



**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: 4776/2015

In the matter between:

THE LAW SOCIETY OF THE FREE STATE

Applicant

And

NTSIKELELO NELSON MAJOLA

Respondent

CORAM:

DAFFUE, J *et* FISCHER, AJ

HEARD ON:

4 AUGUST 2016

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

12 AUGUST 2016

I INTRODUCTION

- [1] This is an application by the Law Society of the Free State (“the Law Society”) for an order removing the respondent’s name from the roll of attorneys, alternatively, that he be suspended from practising as an attorney until he satisfies the court that he is a fit and proper person to resume practice as an attorney, together with the customary ancillary relief.

II THE PARTIES

- [2] As mentioned *supra*, the Law Society is die applicant in this application.
- [3] Respondent is Ntsikelelo Nelson Majola, an attorney and sole practitioner practising in Bloemfontein under the name and style of Majola Attorneys who was admitted as an attorney approximately twenty seven years ago according to the heads of argument drafted by his former counsel, Adv. Potgieter.

III THE COMPLAINTS

- [4] The Law Society’s submission that respondent is not a fit and proper person to practise as attorney is based on respondent’s failure to comply with directives from its duly appointed Disciplinary Committee and/or its Executive Officer pertaining to eight complaints received by the Law Society from respondent’s former clients. These complaints and the history of the protracted

battle between the Disciplinary Committee and applicant's Executive Officer on the one hand and respondent on the other will be dealt with in more detail *infra*.

- [5] Although the Law Society's President for the time being, Mrs D Milton, averred in a replying affidavit that respondent's failure to account to a client timeously and only effecting payment two and a half years after a complaint had been laid, "leads one to the inescapable conclusion that the Respondent did make himself guilty of failing to pay trust funds over to his client (the Complainant) when obliged to do so and of not keeping such monies on trust and dealing therewith in accordance with applicable practise (sic) rules and principles", it cannot be found as a fact that respondent acted dishonestly and/or that he misappropriated trust funds. More will be said in this regard *infra*.

IV THE APPLICABLE LAW

- [6] Section 22(1) of the Attorneys Act, 53 of 1979 stipulates that an attorney may "on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he practices –
- (d) if he or she, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney."
- [7] The application of s 22(1)(d) involves a threefold enquiry (see e.g. Law Society of the Cape of Good Hope v Budricks 2003 (2) SA 11 (SCA) in para [2] and numerous SCA judgments thereafter).

- [8] The first enquiry is aimed at determining whether the applicant has established the offending conduct relied upon on a balance of probabilities. Secondly, it has to be determined whether the attorney, in the light of the misconduct proven, is not a fit and proper person to continue to practise as an attorney. In considering the second requirement the court exercises a discretion which in the words of Scott JA in **Jasat v Natal Law Society** 2000 (3) SA 44 (SCA) at 51E-F:

“... involves in reality a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment.”

See also **Budricks** *supra* at 14A. Finally, and only if it is found that the attorney is not a fit and proper person as mentioned, the court must decide, in the exercise of its discretion, whether the attorney deserves the ultimate penalty of being struck off the roll or whether an order of suspension from practice will suffice.

- [9] Applications for striking off are considered to be *sui generis*. They are not ordinary civil proceedings, but proceedings of a disciplinary nature. See: **Hepple and Others v Law Society of the Northern Provinces** [2014] 3 All SA 408 SCA in para [9]. A Law Society relying on s 22 of the Attorneys Act does so *custos morum* as the guardian of morals of the attorneys' profession. It performs a public duty. See pertaining to s 22's predecessor: **Solomon v The Law Society of Good Hope** 1934 AD 401 at 408 – 409. The Law Society's role can also be seen as that of a

nuntius: it merely places facts relating to alleged unprofessional conduct before the court for consideration by it in order for the court to exercise its discretion as to the appropriateness of a sanction to be imposed in the event of the commission of the transgression being established. See: **Hassim v Incorporated Law Society of Natal** 1977 (2) SA 757 (AD) as 767C –G.

- [10] As a general rule the ultimate sanction of striking off is reserved for attorneys who have acted dishonestly whilst transgressions that don't involve dishonesty are usually visited with the lesser penalty of suspension from practice. If dishonesty is found, the circumstances must be exceptional before a court will order suspension instead of striking off. See: **Law Society, Cape of Good Hope v Peter** [2006] SCA 37 RSA in para [19] in which case exceptional circumstances were found.
- [11] In **Summerley v Law Society, Northern Provinces** 2006 (5) SA 631 (SCA) Brand JA made it clear that the so-called general rule referred to *supra* cannot be regarded as a rule of the Medes and the Persians and continued as follows in para [21]:

“The distinction is not difficult to understand. The attorney's profession is an honourable profession, which demands complete honesty and integrity from its members. In consequence dishonesty is generally regarded as excluding the lesser stricture of suspension from practice, while the same can usually not be said of contraventions of a different kind.

- [12] In Malan and Another v Law Society of the Northern Provinces 2009 (1) SA 216 (SCA) Harms ADP states the following in para [10]:

“Obviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal ... Where dishonesty has not been established the position is as set out above, namely that a court has to exercise a discretion within the parameters of the facts of the case without any preordained limitations.”

- [13] In the light of the kind of proceedings, i.e. they are *sui generis* and of a disciplinary nature as illustrated by the Supreme Court of Appeal in Hepple *supra*, the SCA confirmed the duty resting on an attorney in these kinds of proceedings in the following *dictum* in para [9]:

“It follows therefore that where allegations and evidence are presented against an attorney they cannot be met with mere denials by the attorney concerned. If allegations are made by the law society and underlying documents are provided which form the basis of the allegations, they cannot simply be brushed aside; the attorneys are expected to respond meaningfully to them and to furnish a proper explanation of the financial discrepancies as their failure to do so may count against them.”

See also: Malan *supra* at paras [27] - [28]. Let it be clear – *in casu*, there is no clear proof of financial discrepancies, but the *dictum* appears to be applicable to all other allegations of misconduct.

[14] Attorneys confronted with applications for striking-off must be cautious of not trying to blame the Law Society without any foundation. The following remarks by Harms ADP in **Malan** *supra* at paras [27] – [28] are apposite:

“Furthermore, instead of dealing with the merits of the allegations, the appellants conducted a paper war and they attacked the Society and its officers, they attacked the Fidelity Fund and they attacked the attorneys who had to take over their files – in short, their approach on the papers was obstructionist... These factors are ‘aggravating’ and not extenuating because they manifest character defects, a lack of integrity, a lack of judgment and a lack of insight.”

[15] Harms ADP went further and observed in **Law Society of the Northern Provinces v Mogami** 2010 (1) SA 186 (SCA) at para [26] that it had become a common occurrence for persons accused of wrongdoing to accuse the accuser and seek to break down the institution involved instead of properly confronting the allegations. He emphasised that courts cannot countenance such a strategy. I shall deal with the observation of the learned judge again when I consider the evidence *infra*.

[16] In **Law Society of the Northern Provinces v Mabando** [2011] 4 All SA 238 (SCA) the Law Society’s appeal against an order of the High Court succeeded and the practitioner was struck from the roll of attorneys. In para [54] the court considered the approach of the practitioner and I merely quote the following:

“In October 2000, the First Respondent scandalously and in stereotypically errant debtor style dispatched a letter to Mr van Zyl allegedly enclosing a cheque that in fact was not attached. In the case of Mr van Zyl, the amount due was paid approximately five years after the complaint was laid and then was paid in two instalments some nine months after the Appellant had ordered him to so, following on the disciplinary enquiry. In the ordinary course, the amounts collected and due to the instructing attorney or client would have had to be retained in a trust account. Considering the common cause facts the inference is inescapable that the amounts were not so retained — a grave and usually fatal error on the part of any attorney. “

The reader may recognise the words in the last sentence of the *dictum* as this was the conclusion arrived at by Mrs Milton in the replying affidavit of applicant referred to *supra*. In para [55] of **Mabando** *supra* the court continued as follows:

“To this day, the First Respondent continues to demonstrate a remarkable lack of insight concerning the professional and ethical standards expected of an attorney. Lastly, even at the time of the hearing, the First Respondent showed a remarkable lack of contrition and unaccountability.”

[17] Section 78 of the Attorneys Act provides as follows:

“s 78 Trust accounts

(1) Any practising practitioner shall open and keep a separate trust banking account at a banking institution in the Republic and shall

deposit therein the money held or received by him or her on account of any person.

(2)...

(3) ...

(4) Any practising practitioner shall keep proper accounting records containing particulars and information of any money received, held or paid by him or her for or on account of any person, ...”

[18] It is true, as submitted by respondent’s counsel in his heads of argument, that the Law Society could have utilised its rights in terms of s 78(5) of the Attorneys Act and in doing so could have inspected the accounting records of the respondent in order to satisfy itself that he observed the requirements of ss 78(1), (2), (2A), (3) and (4). I shall consider this when evaluating the evidence *infra*.

[19] In **Botha v Law Society, Northern Provinces** 2009 (1) SA 227 (SCA) Cloete JA in paragraph [10] and further considered the uncalled for criticism of the practitioner and his lack of co-operation with the Law Society, but eventually found that striking-off as ordered by the High Court was inappropriate. The practitioner was suspended from practice for one year which suspension was suspended on certain conditions.

V THE BACKGROUND FACTS

- [20] Since January 2010, that is six and a half years ago, the Law Society has received a total of eight complaints from clients / former clients of respondent. These complaints were referred to the Law Society's Disciplinary Committee for investigation in terms of rule 19 of its rules.
- [21] The respondent was in each instance called upon to respond in accordance with the aforesaid rule.
- [22] According to the Law Society respondent displayed a lack of co-operation and consequently the complaints could not be finalised. Respondent, contrary to the Law Society's viewpoint, accuses the Law Society of "over-exaggeration". According to him its Disciplinary Committee cannot argue that complaints could not be finalised as they were in possession of his explanatory affidavits, although he admitted that in several instances the documents relied upon in such affidavits were not attached thereto. Notwithstanding this he blames the Disciplinary Committee for not finalising matters.
- [23] Contrary to respondent's several undertakings to the Disciplinary Committee to present his accounting records and trust ledgers in respect of some of the complaints, he failed to do so, and bearing in mind that he could still present these documents to the court to bolster his defence, he failed to act accordingly.

VI RESPONDENT'S DISREGARD OF THE UNIFORM RULES OF COURT

[24] Before dealing with the relevant facts, I wish to mention that respondent is guilty of deplorable conduct in the High Court proceedings. The following is clear from the court file:

1. The application was served upon him on 26 October 2015 and a notice of opposition was filed on 4 November 2015;
2. Notwithstanding the fact that the answering affidavit was due within 15 days from 4 November, to wit 25 November 2015, he failed to file same timeously. In fact an extraordinary period of three and a half months lapsed before he eventually filed his affidavit on 14 March 2016.
3. The Law Society's attorneys enrolled the matter for hearing on 10 December 2015 as they were entitled to do, but removed it at the request of respondent and simultaneously set down the matter by agreement for hearing on 28 January 2016.
4. By 28 January 2016 there was still no co-operation from respondent and at his request the matter was again removed from the roll and set down for hearing on 18 February 2016.
5. Hereafter respondent filed a formal application for postponement of the matter wherein he set out the reasons for the delay. He confirmed in paragraph 4.4 of his founding affidavit that during consultation with Pretoria counsel in November 2015 he was informed that "it was necessary that I obtain documentary proof of certain transactions wherein it was

contended by the Applicant that I failed to make payments”. Clearly he was already advised at that stage that he had to obtain the documentary proof that the Disciplinary Committee requested and which he promised to provide over a period of two years. In paragraph 4.9 of his affidavit respondent remarked as follows: “I vouch that I shall be in a position to finalise my opposing papers by 24 February 2016 at the latest.”

6. On 18 February 2016 Ebrahim J postponed the main application to 31 March 2016, ordering respondent to deliver his answering affidavit on or before 24 February 2016 and to pay the costs occasioned by the postponement.
7. On 31 March 2016 the matter was postponed by agreement to 28 April 2016, respondent to pay the wasted costs. Contrary to the court order of 18 February 2016 which was made an order of court by agreement, the answering affidavit was filed hopelessly out of time.
8. On 28 April 2016 the matter was postponed to 2 June 2016, costs to stand over.
9. On 2 June 2016 the application was again postponed, this time to 28 July 2016, respondent to pay the wasted costs.
10. On 28 July 2016 the matter was postponed to 4 August 2016 for the reasons indicated *infra*.

[25] As a consequence of the delaying tactics adopted by respondent in line with the strategy followed during the disciplinary proceedings, a matter that could have been finalised in December 2015 will now only be finalised some eight months later.

[26] Respondent, acknowledging the late filing of his answering affidavit and his breach of the court order of 18 February 2016, indicated in paragraph 3 of his answering affidavit that a substantive condonation application would be brought immediately. This has not been done and during oral argument respondent could not proffer any reason for his failure. One wonders how an attorney can act in the interest of his clients if he shows such a lack of respect for the rules of court and court orders.

[27] Heads of argument were drawn on behalf of respondent by Pretoria counsel, Mr H J Potgieter. Mr Potgieter did not attend the proceedings on 28 July 2016 and the court was informed that the parties had agreed that the matter be postponed for a week, the reason being that counsel was not medically fit. On 4 August 2016 respondent appeared in person and informed us that he had disposed of the services of Mr Potgieter and that he was prepared to argue the matter on his own behalf.

VII EVALUATION OF THE EVIDENCE, THE SUBMISSIONS BY THE PARTIES AND APPLICATION OF THE AUTHORITIES

Was the offending conduct relied upon by applicant established?

[28] Since January 2010 the Law Society received eight complaints from clients/former clients of respondent which complaints were referred to the Disciplinary Committee for investigation.

Respondent indicated that two of these complaints were laid by relatives of clients but nothing turns around this.

- [29] The majority of the complaints relate to the failure by respondent to execute his mandate and/or failure to keep clients informed of progress. In at least two instances, the matters of Me Mmabatho Maria Sesotlo and Me Zenziwe Mariam Zumane, the complaints relate to the receipt of trust money received from the Road Accident Fund (“the RAF”) on behalf of the clients and the failure thereafter to properly and timeously account to the clients.
- [30] It is the respondent’s submission that it was unnecessary to present any trust ledgers and/or accounting records in respect of these two clients as he had already been found guilty by the Disciplinary Committee and therefore he regarded the matter as finalised and closed.
- [31] Notwithstanding the principles applicable to opposed applications as set out in **Plascon-Evans** I am satisfied that the version of respondent cannot be accepted and should be rejected insofar as it is far-fetched, untenable and in conflict with objective and documentary evidence. In any event even if the Disciplinary Committee convicted respondent in respect of any complaints on the merits of such complaints, it was still open to the Law Society to refer the matter to this court for consideration as to whether a sanction of striking-off or suspension from practice was appropriate or not.

- [32] It is clear from the minutes, annexure “M5” to the founding affidavit, read with paragraphs 6.6 and 6.8 of the founding affidavit, as well as the summary of complaints, annexure “M3” to the founding affidavit, that respondent was convicted in respect of the complaint laid by Me Sesotlo for failure to respond to the letters of the Executive Officer, and unprofessional conduct in that respondent failed to execute his mandate timeously. It is apparent that the Disciplinary Committee needed additional information from respondent which included the accounting records and trust ledger pertaining to the particular client in order for it to consider the merits of the complaint.
- [33] On 3 December 2014 respondent failed to appear before the Disciplinary Committee in respect of all the outstanding complaints whereupon he was again found guilty of unprofessional conduct because of his non-appearance. Sentence was held over. After the meeting the Law Society received a medical certificate to the effect that respondent was medically indisposed and could not attend that meeting.
- [34] Respondent did not deny the correctness of the summary of complaints prepared by applicant attached as annexure “M3” to the founding affidavit and the information contained therein should therefore be regarded as common cause. His version in paragraph 2 of the answering affidavit that his failure to deal with or traverse any specific averment contained in the founding affidavit should not be construed as admissions of the correctness or accuracy of such averments doesn’t really take the

matter any further. He was called upon to deal with this detailed summary, but failed to do so. In fact when he was called upon to respond to the Law Society's version pertaining to the two complainants, Me Sesotlo and Me Zumane as set out in paragraphs 6.8.1 and 6.8.2 of the founding affidavit, he failed to deal with the specific averments, but indicated that "(A) fine was imposed and strangely I was instructed to furnish certain additional documents to the DC." According to him the procedure adopted by the Disciplinary Committee was prejudicial to him and he concluded as follows in paragraph 9.3:

"I respectfully submit that the act of proceeding with the same matter post-sanctions is not permitted by the enabling legal instrument. Imposition of a sanction brought the consideration of the complaint to an end unless the DC had formulated its decision to include a condition attached to the penalty."

Respondent on his own version did not pay the fine of R2 000,00 issued in respect of the Sesotlo matter (for non-appearance, non-compliance with the complaint and not executing his mandate timeously) and made the following inappropriate and arrogant remark in paragraph 9.2: "I cannot fathom the reasons that failure to pay a fine should be held to be a transgression on its own when there are enforcement machineries available to the Applicant." The fine was imposed three years ago and respondent not only failed to make payment but now blames the Law Society for not utilizing its powers to collect the money!

[35] Respondent's version that the two complaints were finally disposed of and that the matters could not be re-opened is clearly an afterthought. In his application for postponement of the application to be heard on 18 February 2016 he indicated that counsel advised him to obtain the records and documents required by applicant. Respondent himself was fully aware of the requirement and was prepared to adhere thereto. On 5 December 2012 the Disciplinary Committee considered the Zumane complaint. He was informed accordingly in a letter dated 12 December 2012 received by his office on 13 December 2012. He had to comply on or before 11 January 2013. He did not respond and he also did not respond at all to further letters addressed to him dated 18 January 2013 and 8 March 2013 which letters were also received by his office. Respondent was notified to appear before the Disciplinary Committee on 19 March 2013 when he confirmed that the letters were received "in the file" but that he was not aware thereof. However he indicated that he would respond by 14 June 2013 whereupon the disciplinary hearing was postponed to 26 June 2013.

[36] On 26 June 2013 respondent did not appear, but the Disciplinary Committee received a letter from him indicating that he had paid an amount of R27 000,00 to the client (Me Zumane) and, together with a first payment of R10 000,00 made earlier, the client had now received the full capital amount of R37 000,00 received from the RAF. The Law Society was not satisfied with this and respondent was called upon to appear before the Disciplinary Committee on 31 July 2013 on which date he was again

instructed to produce the accounting records and trust ledgers within 14 days, but he failed to do so.

- [37] On 29 January 2014 the Disciplinary Committee discussed the matter again whereupon it was decided to notify respondent that he should appear before it on 25 February 2014 to give compelling reasons why that committee should not make a recommendation to the Law Society's Council for his suspension or removal from the roll. During all these months respondent failed to comply with the directives of the Disciplinary Committee.
- [38] Eventually a summons was issued and served upon respondent directing him to appear before a newly appointed Disciplinary Committee on 2 July 2014. The committee instructed respondent to submit his ledger cards on or before 16 July 2014. Respondent was warned to appear again before it on 6 August 2014.
- [39] On 6 August 2014 the respondent appeared and informed the Disciplinary Committee that he had handed the required documentation to his messenger for delivery to the Law Society, but the messenger had lost the bag with documents in a taxi. A final opportunity was given to respondent to file the required documents by not later than 8 August 2014 and respondent was called upon to appear before the Disciplinary Committee on 3 September 2014. He failed to comply and also failed to attend the meeting, but a medical certificate was delivered.

- [40] Notwithstanding several further demands, respondent failed to provide accounting records and/or trust ledgers in respect of at least the two clients, Me Sesotlo and Me Zumane and eventually the Disciplinary Committee recommended to the Law Society's Council that an application for striking-off be brought.
- [41] In conclusion the following facts are not denied by respondent. Me Sesotlo phoned the RAF who informed her that they had paid an amount of R20 000,00 to her attorney, but respondent indicated that he only received R18 000,00. The complainant received R10 000,00 only and was told by respondent that he was still awaiting other money. Respondent alleged that he deducted his fees from the amount received from the RAF and that once his legal fees have been taxed and paid by the RAF, complainant will be paid what was due to her. However it appears as if no steps were taken to recover costs that were taxed on 24 April 2007 and this led to the complaint being laid in January 2010. In the matter of Zumane the respondent informed his client that he had not received any money from the RAF, but when she contacted the RAF she was provided with proof of payment in the amount of R37 000,00 made to respondent as long ago as 19 September 2007. R10 000,00 was paid to the client at a stage and an amount of R27 000,00 paid only in June 2013, two and a half years after the complainant had laid a complaint with the Law Society.
- [42] Respondent argued that his constitutional rights had been infringed. He relied upon several procedural issues, e.g. the two

matters referred to above had been re-opened as submitted by him after he had been convicted and sentenced whilst the Disciplinary Committee could not act accordingly. Also, this court as an extension of the disciplinary process could not consider the failure to provide accounting records and/or trust ledgers *in casu*. Furthermore the Disciplinary Committee, well-knowing that respondent did not attend its meeting of 3 December 2014 due to illness, never informed him of its intention to refer the matter to the Law Society's Council with a recommendation that it should proceed with a striking-off application against him. In failing to do so, his right to argue the matter before the Disciplinary Committee or the Law Society's Council in order to persuade them not to proceed with court action was unfairly disregarded.

- [43] Another procedural defect according to respondent is the failure by the Disciplinary Committee to deal with the complaints on receipt of his affidavits. According to him it was not required of the committee to prolong the matters by postponing hearings on several occasions. According to him the annexures referred to in his affidavits, and which were not attached thereto, were of a peripheral nature and the Disciplinary Committee was not required to insist on the presentation of these documents. It is apparent that the Disciplinary Committee acted carefully and probably allowed too much leniency to respondent. In doing so its members wasted their own valuable time. However if they had acted more strictly and adopted a robust approach, respondent would probably have been the first to criticise them for such an approach if he was convicted of any misconduct. It may also be

argued that the Law Society and/or its Disciplinary Committee could have utilised s 78(5) of the Attorneys Act in order to obtain the accounting records and trust ledgers of respondent which they opted not to do. The fact of the matter is that they probably believed that it would be more courteous to a colleague to request the documentation from him and to rely on his co-operation, rather than to make use of the provisions of s 78(5). I am not prepared to find as submitted by respondent that the Disciplinary Committee acted unfairly towards him and/or that its members failed to apply their minds to the facts and circumstances of the cases presented to them.

[44] If respondent wanted the court to believe that he was *bona fide* and truthful and that he had nothing to hide, he should have presented this court with his accounting records and trust ledgers pertaining to the various clients. As stated in Hepple *supra*, it is expected of respondent to respond meaningfully to allegations made and to furnish a proper explanation. He could not merely brush aside the requests of the Disciplinary Committee to provide it with accounting records and trust ledgers.

[45] Respondent submitted finally that applicant failed to establish the offending conduct relied upon and therefore did not even succeed in respect of the first enquiry referred to *supra*. I am of the view that applicant has established the offending conduct relied upon on a balance of probabilities and that it was not possible to finalise the disciplinary processes in respect of the eight

complaints received due to respondent's obstructionist approach. Respondent failed to comply with numerous letters over a period of two and a half years. When he eventually filed answering affidavits, he omitted in several instances to attach annexures relied upon and again failed to present these documents when requested. His recalcitrant attitude in not providing the accounting records and trust ledgers in respect of at least the Sesotlo and Zumane complaints is the death knell for any argument that respondent did not commit any misconduct.

Is respondent a fit and proper person to practise as an attorney?

- [46] Respondent submitted that insofar as the Law Society failed to establish any misconduct on a balance of probabilities, the second and third requirements, i.e. whether he is not a fit and proper person to practise as an attorney and the sanction to be imposed, do not come into play at all. Respondent's answering affidavit is replete with accusations against the Disciplinary Committee and the Executive Officer of the Law Society which are really unfair and uncalled for. One example would suffice and I refer to paragraph 15 of the answering affidavit where the following remarks are made: "The contents of this paragraph are denied and it is evidently clear that the disciplinary process was vitiated by a myriad of deficiencies and/or irregularities at various levels. In addition, the Applicant has abysmally failed to make out a substantive case that I was no

longer a fit and proper person to practice (sic) as an attorney. It shall be contended that the plethora of misguided decision (sic) by the Applicant's functionaries is a serious indictment to the disciplinary regime of the Applicant. It begs the question if such an important function of the Applicant was in the hand of fit and proper person (sic) to oversee."

During oral argument respondent persisted with his criticism of the actions of the Disciplinary Committee. It is often said that attack is the best form of defence. Unfortunately such an approach is frowned upon by our courts, particularly in striking-off applications. I refer again to the remarks of Harms ADP in **Malan supra**.

- [47] Respondent failed to comply with directives of the Disciplinary Committee on numerous occasions. According to my calculations twenty letters were sent to him by the Law Society's Executive Officer during the period 2012 - 2014, but notwithstanding the endeavours of the Law Society, its Executive Officer and Disciplinary Committee, the Disciplinary Committee was eventually neither in a position to consider the complaints properly on the merits thereof, nor make any findings.

- [48] Respondent's former counsel attached to his heads of argument an article by Prof Magda Slabbert of the Department of Jurisprudence at the University of South Africa with the title "*The requirement of being a 'fit and proper' person for the legal profession*", published in **Per/Pelj 2011(14)4**. She quoted the following from a report by Mr Govender, the chairperson of the

Ethics Committee of the Law Society of South Africa published in the Law Society of South Africa's Annual Report 2010/11: "Ethics does not in this age, form an essential part of the sword or shield of the majority of legal practices. Ethics is more likely to be slashed by the slick lawyer and trodden upon to get to the loot." Prof Slabbert made the point in her article that the public perceptions about lawyers are also sometimes captured in anti-lawyer humour such as for example "a lawyer is a learned gentleman who rescues your estate from your enemies and keeps it for himself" or "(H)ow do you know when a lawyer is lying? "His lips are moving." She also quoted Prof Pityana, the Principal and Vice Chancellor of the University of South Africa, in his address to mark the 30th anniversary of the Black Lawyers' Association on Friday 9 November 2007, where he mentioned the following: "A lawyer should do more than just occupy a profession. A lawyer should serve the public. To do so effectively lawyers need to be trustworthy men and women of untarnished reputation – thus, "fit and proper" persons."

- [49] Although respondent was admitted twenty seven years ago, it is apparent that since 2007, *i.e.* nine years ago, he has made himself guilty of improper conduct in respect of at least two clients whilst he has kept the Disciplinary Committee on a string for more than two years. If the authorities quoted above are duly considered I am of the view that the accepted evidence shows conclusively that respondent displayed a contemptuous and arrogant attitude towards the Law Society's Executive Officer and his colleagues sitting as the Disciplinary Committee. His lack of co-operation, his evasiveness and his conduct in general are

indicative of a lack of integrity and therefore it cannot be said that he is a fit and proper person to practise as an attorney. Respondent did exactly what Harms ADP warned against in **Mogami** *supra*. A practitioner acting in the manner respondent saw fit *in casu* is in essence guilty of unprofessional conduct. Courts cannot countenance such strategies.

The appropriate sanction: striking-off or suspension from practice?

- [50] As in the case of **Mabando** *supra* respondent paid the capital amount due to one client, Me Zumane, six years after he had received payment from the RAF. The record does not reflect whether respondent received the amount from the RAF in trust and/or whether he kept it in trust until he finally accounted to the client. This is what the Disciplinary Committee wanted to establish, but respondent failed to produce his accounting records and trust ledger. The same applies to the complaint of Me Sesotlo. It was therefore impossible to make any finding as to whether there was any compliance with s 78 of the Attorneys Act. I borrow from the judgment in **Mabando** the following words with which I align myself fully:

“Considering the common cause facts the inference is inescapable that the amounts were not so retained — a grave and usually fatal error on the part of any attorney.”

[51] I am satisfied that the respondent has demonstrated a remarkable lack of insight concerning the professional and ethical standards expected of an attorney. Obstructionism, denials and evasions have no place in matters of this nature and it was expected of respondent to put full facts before the Disciplinary Committee in the first place, but ultimately before the court. See: **Law Society, Northern Provinces v Sonntag** 2012 (1) SA 372 (SCA) at paras [17] – [20] as well as the authorities quoted *supra*. When respondent was asked during oral argument where his accounting records and trust ledgers were at that stage and whether these were still available for inspection, he confirmed that the documents were in possession of his bookkeeper, but he could not even provide the court with the name of the bookkeeper.

[52] In the exercise of my discretion I have to decide whether respondent deserves the ultimate penalty of striking-off or whether a suspension from practice will suffice and in the event of a suspension, whether an order should not be made that the suspension should be for a limited period only.

[53] I have considered the totality of the evidence as well as the authorities quoted, but the following factors play a particular role in the exercise of my discretion:

53.1 Respondent, not a young person anymore, has been practising for 27 years and may find it difficult to get suitable employment if struck from the roll.

- 53.2 The amounts which had to be accounted for are relatively small and although the clients suffered losses due to inflation and a decrease in the value of the rand as a result of late payment, the losses were not severe.
- 53.3 Although I referred to the inescapable inference to be drawn from respondent's failure to present his accounting records and trust ledgers, dishonesty has not been proven.
- 53.4 A total of eight complaints were laid against respondent by eight different clients or former clients (or relatives on behalf of clients) and although the merits of the complaints were not traversed in these proceedings except for the two complaints referred to *supra*, it is apparent from the summary provided by the Law Society that the misconduct complained of was not so serious to warrant a striking-off.
- 53.5 Although respondent stubbornly attacked the Law Society, its Executive Officer and Disciplinary Committee and provided the court with an evasive and argumentative answering affidavit, thereby demonstrating a lack of insight - conduct not expected of an attorney accused of misconduct as indicated in the authorities referred to *supra* - I am of the view that respondent probably believed that attack was the best form of defence. I am of the opinion that he should not be penalised with the ultimate sanction, but in saying that I should not be understood to say that striking-off may not be an appropriate sanction in similar circumstances. The matter *in casu* can be distinguished from the allegations made by the practitioners in the **Malan**

matter *supra*, whilst the facts are more in line with those in **Botha** and **Summerley** *supra*.

53.6 The complaints lodged against respondent date back several years and there is no indication that respondent has committed further misconduct in recent times. There is no suggestion that, save for the eight complaints referred to and his unacceptable lack of co-operation with the Law Society, he has committed any further misconduct. In fact, I have to accept that he has apparently filed his trust audit reports for the past few years punctually and that fidelity fund certificates have been issued to him in terms of s 42 of the Attorneys Act, allowing him to practise for his own account. If this was not so, the Law Society would surely have relied on such failure as well. However unlike the practitioner in **Botha** *supra* who accepted responsibility and eventually made a full disclosure of what happened with certain amounts received on behalf of clients, the same cannot be said of respondent.

[54] I considered suspending respondent from practice instead of striking him from the roll of attorneys. This would mean that he would have to satisfy the court in the future that he is a fit and proper person to resume practising as an attorney. In the light of the above aspects and the evidence in totality together with the authorities, I am of the view that my discretion should be exercised on the basis that respondent should be suspended for

a specific period. I am of the view that respondent will learn from his mistakes and that he will do the necessary introspection which will allow him to become a fit and proper person again to take on the practice of an attorney. In my view a suspension for a period of one year shall suffice to enable respondent to rehabilitate. There is, based on the totality of the evidence, sufficient reason to believe that respondent will not repeat the conduct evident from the record. Having considered the totality of the evidence and in particular the judgment in **Botha** *supra* I do not believe that respondent is entitled to similar relief and therefore a suspension of suspension from practice is not a viable option.

VIII **COURT ORDERS**

[55] Therefore the following orders are made:

1. The respondent Ntsikelelo Nelson Majola is suspended from practising as an attorney for a period of 1(one) year from the date of this order.
2. Respondent shall surrender and deliver to the Registrar of this Court his Certificate of Enrolment as an attorney of this Court.
3. Should Respondent fail to comply with paragraph 2 within FOURTEEN (14) days of this order, the sheriff of the High Court for the relevant district, be empowered and directed to take possession of such certificate(s) and deliver it/them to the said Registrar.

- 4.1 THAT the Chief Executive Officer of the applicant for the time being be appointed as Curator Bonis to exercise the powers and to discharge the duties described in paragraph 7 hereof;
- 4.2 THAT it be ordered that it shall not be necessary for the Chief Executive Officer to provide security as Curator Bonis for the performance of his obligations in terms hereof.
5. THAT the Respondent is directed to surrender and deliver to the Curator Bonis all the Respondent's records relating to his practice which, for the purpose of this order, but without limitation, shall include 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 a 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, or on behalf of the trustee in terms of the Trust Property Control 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.

6. THAT should the Respondent fail immediately to surrender or deliver the items referred to in paragraph 5 after service of

this Order upon the Respondent by the Curator Bonis, 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, be empowered and directed to take possession and deliver them to the said Curator Bonis;

7. THAT the said Curator Bonis shall have the following rights and powers:
 - a) to hand over any said records to any person entitled thereto, as soon as he has satisfied himself that the fees and disbursements in connection therewith have been paid or satisfactorily secured, or that same are no longer required;
 - b) to accept a written undertaking by 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 of paragraph 7(a), provided that such written undertaking incorporates a *domicilium 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 considers them to be relevant to and, (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 accounts which for the purpose of this Order shall include:
 - i.) the accounts relating to any estate, curatorship, trust or company, referred to in paragraph 5 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 5.
- 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 persons having lawful claims upon the said trust accounts

and/or against the Respondent in respect of monies held, received an/or invested by the Respondent in terms of Section 78(1) and/or 78(2) and/or 78(2A) 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 persons 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 call upon the Respondent to furnish him within 30 (THIRTY) 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 have 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 11 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 foregoing, 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 persons 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.

8. THAT the Respondent be interdicted and prohibited from operating the accounts referred to in paragraph 7(d).

9. 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 Sections 14 or 15 of the Administration of Estates Act, Act 66 of 1965 read with section 54(1)(a)(v) of the Act; and
- b) Curator or guardian of any minor or other person's property of which he has been appointed 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; 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 Section 379(2) read with Section 379(1)(e) 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.
10. THAT the Applicant be and is hereby authorised, should it consider it necessary, to engage the services of accountants of its choice, who are registered in terms of the Auditing Professions Act, Act 26 of 2005, 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.
11. THAT the Respondent be and is hereby directed to pay:
- a) 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(5) 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 6 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) The fees and expenses of any person consulted and/or engaged by the Curator Bonis in terms of paragraph 7(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 and incidental to this application on an attorney and client scale.

12. THAT the Respondent be and is hereby directed to satisfy the Curator Bonis, within one 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's 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 recovery thereof.

13. THAT the applicant be and is hereby directed to cause a copy of this order to be served upon the Master of this Court.

J.P. DAFFUE, J

I concur.

P. U. FISCHER, AJ

On behalf of applicant: Adv. M. Louw
Instructed by:

Symington & De Kok
BLOEMFONTEIN

On behalf of respondent: In person

/EB