2000. The applicable section 22(1)(d) contemplates a three-stage inquiry:

"First, the court must first decide whether the alleged offending conduct has been established on a preponderance of probabilities....

The second enquiry is whether, with reference to this conduct, the attorney is a fit and proper person to continue to practice as an attorney. This is expressed as being a discretion but in reality involves a weighing up of the conduct complained of against the conduct expected of an attorney, this being a value judgment.

The third enquiry is whether in all the circumstances the person should be removed from the roll or whether an order suspending him from practice for a specified period will suffice.

This is also a discretionary matter in which relevant factors include the nature of the offending conduct, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession, the likelihood or otherwise of a repetition of the offending conduct, and the need to protect the public. Ultimately it is a question of degree."

<u>Jasat v Natal Law Society</u> 2000 (3) SA 44 (SCA) at [10] per Scott JA.

[30] In **<u>Malan and Another v Law Society Northern Provinces</u>** 2009 (1) SA 216 (SCA) at [7] the court held per Harms ADP:

> "[7] First, in deciding on whichever course to follow the court is not first and foremost imposing a penalty. The main consideration is the protection of the public."

See also **<u>Law Society of the Free State v Molapo</u>** (2013) ZAFSHC 99.

[31] The first leg of the inquiry in terms of section 22(1)(b) concerns the question whether the respondent has indeed committed the transgressions he is accused of. This component of the enquiry is factual in nature.

[32] The second leg of the enquiry in terms of section 22(1)(b) concerns the practising attorney's fitness or otherwise. Here the question is whether the respondent is no longer a fit and proper person to continue to practise as an attorney as the applicant contends.

[33] The third leg of the enquiry in terms of section 22(1)(b) concerns a sanction. Here the question is what an appropriate punishment should be for the proven delinquent attorney. The choices are limited. The respondent is either temporarily suspended from practice or is permanently removed from practice. There is nothing in between. On that note the guiding legal framework ends.

[34] Mrs Sander, council for the applicant, contended that the alleged offending conduct of the respondent in respect of each complaint has been established on preponderance of probabilities; that in view of the proven misconduct, the respondent is no longer a fit and proper person to continue to practise as an attorney and that in these circumstances the only fitting an appropriate punishment is a sanction whereby the respondent's name would be permanently removed from the roll. Therefore, counsel urged us to grant the relief as fully set out in the notice of motion as amended.

[35] **In the first place** I deal with the respondent's failure to apply for and obtain fidelity certificate. This is the very first complaint levelled against him by the applicant. The respondent as an attorney was required by law to apply annually for the issue of a fidelity certificate in terms of section 41(1). The applicant alleged that the respondent was not in possession of the requisite certificates since the year 2014. The allegations levelled against the respondent in this regard were uncontested. That been the case, there is no reason for the averments made by the applicant to be doubted. In the absence of any evidence to the contrary, we are bound to accept those averments as true and correct. Therefore, I find that the respondent has been practising without the requisite fidelity certificate since the year 2014 and that his conduct constitutes contravention of section 41(1).

[36] By practising without a fidelity certificate, the respondent has contravened section 83(10) as well. He has, therefore, committed a criminal offence and liable to be prosecuted. Uncertificated

practice of law as an attorney is a crime of a very serious magnitude. Delinquent attorneys who contravene section 83(10) read with section 41(1) should not be easily led off the hook. They must ideally be prosecuted. Unless they are, a wrong perception will be created out there that law societies do nothing to protect the public against their delinquent members. The applicant has to act swiftly against attorneys who contravene these sections. It is a lamentable state of affairs to note that, in this particular instance, the respondent's default started way back in 2014 but he was only brought to court almost two years later on the 8 December 2016. In my view this was not swift enough.

[37] The failure by an attorney to apply for the annual fidelity certificate is objectively an instant indication that trust funds of the attorney clients might be under threat. A swift action by the law society will ensure that an uncertificated attorney is not given further opportunity to over reach his trust clients. The longer it takes for the law society to act the greater will be the loss of trust and confidence of the public in the lawyering community. In **Jasat, *supra***, the court held, per Cillie JA, that an attorney who practices without the annual fidelity certificate poses a very serious risk to members of the public. I share those sentiments. This disposes of the statutory transgression relating to the fidelity certificate.

[38] **In the second place** I deal with the professional transgressions relating to the duty of an attorney to account. As a result of the respondent's failure to submit the audit reports for the 2014 audit year, the applicant's disciplinary community resolved to bring an application to court to have the respondent's name struck off the

roll in connection with the four separate professional complaints lodged against him. I have earlier given summaries of the alleged misconducts.

[39] The applicant alleged that upon receipt of each one of the four complaints from the respondent's clients, each complaint was taken up with the respondent. He was furnished with copies of each complaint. He was then called upon to answer. He did not answer. He was then requested on several occasions to respond but he did not respond to any such request. The application was served on him. He did not file the answering affidavit. On three or so occasions the matter was postponed at his request. Notwithstanding the postponements, he still did not file the answering affidavit at long last.

[40] Again each of the complaints remains uncontested. The averments of the applicant must, therefore, be accepted as true and correct. In the circumstances, I am satisfied that each transgression has been established on a balance of probabilities. **Jasmat, *supra***.

[41] The failure of an attorney to account to a client is, on its own, a very serious transgression of section 78(1) read with section 83(13). The misconducts committed by the respondent in respect of each of his clients cannot be reconciled with the noble objectives, norms and standards which the applicant strives to cultivate and uphold.

The respondent behaved in a manner which degraded the prestige, the status and the image of the lawyering community. He probably kept no trust accounting books of record, or he probably suppressed some serious irregularities and dishonest dealings in respect of some of his trust accounting books of record. By so doing he tarnished the integrity of the honourable legal profession in general and the dignity of his fellow practitioner in the local community – see sec 58.

[42] "An attorney who cannot properly account to his client poses a very serious threat to public interest. All trust money held by the respondent was at great risk. He closed down his practice while he was under a dark and heavy cloud of suspicion. The manner in which the respondent conducted himself suggested to me that he probably kept no trust accounting records or that there were some serious irregularities in respect of some or all his accounting records." **Molapo, *supra***, at [48].

[43] It seems to me that there was a clear connection between the third complaint and the first complaint. The respondent sold the residential property of the first complainant's late mother to the third complainant. The latter purchased the property for cash. She took immediate beneficial occupation of the property. Notwithstanding that, the respondent still demanded from her occupational rent. As if that was not enough, the respondent dragged his feet for years but never had the property transferred to the third complainant. During those many years, dating back to 2011, the third complainant paid rent to the respondent but the first complainant or the deceased estate received neither the rent nor the purchase price of the property from the respondent. I mention these aspects to illustrate the gravity of the respondent's dishonest conduct.

[44] In the light of the aforegoing, I am also satisfied that the applicant has established each and every one of the demeanours as evidenced by the complaints lodged by the respondent's previous clients. Each of them has been established on a preponderance of probabilities. Therefore, the first question of the inquiry has to be determined in favour of the applicant. See **Jasat, *supra***.

[45] **As regards the second leg of the inquiry**, it is of the utmost importance to bear in mind that the respondent has made himself guilty, not of one, but of two if not four professional misconducts involving dishonesty. I have a suspicion, and it is a very strong suspicion, that the first respondent's misconduct relative to his failure to apply for the issue of a fidelity certificate has an element of dishonesty in it. The evidence indicates that he did not furnish the applicant with the requisite audit certificate since 2015. I do not believe, for one moment, that his failure to do so was in any way innocent.

[46] There is a great likelihood in my view, that the respondent did not cause his trust books of account to be audited as the law requires because he knew all too well that the auditing would have revealed skeletons in the cupboards. If my suspicion is correct, and I have every reason to believe that it is, then the respondent was not only dishonest to his four clients but he was also dishonest to the applicant as well. It is, therefore, important to consider his breach of his duty towards the applicant not differently from his failure or his breach of duty towards his four clients.

[47] The five complaints taken together make out a formidable case of dishonesty against the respondent. An attorney who breaches his statutory duties towards his clients and towards his regulatory body can, in no circumstances, be objectively considered to be still a fit and proper person to practise law as a member of this honourable profession. The respondent's dishonest conduct, particularly towards his trusting clients, disqualifies him from laying any claim to the membership of the noble profession. He acted in a disgraceful, dishonest and unethical manner towards his trusting clients. His deviant conduct offended the noble objectives, norms and standards expected of an attorney. The misconducts he committed show that, by reason of his character or otherwise, he is certainly no longer a fit and a proper person, if he ever was, to practise as an attorney. See **Nyembezi v Natal Law Society** ***supra***.

[48] Consequently the respondent fails the fitness and propriety test. I would, therefore, determine the second question of the inquiry in favour of the applicant. The question raised by the second leg of the inquiry is accordingly answered in the affirmative. I have painstakingly weighed up the respondent's misconduct against the conduct of an ordinary attorney. I found the respondent to be comparatively wanting. Those deplorable acts of dishonesty appeared to be deeply anchored in his character as a person. Shortcomings, inherent in the personhood of an individual take time to be curatively remedied. In this instance, it seems to me that they vitiate any likelihood that the respondent's unfitness and impropriety can, now or in the immediate future, be effectively cured. He has, therefore, imperilled his privilege to serve the

community as an attorney. Therefore, the second question of the inquiry also has to be decided in favour of the applicant. **Jasat v Natal Law Society** ***supra.***

[49] **As regards the third element of the enquiry**, the spotlight concerns an appropriate measure of punishment. To suspend or to remove? That is the question. A material consideration in this regard concerns public interest. The respondent is no longer a fit and proper person to continue practising as an attorney. The four complainants suffered enormous financial prejudice on account of his dishonest conduct. The image of the applicant's honourable profession has been seriously tarnished by his conduct.

[50] On behalf of the applicant, Mrs Sander, submitted to us that suspending the respondent from practice would not be an adequate and appropriate punishment to him for what he did. There was substance in the submission. Anyway, the respondent is no longer practising. That being the state of affairs, it would logically serve no practically useful purpose to suspend him. Consequently suspension would not be an appropriate sanction. In the light of the gravity of at least two acts of dishonesty he has committed, I am of the view, and it is a very firm view, that suspending him from practice for a specific period of time will not be proportionate to the gravity of the transgressions he has committed.

[51] The above conclusion leaves us with no other satisfactory alternative other than to have the respondent's name permanently removed from the roll. The misconduct he has committed reflect

very poorly upon his character. Those unethical acts of misconduct portray him as a lawyer unworthy to remain in the ranks of an honourable profession. Above all these considerations the need to protect the public is the most paramount consideration. **Jasat** ***supra*** and **Molapo** ***supra***.

[52] In **Malan** ***supra***, the court held:

"First in deciding whichever course to follow the prime consideration is the protection of the public." (vide par [7])

The court went further to say:

"Logic also dictates that if a court finds that someone is not a fit and proper person to continue to practice as an attorney, then such person has to be removed from the roll." vide par [8]

Pretty much the same sentiments where expressed in **Molapo** ***supra***. It has to be recognised though, that there are qualitative degrees of unfitness – some benign others malignant. The latter is inherently incurable form of unfitness. That is precisely the situation here. There are virtually no good transformative prospects.

[53] Once the temporary suspension of the delinquent attorney has been ruled out as an inappropriate punishment, there remains effectively only one available sanction to impose. This is particularly so in the case where the conduct of a delinquent attorney was tainted by elements of dishonesty.

"It is seldom, if ever, that a mere suspension from practice for a given period in itself will transform one who is unfit to practise into one who is fit to practise."

Malan, ***supra***, *at [8].*

[54] Having considered all the circumstances of this particular case I could find no reason whatsoever which slightly suggested that the suspension and not the removal of the respondent would be a fitting and appropriate sanction. I share the following views:

"Obviously if the court finds dishonesty, in any facet of the conduct complained of, then, in that event, the circumstances must be exceptional before a court would order a suspension instead of a removal." **Malan, *supra,*** at [10]:

"In the instant matter there was virtually no argument advanced and I could find no evidence to support any conclusion that there were exceptional circumstances which substantially compelled the suspension of the respondent instead of his removal from the roll of attorneys." **Molapo, *supra***, at [54]:

"The protection of the public is always of paramount importance in matters such as this. In my view the public has to be protected against the respondent. The most effective and meaningful way of protecting the public against the danger posed by the respondent as an attorney is to have the respondent's name removed from the roll. Such a sanction would prevent him from endangering public interests." **Molapo, *supra,*** at [56].

[55] Having considered the peculiar circumstances of this particular case and the three stage enquiry, I have come to the following conclusion:

55.1 That each complaint lodged against the respondent has indeed been established on the preponderance of probabilities;

55.2 That the respondent is indeed no longer a fit and proper person to continue practicing as an attorney;

55.3 That the removal of the respondent's name from the roll of practising attorneys is a fitting and appropriate punishment for him for all the five transgressions he has committed.

[56] Accordingly I make the following order:

56.1 The respondent's name is struck off the roll of attorneys;

56.2 The respondent must surrender and deliver to the registrar of this court his certificate of enrolment as an attorney of this court;

56.3 Should the respondent fail to comply with paragraph 2 within fourteen (14) days of this order, the sheriff of the this court for the relevant district, is empowered and directed to take possession of such certificate and to deliver to the said registrar;

56.4 The chief executive officer of the applicant for the time being is appointed as curator bonis to exercise the powers and to discharge the duties described in paragraph 8 hereof;

56.5 The chief executive officer is exempted from to providing security to the master of this court for her appointment as curator bonis for due performance of her obligations in terms this order and the law;

56.6 The respondent is directed to surrender and to deliver to the curator bonis all the records relating to his practice which, for the purpose of this order, shall include but not limited to all accounting records, files, correspondence, documents and the like which are directly or indirectly relevant to or which contain particulars and information relating to;

(a) Any monies received, held or paid by the respondent for or on account of any person;

(b) Any monies invested by the respondent in terms of any provision of Section 78 of the Attorneys Act, No. 53 of 1979 (hereinafter referred to as "the Act");

(c) Any interest on monies so invested in terms of Section 78(2) or 78(2A) of the Act;

(d) Any estate of deceased person administrated by the respondent, whether as executor or on behalf of the executor, in terms of the provisions of the Administration of Estates Act, Act 66 of 1965;

(e) Any estate in which the respondent acted as or on behalf of the Curator to administer the property of a minor child or any other person in terms of Section 72 of the Administration of Estates Act, Act 66 of 1965;

(f) Any insolvent estate administrated by the respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, Act 24 of 1936;

(g) Any trust administrated by the respondent as trustee, of on behalf of the trustee in terms of the Trust Properties Act, Act 57 of 1988;

(h) Any company liquidated in terms of the Companies Act, Act 61 of 1973, administrated by the respondent as liquidator or on behalf of the liquidator;

(i) Any close corporation liquidated in terms of the Close Corporations Act, Act 69 of 1984 administrated by the respondent as liquidator or on behalf of the liquidator; or

(j) The respondent's practice as an attorney of this Court.

56.7 Should the respondent fail immediately to surrender or to deliver the items referred to in paragraph 6 after service of this order upon him, or after a return by the person entrusted with such service that such a person has been unable to effect service of this order upon the respondent, as the case may be, the sheriff of the high court for the district in which such records are, is empowered and directed to take possession and to deliver them to the said curator bonis.

56.8 The said curator bonis shall have the following rights and powers:

(a) to hand over any said records to any person entitled there to, as soon as he has satisfied himself that the fees and disbursements in connection therewith have been paid or satisfactory secured, or that same are no longer required;

(b) to accept a written undertaking y a trust creditor to pay such amount as may be due to the respondent, either on taxation, assessment or by agreement, as satisfactory security for the purpose paragraph 8(a), provided that such written undertaking incorporates a *dimicilium citandi et executandi* of such creditor;

(c) to require that any records, so handed over, be delivered back to him if, in his sole and absolute opinion, he considered them to be relevant to an, (including any possible anticipated or threatened) claim against him as Curator Bonis and/or the respondent and/or the respondent's clients and/or the Attorney Fidelity Fund (hereinafter referred to as "the Fund");

(d) to administer and control all the respondent's trust account which for the purpose of this orders shall include:

i. the accounts relating to any estate, curatorship, trust or company, referred to in paragraph 6 hereof;

ii. any and all banking accounts opened and/or kept by the respondent (or on the respondent's behalf) in terms of any provision contained in the Act or any of the Acts referred to in paragraph 6.

(e) Subject to approval of the Board of Control of the Fund (hereinafter referred to as "the Board"), to sign and endorse cheques and/or withdrawal forms and generally to operate upon the said trust accounts, but only to such extent and for such purposes as may be necessary to bring to completion current transactions in which the Respondent was acting as at the date of this Order;

(f) Subject to the approval of the Board, to recover and receive and, if necessary in the interest of person having lawful claims upon the said trust accounts and/or against the respondent in respect of monies held, received and/or invested by the respondent in terms of Section 78(1) and/or 78(2) of the Act (hereinafter referred to as the "trust monies") to take any legal proceedings which may be necessary for the recovery of money which may be due to such person in respect of incomplete transactions in which the Respondent may have been concerned and which may have been wrongfully and unlawfully paid from the said trust accounts and to receive such monies and to pay the same to the credit of the said trust accounts;

(g) To ascertain from the respondent's records the names of all persons on whose account the respondent appears to hold or to have received trust monies (hereinafter referred to as "trust creditors") and to all upon the respondent to furnish him within thirty (30) days of the date of this order or within such further period as he may agree to in writing with the names and addresses of, and amounts due to, all trust creditors;

(h) 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, to determine whether any such trust creditors has a claim in respect of money in the said accounts and, if so, the amount of such claim;

(i) Subject to the approval of the Board, to admit or reject in whole or in part, the claims of any such trust creditor without prejudice to such trust creditor's right of access to the Civil Courts;

(j) Subject to the approval of the Board, to pay such claims as he may consider lawfully due;

(k) In the event of there being any surplus in the said trust accounts after payment of any such claims, 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 the Act in respect of any interest therein referred to and, secondly without prejudice to the rights of the respondent's creditors, the costs, fees and expenses referred to in paragraph 12 hereof, or such portion thereof as has not already been separately paid by the respondent to the applicant and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance to the fund;

(l) In the event of there being insufficient trust monies in the said accounts to pay in full the claims of trust creditors as reflected in the records of the respondent:

i. Subject to the approval of the Board, to close the said accounts and to pay the credit balances therein to the Fund and require such credit balances therein to be placed to the credit of a special trust suspense account in the name of the respondent in the Fund's books;

ii. To refer the claims of all trust creditors to the Board to be dealt with in terms of the provisions of the Act;

iii. To authorise the Board to credit the credit balances referred to above to its "paid claims account" when the Fund has paid, in terms of Section 26 of the Act, admitted claims of the trust creditors of the respondent in excess of such credit balances, provided that, notwithstanding the aforegoing, the Board in its discretion shall be entitled to transfer to its: paid claims account" the amounts of any claim as and when admitted and paid by it.

(m) Subject to the approval of the Chairman of the Fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any such other person where considered necessary, to assist him in the carrying out of his duties as Curator Bonis.

(n) To render from time to time returns to the Board showing how the said accounts have been dealt with until such time as the Board notifies him that he may regard his duties as Curator Bonis as terminated.

56.9 The respondent is interdicted and prohibited from operating the accounts referred to in paragraph 8(d);

56.10 The respondent is hereby removed from the office as:

(a) Executor of any estate in respect of which he has been appointed in terms of Section 14(v) of the Administration of Estates Act, Act 66 of 1965 or the estate of any other person referred to in Section 72(1); and

(b) Curator or guardian of any minor or other person's property in terms of Section 72(1), read with Sections 54(1)(a)(v) and 85 of the Administration of Estates Act,

Act 66 of 1965, or the estate of any other person referred to in Section 72(1); and

(c) Trustee of any insolvent estate in terms of Section 59 of the Insolvency Act, Act 24 of 1936; and

(d) Liquidator of any company in terms of Sections 379(2) read with Section 379 of the Companies Act, Act 61 of 1973; and

(e) Trustee of any trusts in terms of Section 20(1) of the Trust Property Control Act, Act 57 of 1988; and

(f) Liquidator of any Close Corporation appointed in terms of Section 74 of the Close Corporations Act, Act 69 of 1984.

56.11 The applicant is hereby authorised, should it consider it necessary, to engage the services of accountants of its choice who are registered in terms of the Public Audit Act, Act 25 of 2004 to conduct an examination and audit of the respondent's accounting records and to report to applicant in respect of such an examination and audit insofar as such accountants, and/or applicant, may consider it necessary.

56.12 The respondent be and is hereby directed to pay;

(a) The applicant's costs of the inspections which may have been carried out of the Respondent's records in terms of Section 70(1) and 78() of the Act at the rate of R600.00 per hour;

(b) The costs of the said accountants in respect of any examination audit or report made by them in terms of this order;

(c) The costs of the sheriff, employed in terms of paragraphs 3 and 7 above;

(d) The fees and expenses of the Curator Bonis, such fees to be assessed at the rate of R600.00 per hour (including travelling time) and *prima facie* proof whereof shall be sufficiently constituted by way of certificate purporting to be signed by the Curator Bonis and specifying the expenses and the length of time during which he was engaged in the performance of his duties as curator Bonis;

(e) He fees and expenses of any person consulted and/or engaged by the Curator Bonis in terms of paragraph 8(m) above, at such person's prescribed tariff rate save where such person is an attorney, at the rate as between attorney and client;

(f) The costs of an incidental to this application on an attorney and client scale.

56.13 The respondent is hereby directed to satisfy the curator bonis within one (1) year of the respondent having been requested to do so by the Curator, or within such shorter period as the curator bonis may agree to in writing, by means of submission of taxed bills of costs or otherwise, of the amount of fees and disbursements due to the respondent in respect of the respondent said practice and, should the respondent fail to do so, the respondent shall not be entitled to recover such fees and disbursements from the curator bonis, but without prejudice to any such rights, if any, as the respondent may have against the trust creditors, concerned for payment or the recovery thereof;

56.14 The applicant is hereby directed to cause a copy of this order to be served upon the master of this court;

56.15 The copies of this judgment be served by the applicant through the sheriff on each of the complainants;

56.16 The applicant is further directed to file proof of each service with the registrar via the scribe hereof before the 30 November 2017.

MH RAMPAI, J

I concur

BR LEEENYA, AJ

On behalf of applicant: Adv I Sander

Instructed by: Molefi Thoabala Inc

Bloemfontein

On behalf of respondent: No appearance