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

Case No: 44078/2012

12/6/2013

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

12/6/2013
DATE SIGNATURE

In the matter between:

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

and

SAMUEL JACOBUS VAN DEN BERG **RESPONDENT**

CORAM: MAUMELA J ET EBERSOHN AJ

DATE HEARD 31 MAY 2013-06-10

DATE JUDGMENT HANDED DOWN: 12 th June 2013

JUDGMENT

EBERSOHN AJ:

[1] The Law Society of the Northern Provinces (hereinafter referred to as "the Law Society") is applying for the removal of the name of Samuel Jacobus Van Den Berg (hereinafter referred to as "the Respondent") from the roll of practising attorneys.

[2] 2.1 The Respondent was admitted as an attorney of this Honourable Court on 1 February 2001 and his name is still on the roll; and

2.2 The Respondent is currently practising as an attorney of this Honourable Court for his own account and as a single practitioner under the style of Van den Berg Attorneys at First Floor, Landmark Building, The Link, No 13 Umgazi Street, Menlo Park, Pretoria, Gauteng.

[3] The purpose of this application is to submit to this Honourable Court facts which the Law Society contends constitute such a deviation from the standards of professional conduct that the Respondent is not a fit and proper person to continue to practice as an attorney and which will justify the Honourable Court in ordering that the Respondent be suspended from practising as an attorne

[4] 4.1 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.

4.2 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.

4.3 In exercising its discretion, the Court is faced with a three stage inquiry:

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

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

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

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

4.4 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.

4.5 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).

4.6 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)

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

5.1 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;

5.2 The Respondent failed to submit his Rule 70 Auditor's report for the period ending 28 February 2011 to the Law Society;

5.3 The Respondent failed to notify the Law Society of his change of address inaccordance with the provisions of Rule 3; and

5.4 The Respondent failed to reply to correspondence addressed to him by the Law Society.

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

6.1 The application was served by the Sheriff on the Respondent personally on 26 September 2012.

6.2 The Respondent did not enter an appearance to defend. The application is therefore unopposed.

6.3 On 26 November 2012 a Notice of Set Down was served personally on the Respondent.

[7] The Respondent has failed to submit his Rule 70 auditor's report for the period ending 28 February 2010 to the Law Society. This report had to be submitted to the Law Society on or before 31 August 2011.

7.1 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 Act and that an attorney handles and administers trust monies entrusted to him by his clients properly and responsibly.

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

7.3 Due to the Respondent's abovementioned failure the Law Society notified him on 19 October 2011 to appear before a disciplinary committee of the Council on 22 November 2011.

7.4 The Law Society was unable to deliver the notice to the Respondent due to the fact that he had left the addressed recorded in the Law Society's records without advising the Law Society thereof in terms of the provisions of Rule 3.

7.5 By failing to comply with the provisions of Rule 3 the Respondent made himself guilty of unprofessional, dishonourable or unworthy conduct in terms of the provisions of Rule 89.11 of the Law Society's Rules,

8.1 Section 41(1) of the Act provides that a practitioner shall not practise or act as a practitioner for his own account or in partnership unless he is in possession of a fidelity fund certificate. This stipulation is peremptory by nature and a contravention thereof is in terms of section 83(10) of the Act an offence punishable with a severe fine.

8.2 The purpose of the issue of a fidelity fund certificate is to protect the general public. The Attorneys Fidelity Fund (the Fund) was founded for the purpose of reimbursing persons who suffer pecuniary loss as a result of the theft committed by a practising attorney.

8.3 A fidelity fund certificate is mainly issued on the strength of an unqualified auditor's report which must be submitted annually to the Law Society in terms of Rule 70. This report must be submitted within six months of the annual closing of the accounting records of the firm concerned.

8.4 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, the Respondent was not issued with a fidelity fund certificate for 2012. He nevertheless continued practising without a certificate from 1 January 2012.

8.5 The seriousness of the Respondent's conduct in practising without a fidelity fund certificate cannot be overemphasised. Firstly his conduct is contrary to a peremptory legal requirement and the Respondent made himself guilty of an offence. Secondly the Respondent places his trust creditors who may suffer pecuniary loss as a result of the misappropriation of trust monies, at risk. In its entirety this state of affairs in unacceptable.

[9] 9.1 After the Respondent had failed to submit his Rule 70 auditor's report for the period ending 28 February 2011 to the Law Society, the Law Society instructed a management consultant and forensic investigator, Mr AWP Van Rooyen (Van Rooyen), to visit the Respondent and to investigate his practice affairs.

9.2 Van Rooyen executed his mandate and report to the Law Society in writing on 16 April 2012.

9.3 Van Rooyen made five attempts to contact the Respondent telephonically, but he was unsuccessful. Van Rooyen then attended at the Respondent's offices at the address recorded in the Law Society's records.

9.4 Van Rooyen was advised by the security officer at the premises that the Respondent had vacated his offices during September 2011. Van Rooyen was further advised to contact attorney Van Der Westhuizen, who practises in Wapadrand and who was the Respondent's land lord.

9.5 Van Rooyen contacted attorney Van Der Westhuizen and was advised that the Respondent had leased offices from him, but that he was no longer practising at the said premises. He furnished Van Rooyen with the Respondent's mobile telephone number.

9.6 Van Rooyen then contacted the Respondent. The Respondent advised Van Rooyen that he has ceased practising during October 2011. He admitted that his Rule 70 auditor's report was still outstanding and under took to furnish the Law Society with same within two weeks.

9.7 The Respondent at no stage advised the Law Society of the alleged closure of his practice. He also failed to submit a closing auditor's report to the Law Society after the closure of his practice. A closing auditor's report must be submitted to the Law Society within six months of the closure of a practice in order to satisfy the Law Society that all trust funds previously received by the attorney had been properly accounted for.

9.8 On 19 March 2012 Van Rooyen received an e-mail from the Respondent. He advised Van Rooyen that he was awaiting his original trust bank statements from his bank. He indicated that he hoped to receive the bank statements by 21 March 2012 where after his report would be finalised. Van Rooyen did not hear anything further from the Respondent.

9.9 The Respondent has contravened at least the following provisions of the Law Society's Rules:

a) Rule 3 due to the Respondent's failure to notify the Law Society of his change of addressed alternatively the closure of his practice;

b) Rule 70.3 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; and

c) Rule 89.23 and Rule 89.25 due to the fact that the Respondent failed to reply to correspondence addressed to him by the Law

Society.

[10] 10.1 The Respondent has contravened the provisions of the Attorneys' Act and has failed; alternatively he has ignored to comply with the requirements of the Attorneys' Act and the Rules.

10.2 Therefore, it is submitted, with respect, that the Respondent has made himself guilty of unprofessional conduct.

10.3 The Law Society requested that in these circumstances the Honourable Court grant the order as prayed for in the notice of motion. The Law Society submitted that the nature of the offences committed warrants an order of costs on the attorney and client scale.

[11] The following order is made:

1. That the name of Samuel Jacobus Van Den Berg (the respondent) be removed from the roll of attorneys;

2. That respondent immediately surrenders and delivers 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 certificates are, be authorised and directed to take possession of the certificates 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 the applicant or any person nominated by him, be appointed as *curator bonis* (curator) to administer and control the trust accounts of the 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 a 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 and 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); 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 any, 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 accounts(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 an/or consult with and/or engage the services of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist him 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 he 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 delivers his accounting records, records the premises 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 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, administrated 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; and

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 into 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; and

8.3 publish this order or an abridged version thereof in any newspaper 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 Corporations 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 (respondent) 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/B30260