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

Case No: 44079/2012

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

12/6/2013
DATE SIGNATURE

12/6/2013

In the matter between:

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

and

JANALD SCHOLTEMEYER **RESPONDENT**

CORAM: MAUMELA J ET EBERSOHN AJ

DATE HEARD 31 MAY 2013-06-10

DATE JUDGMENT HANDED DOWN: 12th June 2013

JUDGMENT

EBERSOHN AJ

[1] The Law Society of the Northern Provinces (hereinafter referred to as "the Law Society") is applying for the suspension of the name of Janald Scholtemeyer (hereinafter referred to as "the Respondent") from the roll of practising attorneys.

[2] The Respondent was admitted as an attorney of this Honourable Court on 15 December 1997 and his name is still on the roll and he is currently practising as an attorney of this Honourable Court for his own account and as a single practitioner under the style of Scholtemeyer Attorneys at No 19A Hans van Rensburg Street, Polokwane, Limpopo Province.

[3] The purpose of this application is to remove the respondent from the roll of attorneys in which application the Law Society contends shows such a deviation by the respondent from the standards of professional conduct to the effect that the respondent is not a fit and proper person to continue to practice as an attorney and which will justify this Court in ordering that the respondent be removed from the roll of attorneys.

[4] It is trite law that applications such as this one, are *sui generis* and of a disciplinary nature. There is no *lis* between the Law Society and the Respondent. The Law Society, as *curatos morum* of the profession, places facts before the Court for consideration.

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

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

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

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

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

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

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

Vide: Jasat v Natal Law Society, 2000(3) SA 44 (SCA) at 51 B – I.
Law Society of the Cape of Good Hope v Budricks, 2003(2) SA11 (SCA) on 13E – 14.

(7) The Court's discretion must be based upon the facts placed before it and facts in question must be proven upon a balance of probabilities.

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

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

Vide: Law Society, Transvaal v Matthews, supra at 420 B – D.

Law Society, Cape of Good Hope v Segall, 1975(1) SA 95C at 99B.

Beyers v Pretoria Balie Raad, 1966(2) SA 593 (A) at 606B.

Malan and another v The Law Society, Northern Provinces [2009] 1 All SA 133 (SCA).

[9] The following case law reflects the attitude of the Courts in respect of attorneys not holding proper accounting records:

Vide: Malan and another v The Law Society, Northern Provinces [2009] 1 All SA 133 (SCA)

Law Society of the Northern Provinces v Morkel [2003] FOL 10868 (T)

Botha & Others v The Law Society of the Northern Province [2009] 3 All SA 293 (SCA)

Law Society of the Northern Provinces v Setshogoe [2009] JOL 2307 (T)

[10] The facts and circumstances which prompted the Law Society to bring this application to the Honourable Court include the following:

a) The respondent is practising as an attorney of this Honourable Court without being in possession of a fidelity fund certificate and he has done so since 1 January 2012;

b) The Respondent has failed to submit his Rule 70 auditor's report for the period ending 28 February 2011 to the Law Society;

c) The Respondent failed to keep proper accounting records in respect of his practice;

d) The Respondent failed to account to clients;

e) The Respondent failed to cooperate with the Law Society and to make his accounting records available to the Law Society for purposes of an inspection thereof.

f) The Respondent failed to honour undertakings given to the Law Society;

g) The Respondent failed to reply to correspondence;

h) The Respondent contravened several provisions of the Law Society's Rules relating to proper bookkeeping by attorneys;

i) The Respondent failed to pay fines imposed by disciplinary committees of the Council to the Law Society; and

j) The Law Society received a complaint against the Respondent.

[12] In July 2012 the Law Society launched an application for the suspension of the Respondent in his practise.

[13] On 3 August 2012 the application was served by the Sheriff on the Respondent personally.

[14] A Notice to Oppose was received from the Respondent on 15 August 2012. The Respondent failed to file his answering affidavit.

[15] On 10 November 2012 a notice of set down was served on the Respondent's correspondent attorneys.

[16] The Respondent has failed to submit his Rule 70 auditor's report for the period ending 28 February 2011 to the Law Society. This report had to be submitted to the Law Society on or before 31 August 2011.

[17] The purpose of a Rule 70 auditor's report is to satisfy the Law Society that an attorney's accounting records are kept in accordance with the provisions of the Rules and the Attorneys' Act and that an attorney handles and administers trust monies entrusted to him by his clients properly and responsibly.

[18] By failing to submit his Rule 70 auditor's report to the Law Society, the Respondent contravened the provisions of Rule 70. According to the provisions of Rule 89.11 the Respondent made himself guilty of unprofessional, dishonourable and unworthy conduct by contravening Rule 70.

[19] Due to the Respondent's abovementioned failure he was on 20 October 2011 notified

to appear before a disciplinary committee of the Council on 17 November 2011.

[20] The Respondent attended the proceedings of the disciplinary committee and pleaded guilty to the charge.

[21] The disciplinary committee found the Respondent guilty to the charge and also noted that the Respondent had previously been found guilty by disciplinary committees to similar charges, in respect of his Rule 70 auditor's 28 February 2007 and 29 February 2008 respectively. reports for the periods ending 28 February 2006,

[22] The disciplinary committee resolved to refer the matter to the Council and imposed a fine in the amount of R20 000.00. The committee also ordered the Respondent to pay the *pro rata* costs relating to the disciplinary enquiry in the amount of R500.00.

[23] The Law Society addressed a letter to the Respondent on 18 November 2011 and recorded the findings and order of the disciplinary committee.

[24] On 19 March 2012 the Law Society addressed a further letter to the Respondent and recorded his failure to submit his Rule 70 auditor's report for the period ending 28 February 2011 to the Law Society. The Law Society requested the Respondent to rectify his failure immediately, failing which an application for his suspension from practice would be launched.

[25] The Respondent failed to reply to the Law Society's letter.

[26] The Respondent also failed to pay the fine in the amount of R20 000.00 and the costs of the disciplinary enquiry held on 17 November 2011, in the amount of R500.00, to the Law Society.

[27] On 17 February 2012 the Law Society addressed a letter to the Respondent and demanded payment of the amount of R20 500.00 within seven days from the date of the letter.

[28] The Respondent subsequently and on 28 February 2012 paid the amount of R20 500.00 to the Law Society, three months after he had been ordered by the disciplinary committee to do so.

[29] After the Law Society had received a complaint against the Respondent to the effect that he failed to account to a client, the Law Society instructed a legal official in the employ of the Law Society's Monitoring Unit, Ms Magda Geringer (Geringer), to visit the Respondent and to investigate the complaint.

[30] Geringer executed her mandate and reported to the Law Society in writing on 22 February 2012.

[31] The Law Society received a written complaint from attorney PG Uys on behalf of Mr Hendrik Van Niekerk (van Niekerk) and the trustees of the Oubaas Van Niekerk Trust. According to the complaint the Respondent attended to the registration of the transfer of the property from Oubaas Van Niekerk Trust to Tysocon. The transfer was registered during June 2010, but the Respondent failed to account to his client and to pay to the client the proceeds of the transaction.

[32] Geringer discussed the complaint with the Respondent and inspected the relevant office files.

[33] The Respondent advised Geringer that he did not attend to the registration of the transfer of the property and that he was therefore not in possession of a client file. The firm Rooth & Wessels attended to the registration of the transfer and thereafter paid the proceeds of the transaction in the amount of R1 991 958.54 into the Respondent's trust banking account on van Niekerk's instruction.

[34] Before the property was sold to Tysocon, Van Niekerk approached the Respondent and instructed him to enter into agreements with certain of his creditors due to the fact that he was not in a position to pay his debts.

[35] A bond was registered over the immovable property in favour of ABSA Bank and the property served as security for several of the debtors.

[36] On registration of the property the amount payable to ABSA Bank was paid from the purchase price. The balance of the funds remained in the Respondent's trust banking account. The Respondent was instructed to pay out certain funds to Van Niekerk's creditors in terms of the agreements reached with them.

[36] The Respondent was from time to time requested by Van Niekerk to make payments to him and/or to Bezuidenhout Bore as he experienced cash flow problems.

[37] According to an agreement between Van Niekerk and the Respondent, the Respondent was allegedly entitled to deduct his outstanding fees from the proceeds of the transaction.

[38] The Respondent advised Geringer that he was in the process of preparing a reconciliation between the amount received from Rooth & Wessels and the payments made to or on behalf of Van Niekerk. He undertook to furnish Geringer with a copy of the reconciliation.

[39] The Respondent failed to comply with his abovementioned undertaking.

[40] During Geringer's visits to the firm the accounting records were not available at the Respondent's offices. This is a contravention by the Respondent of the provisions of Rule 68.4.2 of the Law Society's Rules.

[41] On 16 November 2011 the Respondent contacted his auditor, Mr Mundus Uys. Uys confirmed that he was in the process of finalizing and updating the firm's accounting records. He also confirmed that the outstanding Rule 70 auditor's report in respect of the period ending 28 February 2011 would be submitted to the Law Society by 30 November 2011.

[42] At the time of Geringer's visit, the firm's accounting records were not written up and balanced. This is a contravention of the provisions of Rule 68.5 of the Law Society's Rules.

[43] No cash books or bank statements were made available to Geringer for inspection.

[44] Due to the fact that no accounting records were available at the Respondent's office, Geringer was unable to determine the firm's accurate trust position. Geringer however utilised reconciliation between trust creditors and available trust funds as at 31 October 2011 which was furnished to her by the Respondent. According to the reconciliation there is no trust deficit in the firm's bookkeeping.

[45] The Respondent has practised as an attorney without being in possession of a Fidelity Fund Certificate since 1 January 2012. This is a contravention of the provisions of Section 41 of the Attorneys' Act.

[46] Respondent has contravened at least the following provisions of the Attorneys' Act and the Law Society's Rules:

a) Section 41(1) of the Attorneys' Act due to the fact that the Respondent has been practising without a Fidelity Fund Certificate since 1 January 2012;

b) Rule 68.4.2 of the Rules due to the fact that the Respondent failed to keep his accounting records at no place other than his office;

c) Rule 68.5 of the rules due to the fact that the Respondent failed to update his accounting records in accordance with the Law Society's Rules;

d) Rule 70.4 of the Rules due to the fact that the Respondent failed to submit his Rule 70 auditor's report for the period ending 28 February 2011 to the Law Society.

[47] Although the Respondent undertook to furnish Geringer with a complete reconciliation of Van Niekerk's accounts, he failed to do so. The Respondent failed to open a client ledger account in respect of Van Niekerk's property transaction. No accounting records were available at the Respondent's offices in order to enable Geringer to investigate Van Niekerk's complaint further. The calculated trust position in accordance with the firm's trust reconciliation could not be confirmed in the absence of the firm's accounting records. The Attorneys Fidelity Fund may be at risk.

[48] One Mogashoa submitted a complaint against the Respondent to the Law Society on 12 March 2010. Mogashoa instructed the Respondent during August 2005 to act on his behalf in a labour matter. Mogashoa paid to the Respondent a deposit in the amount of R10 000.00.

[49] The Respondent addressed a letter to Mogashoa acknowledging receipt of the amount

of R10 000.00. The Respondent however failed to address any further letters to Mogashoa. He also failed to report to Mogashoa on the progress in the matter, if any.

[50] Mogashoa terminated the Respondent's mandate on 1 February 2011. He requested the Respondent to furnish him with a statement of account in respect of his fees. The Respondent failed to comply with his request.

[51] Mogashoa also requested his file from the Respondent. The Respondent undertook to furnish Mogashoa with his file, but he failed to do so.

[52] The Law Society addressed a letter to the Respondent on 14 July 2011 and furnished him with the particulars of the complaint. The Law Society requested the Respondent to furnish it with his comments on the complaint.

[53] The Respondent failed to reply to the Law Society's letter. The Law Society addressed a further letter to the Respondent on 25 August 2011 and requested his reply within fourteen days. The Respondent failed to reply to the abovementioned letter.

[54] The Law Society has to date not received any letter from the Respondent containing a reply to Mogashoa's complaint.

[55] It is clear that the Respondent has contravened the provisions of the Attorneys' Act and has failed to comply with the requirements of the Attorneys' Act and the Rules and has made himself guilty of unprofessional conduct and is not a fit and proper person to be on the roll of attorneys and that the prayers set out in the notice of motion be granted and that the Respondent be ordered to pay the costs on of this application on the attorney and client scale.

[56] The following order is granted

1. That the name of Janald Scholtemeyer, (the respondent) be removed from the roll of attorneys.

2. That respondent immediately surrenders and deliver to the Registrar of this Honourable Court his certificate of enrolment as an attorney of this Honourable Court.

3. That in the event of the respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate and to hand it to the Registrar of this Honourable Court.

4. That respondent be prohibited from handling or operating on his trust accounts as detailed in paragraph 5 hereof.

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

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

5.2 subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against respondent in respect of monies held, received and/or invested by respondent in terms of section 78(1) and/or section 78(2) and/or section 78(2A) of Act No 53 of 1979 (hereinafter referred to as trust monies), to take any legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions, if any, in which respondent was and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);

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

5.4 to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of, the board of control of the fund, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of respondent and, if so, the amount of such claim;

5.5 to admit or reject, in whole or in part, subject to the approval of the board of control of the fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;

5.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the board of control of the fund;

5.7 in the event of there being any surplus in the trust account(s) of respondent after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce (as the case may be), firstly, any claim of the fund in terms of section 78(3) of Act No 53 of 1979 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of respondent, the costs, fees and expenses referred to in paragraph 10 of this order, or such portion thereof as has not already been separately paid by respondent to applicant, and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the board of control of the fund, to respondent, if he is solvent, or, if respondent is insolvent, to the trustee(s) of respondent's insolvent estate;

5.8 in the event of there being insufficient trust monies in the trust banking account(s) of respondent, in accordance with the available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which may be available in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the Attorneys Fidelity Fund;

5.9 subject to the approval of the chairman of the board of control of the fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and

5.10 to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of respondent has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.

6. That respondent immediately deliver his/his accounting records, records, files and documents containing particulars and information relating to:

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

6.2 any monies invested by respondent in terms of section 78(2) and/or section 78 (2A) of Act No 53 of 1979;

6.3 any interest on monies so invested which was paid over or credited to respondent;

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

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

6.6 any trust administered by respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;

6.7 any company liquidated in terms of the Companies Act, No 61 of 1973, administered by respondent as or on behalf of the liquidator;

6.8 any close corporation liquidated in terms of the Close Corporations Act, 69 of 1984, administered by respondent as or on behalf of the liquidator;

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

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

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

8. That the curator shall be entitled to:

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

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

8.3 publish this order or an abridged version thereof in any newspapers he considers appropriate.

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

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

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

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

9.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973;

9.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;

9.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984.

10. That respondent be and is hereby directed:

10.1 to pay, in terms of section 78(5) of Act No. 53 of 1979, the reasonable costs of the inspection of the accounting records of respondent;

10.2 to pay the reasonable fees of the auditor engaged by applicant;

10.3 to pay the reasonable fees and expenses of the curator, including travelling time;

10.4 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;

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

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

11. That if there are any trust funds available the respondent shall within 6 (six) months after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, shall satisfy the curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to him in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof;

12. That a certificate issued by a director of the Attorneys Fidelity fund shall constitute *prima facie* proof of the curator's costs and that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.

P.Z. EBERSOHN
ACTING JUDGE OF THE HIGH COURT

I AGREE.

T.A. MAUMELA
JUDGE OF THE HIGH COURT

APPLICANT'S ATTORNEYS ROOTH & WESSELS
REF MR. BLOEM /B30268