

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1030/2013

In the matter between:-

THE LAW SOCIETY OF THE FREE STATE

Applicant

and

MAHLOMOLA GOODWIN MOLAPO

Respondent

CORAM:

RAMPAL, AJP *et* LEKALE, J

HEARD ON:

23 MAY 2013

JUDGMENT BY:

RAMPAL, J

DELIVERED ON:

27 JUNE 2013

- [1] These were motion proceedings. The applicant approached the court in order to have the name of the respondent removed from the roll of attorneys. The alternative relief which the applicant sought was to have the respondent conditionally suspended from practising as an attorney of this court. The application was unopposed.
- [2] The respondent was admitted as an attorney on 2 July 1998. Since then he practised as such in Welkom. During the annual audit period which commenced on 1 March 2010 and ended

on the 28th February 2011 the respondent was still practising as an attorney in Welkom.

- [3] The respondent was as such obliged, by the rules of the applicant, to submit an annual audit report to the applicant before or on 31 August 2011 in respect of the aforesaid audit period. However he failed to do so.
- [4] Subsequent to the expiry date for the submission of the required annual audit report it came to the attention of the applicant that the respondent had abandoned his practice. He was obliged by the rules to inform the applicant of his intention to cease practising as an attorney. However, he failed to do so.
- [5] One of the respondent's clients was Bokamoso Farmers Trust ("BFT"). The registration number of the trust was IT584/1996. It owned a fixed property. The trust property was known as Ventervlakte Farm 740 in the Ventersburg district in the Free State Province. The size of the property was 431,6388 hectares. It had 41 beneficiaries, and an undisclosed number of trustees. Ms Joalane Alina Mafa, Ms Nomvula Betty Thakamakhoa, Mr Lekhyanya Abel Thakamakhoa and Mr Johannes Phoshodi were some of them.
- [6] On 15 January 2009 the trust sold the aforesaid property to Matjhabeng Local Municipality for R6 million. The respondent received the purchase price from the seller on behalf of the trustees. The respondent subsequently paid certain sums of

money to the beneficiaries of the trust. The majority of them were dissatisfied.

[7] They reckoned that the respondent had overreached them. The applicant investigated the 26 complaints lodged by the aggrieved beneficiaries. An affidavit (annexure "A6") was obtained from the aforesaid trustee Ms Mafa. According to her the respondent had failed to properly account to BFT. The trust deficit complained of was conservatively estimated to be R859 361.60 at least.

[8] Those then were the complaints levelled against the respondent. The statutory council of the applicant held a meeting on 25 October 2010. One of the items on the agenda concerned was the alleged misconduct of the respondent; viz. practising without the requisite fidelity certificate. The council decided to hold a disciplinary inquiry into the respondent's misconduct.

[9] Pursuant to that decision the chief executive officer of the applicant, Mr M A Mohobo, addressed a letter to the respondent on the 1st November 2012. The letter reads as follows:

"Dear Sir

**RE: OUTSTANDING TRUST AUDIT REPORT/PRACTISING
WITHOUT A FIDELITY FUND CERTIFICATE FOR THE YEAR
ENDING 31 DECEMBER 2012**

We refer to the above.

You are hereby given a notice to appear before the Council of the Free State Law Society during its meeting of **23 November 2012** at **10h00** at office of the Free State Law Society, 139 Zastron Street Bloemfontein to give compelling reasons why an application of (sic) the striking (sic) of your name from the roll of attorneys or suspend (sic) you from practice should not be made.

Should you wish to provide written submission, you must ensure that you submit them to the Law Society on or before **16 November 2012**.

Kindly be informed that you are entitled to be legally presented during the appearance before the Council of the Law Society.

You must remain in attendance until you are formally excused by the President of the Law Society.

Yours faithfully

(signed)
MZWEKHAYA ARNOLD MOHOBO
CHIEF EXECUTIVE OFFICER"

- [10] The letter (annexure "A7") was duly served on the respondent's human resources manager at the respondent's workplace in Johannesburg on the 16th November 2012 as would fully appear from the sheriff's return, annexure "a8".
- [11] Although the respondent had been called upon to appear before the applicant's council, he failed to show up on 23

November 2012 in accordance with annexure “a7”. Instead he reacted through his lawyer, a certain Attorney M C Nkomo of Durban. The fax (annexure “a9”), which was marked urgent and dated 23 November 2012 reads as follows:

“Dear Sirs,

**RE: OUTSTANDING TRUST AND AUDIT REPORT/
PRACTISING WITHOUT A FIDELITY FUND CERTIFICATE
FOR THE YEAR ENDING 31 DECEMBER 2012 // M G MOLAPO**

We refer to the above matter and confirm that we act for the above-named client.

It is our instruction that our client received the notice in respect of the above on Monday, the 19th November 2012 as he was on leave (sic) the 16th November 2012 when it was served at his work (sic) of work.

It is our instruction to request an extension to enable him to properly consult with us and also to attend to the auditors who could only see him on Saturday the 24th of November 2012. We further do not believe that our client will pose any threat to the profession should you pend your action, taking into account that he no longer practises.

We hope our request will be acceded to.

Yours Faithfully

M.C. NKOMO

(signed) _____
FOR MDU NKOMO & CO”

- [12] At the meeting held on 23 November 2012 the applicant's council, rejected the respondent's request for an extension for the submission of the required annual audit report and resolved to launch the current application.
- [13] The sheriff served the notice of motion, the founding affidavit and annexures thereto upon the respondent personally in Johannesburg on 27 March 2013. Notwithstanding such service there has been deafening silence on the part of the respondent.
- [14] Those then were the facts before us. They were all undisputed. There were no disputed facts. The respondents implicitly decided to abide.
- [15] An overview of the law appeared to be necessary. Section 58 Attorneys Act 53 of 1979 as amended outlines, among others, the prime objectives of the law society. Amongst them I selected the following few:
- 15.1 To maintain and enhance the prestige, status and dignity of the profession;
 - 15.2 To regulate the exercise of the profession;
 - 15.3 To deal with all matters relating to the interest of the profession and protect those interests;
 - 15.4 To provide for the effective control of the professional conduct of practitioners;
 - 15.5 To promote uniform practice and discipline among practitioners.

[16] In terms of Section 78 of the same national legislation any practising practitioner shall open and keep a separate trust banking account at a banking institution in the Republic of South Africa and shall deposit therein the money held or received by him on account of any person and he shall keep proper accounting records containing particulars and information of any money received, held or paid by him for or on account of any person.

[17] Rule 16B.4.1 of the Rules of the Law Society of the Free State reads as follows:

“Every accountant who has accepted an appointment in terms of Rule 16B.1 shall within six months after the annual closing of the accounting records of the firm concerned, or at such other times as the Council may require, furnish the Council with a report which shall be in the form of schedule C to these rules.”

[18] Rule 16B.3 reads as follows:

“A firm shall ensure that the report to be furnished by an accountant in terms of Rule 16B.4 is so furnished within the required time or on the required date; provided that the Council may in its discretion and on such conditions as it may stipulate, on written application by a firm relating to a particular report, condone a failure by that firm to comply with requirements.”

[19] Section 22(1)(b) of the same legislation requires a three stage enquiry:

- 19.1 First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities;
- 19.2 Second, it must consider whether the person concerned “in the discretion of the court” is not a fit and proper person to continue to practise;
- 19.3 And third, the court must enquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practise would suffice.

(See **Jasat v Natal Law Society** 2000 (3) SA 44 (SCA).

[20] In terms of Section 78(8) of the aforesaid statute the court may on application made by the law society of the province concerned and on good cause shown, prohibit any practitioner from operating in any way on his trust account, and may appoint a *curator bonis* to control and administer such trust account, with such rights, duties and powers in relation thereto as the court may deem fit.

[21] In deciding whichever course to follow the prime consideration is the protection of the public. Logic also dictates that if a court finds that someone is not a fit and proper person to continue to practise as an attorney, then such person has to be removed from the roll. (See **Malan & Another v Law Society, Northern Provinces** 2009 (1) SA 216 (SCA).

- [22] It is seldom, if ever, that a mere suspension from practice for a given period in itself will transform one who is unfit to practise into one who is fit to practise. (See **Malan & Another v Law Society, Northern Provinces** *supra*.)
- [23] There were three professional transgressions levelled against the respondent by the applicant. I proceed to deal with them one by one.
- [24] As regards the first transgression, the applicant averred that the respondent had failed to furnish the provincial law society council with an annual audit report. The respondent was obliged to submit an annual audit report to the applicant's law council after the annual closing of the accounting records.
- [25] The annual accounting periods pertaining to the complaint was 28 February 2011. The annual accounting of the respondent's trust records closed on that day. The respondent's accountant, appointed in terms of rule 16B.1, was supposed to furnish the applicant's law council with the required audit report within six months after the annual closing of the accounting records. Such six months period expired on 31 August 2011. The applicant's law council never received the required annual audit report from the respondent's appointed accountant in terms of rule 16B.4.
- [26] It was the respondent's responsibility to see to it that the accounting records of his law practice were annually audited by his appointed accountant. It was also incumbent upon him

to ensure that his appointed accountant furnished the annual audit report to the applicant's law council – rule 16B.3.

[27] When the applicant's law council receives a favourable or satisfactory annual audit report from an attorney's appointed accountant it forwards such report to the Attorney's Fidelity Fund ("AFF"). The AFF would then issue the requisite annual fidelity certificate to the attorney concerned. By virtue of the fidelity certificate the attorney is annually licensed to practise law. The accounting records of the attorney are thereby publicly confirmed or certified to be in order. By means of an annual fidelity certificate the applicant holds the bearer thereof out as its honourable and trustworthy member to whom the members of the public can entrust their affairs.

[28] From the comments I have made in the preceding paragraphs two things emerge. The first is the significance of the annual auditing report of the accounting records of an attorney. The second is the danger posed to public interest by an attorney's neglect to cause the required annual audit report to be furnished to the applicant. The essence of rule 16B is the protection of the public from untrustworthy individuals who infiltrate the noble vocation and masquerade as honourable lawyers only to exploit humble, unsuspecting, unwary and trusting members of the public.

[29] The respondent was accused of practising as an attorney without the annual fidelity certificate. An attorney cannot obtain an annual fidelity certificate unless, he, first and

foremost, obtains an unqualified annual audit report. I pause to stress that such an annual audit report has to be compiled by an accountant appointed and paid by an attorney and not the law society. This was the first charge. The particulars of the charge were contained in a letter – annexure “A7”.

[30] The sheriff served the written charge at the respondent's current workplace. The charge came to the respondent's attention through the human resources manager of Ernst & Young. The letter from his attorney (annexure “A9”) and his own affidavit (annexure “A10”) showed that he knew about the charge and the date of the hearing. His knowledge notwithstanding, he did not attend the hearing in Bloemfontein on 23 November 2012. He gave some lame excuse.

[31] He and his accountant were supposed to have met a day after the applicant's council meeting. The meeting never materialised. It was postponed to 1 December 2012. December 2012 came and went. The applicant never heard again from the respondent, his attorney or even his accountant since 23 November 2012.

[32] The current application was served upon the respondent personally at his place of residence at Winchester Hills in Johannesburg. Notwithstanding such service, the respondent never filed an answering affidavit. Consequently we have to accept the applicant's case that the respondent failed to submit the outstanding audit report, for an annual accounting period stretching from 1 March 2010 to 28 February 2011, which he

was obliged to have submitted to the applicant on 31 August 2011, at the very latest. The respondent has given no reasonably acceptable explanation for his serious contravention of the rule.

[33] In the circumstances I would find that, on a balance of probabilities, the respondent has contravened rule 16 of the applicant's rules. Therefore, the applicant has established the merits of the first misconduct committed by the respondent in contravention of the rule as well as section 41 of the statute. The section not only prohibits an attorney from practising without a valid fidelity fund certificate but also criminalises it.

[34] As regards the second transgression, the applicant averred that the respondent had practically abandoned his practice. The respondent was obliged to give the applicant prior notice of his intention to voluntarily cease practising as an attorney – *vide* rule 3B.2.

[35] It was undeniable that the respondent had practised for his own account, in the Free State Province, during the accounting period 1 March 2010 to 28 February 2011. It was also undisputed that he previously practised as an attorney under the name and style Molapo-Mofokeng in Welkom; that the respondent was no longer practising law in the province or anywhere else in the country, for that matter; that he unilaterally closed down his practice on or about 31 January 2012 and that he presently lives and works in Johannesburg, where he is in the employ of Ernst & Young.

[36] On the papers the following accomplished facts can be accepted: firstly, that the respondent did not apply to this court, as he was required to do, to have his name formally removed from the roll of active attorneys; secondly, that the respondent did not furnish the applicant with a certificate by an accountant, as he was required to do, to verify that he had made proper provision for the winding-up of his practice, for its take-over and for the protection of the trust money of his clients; and thirdly, that the respondent did not satisfy the applicant by way of a sworn statement, as he was required to do, that he had discharged all mandatory obligations towards his clients and that any other specially additional safeguards – which the applicant invariably deems necessary where an attorney winds up – for the adequate protection of the trust money, the final completion of work on hand and the orderly winding-up of his practice, have generally been met – *vide* Rule 3B.1.

[37] It follows from those comments that the respondent flagrantly violated the recognised code of rules, norms and standards applicable to the winding-up procedure pertaining to a law practice. He was obliged to give the applicant prior notice of his intention to voluntarily cease practising and to solicit the co-operation and active participation of the applicant in the winding-up process in order to protect the interests of his clients in a relatively meaningful and effective manner.

[38] In the circumstances, I am inclined to find that the respondent, has on a balance of probabilities, contravened the provisions of Rule 3B. He clearly abandoned his practice. There can be

no doubt that he carelessly, if not recklessly, disregarded the interests of his clients. He proverbially left all of them in the lurch. In my view the second conduct complained of also constituted misconduct. That the respondent has unprofessionally abandoned his practice has clearly been established.

[39] As regards the third complaint, the applicant averred that the respondent had given no proper account to his client, BFT. The respondent received a substantial amount of R6 million for and on behalf of his client. Moreover, the respondent also received the additional sum of R223 732,40 from the purchaser in respect of the three taxed bills of costs. That sum brought a total cash received to R6 223 792,40.

[40] Ms J A Mafa alleged that the respondent misappropriated trust funds to the tune of R1 040 155,71. The accusation was not entirely correct. The fact of the matter was that 21,51% thereof was his fees. He deservedly earned it. The thrust of the third complaint was that the respondent over-charged the BFT by a substantially excessive amount of R859 361,60 over and above the fee he had legitimately earned. The averment stood undisputed before us – *vide* paragraph 4 annexure “A6”.

[41] This court, per JB Mthembu AJ, ordered the respondent to render a proper account to the attorneys of the BFT in respect of the balance of R859 361,60. The order was made on 17 June 2010 under case number 1355/2010. Needless to say that the respondent never complied with the order. Instead, he

shut down his practice *ex parte*, in haste, in stealth and then vanished.

[42] I am satisfied firstly, that the respondent failed to account to his client in the ordinary course of executing his mandate as he was ordinarily obliged by the professional rules of his vocation; secondly, that he neglected to refund the excessive amount on demand; and thirdly, that he disobeyed the court order by Mthembu AJ to justify his retention of alleged excessive fees as a legitimate remuneration commensurate to the magnitude of the services rendered.

[43] In the circumstances, I am persuaded that the applicant has shown, on a balance of probabilities, that the respondent has failed to properly account to his client. His conduct was not in keeping with the important obligations imposed on him as an attorney in terms of section 78 of Attorneys Act 53 of 1979 as amended.

[44] I have considered whether each of the alleged transgressions has been established on a balance of probabilities. Having done so, I determined that each alleged offending conduct has been accordingly established. Put differently, I have come to the conclusion that the respondent wrongly practised without the requisite annual fidelity fund certificate; that he wrongly shut down his practice and that he unjustifiably failed to render proper account to his client. This concludes the merits of the matter, the first leg of the three stage inquiry in terms of section 22(1)(b). (See **Jasat v Natal Law Society** 2000 (3)

SA 44 (SCA). Here ends the first dimension of the application before us. I now proceed to consider the question of a sanction.

[45] The second leg of the inquiry in terms of section 22(1)(b) is whether the respondent is no longer a fit and proper person to continue to practise as an attorney as the applicant contends. (**JASAT** *supra*)

[46] None of the misconducts committed by the respondent can be reconciled with the noble objectives, norms and standards the applicant strives to cultivate and uphold. An attorney who practices without the annual fidelity certificate poses a very serious risk to members of the public. An appointed accountant can only prepare the required audit reports, an essential prelude to the issue of an annual fidelity certificate, provided an attorney places him or her in actual possession of the auditable accounting records. Implicit in this is the understanding that an accountant's failure to furnish the applicant with an attorney's annual audit report can almost invariably be attributed to an attorney's failure to keep proper accounting records.

[47] An attorney who abandons his practice, as the respondent did, poses a very serious financial risk to members of the public. In this instance their claims might have been extinguished by prescription and default judgments might have been taken without any fault on their part. The clandestine and unprofessional decision of the respondent to desert his clients

could have thrown the affairs of some of them into disarray. The adverse impact of his misconduct is too numerous to exhaustively contemplate.

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

[49] In **Chetty v The Law Society, Transvaal** 1985 (2) 756 AD at 768E-H Miller AJ said the following:

“The allegations and findings of misappropriation stemmed from inferences drawn from the state of the appellant's books of account. It was clear that the appellant had failed to keep proper books of account as he was required to do and that there appeared to be deficiencies in his trust account which at times was overdrawn. The trust account, moreover, was not used solely for trust monies, which were often mixed with funds other than trust funds. **It now appears, however, that despite irregularities and impropriety in the keeping and administration of the accounts, there was in the final result no misappropriation of trust funds by the appellant. It may be that even if this had been shown on the return date of the rule *nisi*, the Court would have ordered the removal of the appellant's name from the roll, for it has frequently been held that failure by an attorney to keep proper books of account in compliance with**

the provisions of Act 23 of 1934 is a "serious contravention" which exposes the offender to the real risk of suspension or removal from the roll. (*Cirota and Another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 193E - F.) And, of course, the Court would have considered the other four complaints in conjunction with contraventions relating to the books of account."

[50] In the instant matter we have to take into account two other transgressions in conjunction with the respondent's contraventions relating to his dismal neglect to have the trust books of account audited - **Chetty** *supra*. And attorney's failure to cause trust accounting records to be audited creates a dark avenue of opportunistic misappropriation of trust money. Besides these additional transgressions, the respondent also disobeyed a court order. All these were serious aggravating factors.

[50] In my view an attorney whose conduct was so glaringly inimical to the prestige, status and dignity of the profession cannot be any more regarded as fit and proper person to continue practising as a trusted provider of legal services. As was stated in **Jasat** case *supra*, in deciding whether a person is still a fit and proper person to continue practice as an attorney involves a weighing up of the conduct complained of against the conduct one would ordinarily come to expect of a diligent, trustworthy and ethical attorney. When I comparatively weighed up the respondent's conduct as against that of an average attorney with those attributes, I found that the scales weighed heavily against the respondent. In my view

his conduct was disturbingly far below the acceptable ethical benchmark. The gradient negatively widened every time he committed each of the three misconducts. The comparative balancing exercise resoundingly disqualified him.

[51] The conduct complaint of in general and the misappropriation of funds in particular were ethically deplorable. Certainly it was not expected of an attorney worth his salt to behave in such an unethical fashion. The conduct is one which is highly deplorable and frowned upon by upright members of the profession.

[52] The third leg of the inquiry in terms of section 22(1)(b) is whether, in the light of all the peculiar circumstances of the particular case, the name of the person concerned is to be removed from the roll of attorneys or whether suspension from practice would suffice. **Jasat** *supra*. Here the focus of the inquiry shifts to the question of an appropriate form of punishment or sanction.

[53] It was submitted on behalf of the applicant that the mere suspension from practice would not be an appropriate sanction to the respondent for the very serious acts of misconduct he committed. It was forcefully contended that the gravity of the transgressions demanded that his name be permanently removed from the roll of attorneys. I have to say, and I say it without any reservation at all, that the respondent's conduct was very shameful indeed. The force of the submission made by counsel cannot be seriously questioned.

- [54] It was stated, in **Malan** case *supra* that if the court finds dishonesty, in any facet of the conduct complained of, then, in that event, the circumstances must be exceptional before a court would order a suspension instead of a removal. In the instant matter there was virtually no argument advanced and I could find no evidence to support any conclusion that there were exceptional circumstances which substantially compelled the suspension of the respondent instead of his removal from the roll of attorneys.
- [55] Apart from the misappropriation of funds, itself a very serious misconduct, the respondent also failed to submit his annual audit certificate and has also abandoned his practice without informing the applicant and without conforming to important obligations in terms of the applicable professional rules relating to the winding-up of an attorneys practice. The blatant disregard of the rules of the society and the provisions of the statute also justifies, in my view, an order for the imposition of the ultimate punitive measure.
- [56] The protection of the public is always of paramount importance in matters such as this. In my view the public has to be protected against the respondent. The most effective and meaningful way of protecting the public against the danger posed by the respondent as an attorney is to have the respondent's name removed from the roll. Such a sanction would prevent him from endangering public interests. It appears from the papers filed on behalf of the applicant that the respondent is, in any event, not practising as an attorney

anymore and, as such, he would merely be disgraced but not necessarily be prejudiced by the principal order sought by the applicant. By his very own stance, he has demonstrated that he was no longer interested to practise law any more.

[58] Having considered all the peculiar facts of this particular matter, including but not limited to the gravity of each transgression, the cumulative impact of the three misconducts, the magnitude of the embezzled trust funds and the plight of the victims, I am persuaded that it will only be in extremely unusual circumstances that a striking-off order would be inappropriate where, as in this instant matter, there was a substantial measure of dishonesty. Twenty six members of the public consider him to be an untrustworthy lawyer. In my view, and it is a very firm view, there are no unusually compelling circumstances to justify any sanction other than the permanent removal of the name of the respondent from the roll.

[59] Nothing but permanent striking-off would be an appropriate sanction in this matter. Should we merely suspend the respondent, our decision would not be compatible with the proper exercise of judicial discretion entrusted to us. (See **Melani v Santam Insurance Limited** 1962 (4) SA 531 (A).)

[60] Consequently I am inclined to impose the ultimate sanction of striking off in this matter. On that note I wrap up the last dimension of the application before us.

[61] There remains one aspect to deal with. The question of the furnishing of security by the proposed *curator bonis*. The proposed *curator bonis* is Attorney M A Mohobo, the chief executive officer of the Free State Law Society. His primary responsibilities would entail administering and controlling the accounting records relating to the respondent's practice. He is obliged in terms of section 77(1) of the Administration of Estates Act 66 of 1965 to furnish security to the Master of the High Court, Free State Province. The Master is unable to issue a certificate of appointment until the required security is furnished by the proposed *curator bonis*.

[62] Section 5 of the Attorneys Admission Amendment and Legal Practitioners Fidelity Fund Act (Act 19 of 1949 as amended by section 26 of the Trust Property Act (Act 57 of 1988) empowers the court to exempt a *curator bonis* from the statutory obligation of furnishing security. The section reads as follows:

“The obligation to provide security imposed by any law upon executors, tutors, curators and trustees in insolvency, shall not be capable of being waived unless the instrument by which they are nominated expressly directs that such security shall be dispensed with or unless a provincial or local division of the High Court of competent jurisdiction, on application, grants special exemption there from.”

[63] The applicant has not specifically requested that the proposed *curator bonis* be exempted from the obligation to furnish security. However, the master has no objection if I *mero motu*

exempt the proposed *curator bonis* from furnishing security. The master considers him a suitable candidate for the statutory office. I share the sentiments. Therefore, I would exempt the proposed *curator bonis* from the furnishing of security. I do this in terms of section 65.

[64] The master made the following request at paragraph 7 of his report:

“I will require the *Curator Bonis* to comply with section 75 of the Administration of Estates Act, 66 of 1965, but since he has to report to the Board of Control of the Fidelity Fund [in terms of prayer 7(n)] there is no need for the *Curator Bonis* to comply with the provisions of sections 78 and 83 of the said act. I therefore humbly request the Honourable Court to specifically exclude the application of sections 78 and 83 of the said Act in this matter.”

I accede to that request this way.

[65] In the circumstances I make the following order:

- 65.1 That the respondent's name be removed from the roll of attorneys;
- 65.2 That the respondent surrender and deliver to the Registrar of this Court his Certificate of Enrolment as an attorney of this Court;
- 65.3 That 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;

- 65.4 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;
- 65.5 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 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 66 of 1936;
- g) Any trust administrated by the respondent as trustee, of on behalf of the trustee in terms of the Trust Properties Act, Act 57 of 1968;
- 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 Corporation Act, Act 69 of 1964, administrated by the respondent as liquidator or on behalf of the liquidator; or
- j) The respondent's practice as an attorney of this Court.

65.6 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*;

65.7 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 security, 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 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's clients and/or the Attorney Fidelity Fund (hereinafter referred to as "the Fund");
- d) to administer and control all the respondent's trust account which for the purpose of this 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 has a claim in respect of money in the said accounts and, if so, the amount of such claim;
- i) Subject to the approval of the Board, to admit or reject in whole or in part, the claims of any such trust creditor without prejudice to such trust creditor's right of access to the Civil Courts;
- j) Subject to the approval of the Board, to pay such claims as he may consider lawfully due;
- k) In the event of there being any surplus in the said trust accounts after payment of any such claims, to utilise such surplus to settle or reduce, as the case may be, firstly any claim of the Fund in terms of Section 78(3) of the Act in respect of any interest therein referred to and, secondly without prejudice to the rights of the respondent's creditors, the costs, fees and expenses referred to in paragraph 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 to 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 a 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.

65.8 That the respondent be interdicted and prohibited from operating the accounts referred to in paragraph 7(d).

65.9 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 Section 51(1)(a)(v) of the Administration of Estates Act, Act 66 of 1965 or the estate of any other person referred to in Section 72(1); and
- b) Curator or guardian of any minor or other person's property in terms of Section 72(1), read with Sections 54(1)(a)(v) and 85 of the Administration of Estates Act, Act 66 of 1965, or the estate of any other person referred to in Section 72(1); and
- c) Trustee of any insolvent estate in terms of Section 59 of the Insolvency Act, Act 24 of 1934; and
- d) Liquidator of any company in terms of Section 379(2) read with Section 379(e) of the Companies Act, Act 61 of 1973; and
- e) Trustee of any trust 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.

65.10 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 Profession 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.

65.11 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 paragraph 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.

65.12 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.

65.13 That the applicant be and is hereby directed to cause a copy of this order to be served upon the Master of this court;

65.14 The proposed *curator bonis*, Attorney Mzwekhaya Arnold Mohobo, the Chief Executor Officer of the Free State Law Society, is in terms of section 5, Act 19 of 1941 exempted from furnishing security to the Master of the Free State High Court.

65.15 The provisions of section 78 and 83 of Act 66 of 1965 shall not apply to the *curator bonis* but he shall be

obliged to report to the board of control of the Attorney's Fidelity Fund in terms of paragraph 63.7(n) hereof.

M. H. RAMPAL, AJP

I concur.

L. J. LEKALE, J

On behalf of applicant: Adv. J. Els
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of respondent: No appearance

/eb