IN THE HIGH COURT OF SOUTH AFRCIA

(NORTH GAUTENG HIGH COURT, PRETORIA)

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

27.2.2012
DATE

SIGNATURE

CASE NO: 70383/10

29/2/2012

IN THE MATTER BETWEEN:

THE LAW SOCIETY OF THE NORTHERN PROVINCES **APPLICANT**

(Incorporated as the Law Society of the Transvaal)

And

BAREND JACOBUS BURGERS **RESPONDENT**

JUDGMENT

TOLMAY, J:

[1] An order was granted on 24 February 2012 and we indicated at the time that reasons for that order will be given during the week of 27 February 2012. The reasons for the order follow:

[2] On 7 December 2010 the applicant brought an urgent application for the suspension of the respondent in terms of sec 22(1)(d) of the Attorneys Act 53 of 1979 (the Act) from practice as an attorney. The respondent filed opposing papers but despite this an order to that effect was granted.

[3] The respondent filed an application for leave to appeal to this order, which was withdrawn in due course. The respondent tendered the wasted costs occasioned by that application.

[4] The applicant now seeks an order in terms of sec 22(1)(d) of the Act for the removal of the respondent's name from the roll of attorneys with ancillary relief on the ground that the respondent is no longer a fit and proper person to practise as an attorney. No one appeared on behalf of the respondent at the hearing of this application.

[5] The respondent was admitted as an attorney on 17 June 1999 and he practised as a single practitioner for his own account under the name and style of Barend Burgers Attorneys.

[6] The question whether an attorney is a fit and proper person to practise as an attorney requires a three fold enquiry from the Court, namely:

(a) whether the offending conduct has been established on a preponderance of probabilities, if so

(b) it must be decided whether the person concerned is a fit and proper person to practise as an attorney, this requires a value judgment, and if not

(c) it must decide in it's discretion (which also requires a value judgment) whether the attorney should be suspended for a period of time or removed from the roll[1].

[7] A complaint by Enslin Attorneys prompted the applicant to bring this application. Enslin Attorneys, who represented a certain Mr Du Toit complained that Du Toit deposited R70 800-00 into respondent's trust account

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[1] Kaplan v Incorporated Law Society Transvaal 198 (2) SA p 762 at page 782 A-C; Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop 1994(1) SA page 359 at page 369-370; Jasat v Natal Law Society 2000(3) SA 44 (SCA) at 51 B-J and Malan v The Law society of Northern Provinces 568/2007 ZASCA 90 (123/09/2008) at 4 - 9

for a property related transaction. The transaction did not materialize and as a result the respondent demanded repayment of the money. Initially the attorneys had difficulty in contacting the respondent. After sending a letter of demand the respondent on 23 November 2009 made an offer to repay the amount in instalments of R2 000-00 per month. The response sent by the respondent to the attorneys stated that the respondent did not have the funds to pay the amount outstanding. Van Rooyen, the curator, confirmed in his report that as at 17 December 2004 the respondent's trust banking account showed a balance of only R6 409-24. A trust deficit existed in the amount of R64 390-76 on this transaction as at December 2004. The *curator's* report that was filed on 24 January 2012 indicated that the respondent's trust account showed a deficit for approximately six years pertaining to this transaction. The respondent eventually paid R15 000-00 in favour of the complainant on 2 July 2009. The curator's investigation furthermore revealed continuous deficits in the trust account pertaining to various transactions.

[8] After the investigation by the curator it transpired that apart from the aforesaid, several other contraventions of the Act and the applicant's rules by the respondent occurred, the facts pertaining to these contraventions are set out in the curator's report. The following are examples of these contraventions:

a) The respondent confirmed to the curator, Mr Van Rooyen that he had access to the firm's trust account through his business account which made it possible for him to effect payments from the trust account into the business account from automated teller machines.

b) The respondent also told Mr Van Rooyen that amounts were transferred from the trust account to the business account when he exceeded his overdraft facility on his business account. Respondent explained that the business banking account had an overdraft facility of R25 000-00 and transfers were made when this limit was almost exhausted. In the premises transfers were made from the trust account into the business account in an irregular manner.

c) The respondent's firm's accounting records were inadequate and no supporting documents were made available to Mr Van Rooyen except for certain trust bank statement and files.

d) The respondent advised Mr Van Rooyen that since the inception of his firm he has not kept any business accounting records and never submitted tax returns.

e) The respondent filed unqualified audit reports for the periods ending 2007, 2008, 2009 and 2010, in the light of various irregularities the reports should not have been unqualified.

f) An inspection of files of a number of clients followed. The curator reported that the respondent utilised one client's funds to subsidise another client, and by so doing misappropriated the client's trust funds. fees debited did not correspond with the time at which the work was concluded and fees were debited in an irregular manner.

[9] The respondent contravened the following rules of the applicant:

- Section 78(1) of the Act in that the Respondent failed to keep sufficient funds in his firm's trust banking account to satisfy his obligations to trust creditors. Read with Rules 68.3 and 69.5 in that the trust account was not used as it should have been used and therefore is at risk of having lost its identity;

- Sections 78(4) of the Act read together with Rules 68.1 and 68.2 of the Rules in that the Respondent's firm did not retain such accounting records as are necessary to represent fully and accurately in accordance with generally accepted accounting practice the transactions and records containing particulars and information of all moneys received, held and paid by it for and on account of any person;

- Rule 68.5 of the Rules in that the Respondent failed and/or neglected to regularly and promptly update his firm's accounting records;

- Rule 89.7 in that the Respondent, without lawful excuse, delayed the payment of trust money after due demand was given to him;

- Rule 68.7 in that the Respondent did not, within a reasonable time after the performance or earlier termination of his mandate, account to his client in writing;
- Rule 68.8 in that the Respondent did not pay any amount due to his client within a reasonable time; and
- Section 70 of the Act in that the Respondent initially refused to comply with a direction of the Applicant to produce for inspection to a person authorised thereto the account records of the firm.

[10] In his opposing affidavit the respondent states as follows:

"I struggle with the bookkeeping part of my practice and I was merely trying to survive. I only had Std 7 accounting, and barely scraped through the bookkeeping admission exam. But because I could not afford a bookkeeper I was forced to do the bookkeeping, and I wish I had alternatives to consider at the stage, but I did not. I believed that all I have to do is keep on practicing and that someday I will get the breakthrough, but the breakthrough came later than I anticipated".

"I know that my bookkeeping was wrong, and I believe I have been blind to the extent that my trust account bookkeeping has deteriorated. Mr Van Rooyen opened my eyes to all the deficiencies in my firm's administration".

"I submit that at the time of drafting this opposing affidavit my trust creditors have all been paid where there were trust deficits".

[11] He then goes further to say that he should be allowed to practise as an attorney under supervision. This excuse for the respondent's failure certainly does not suffice and is totally unacceptable.

[12] As was stated in **Law Society v Matthews[2] :**

"*Failure to keep proper books of account is a serious contravention and renders an attorney liable to be struck off the roll of practitioners or liable to suspension; and the Courts have repeatedly warned practitioners of the seriousness of such a contravention. See* Cirota and Another v Law Society, Transvaal *(supra at 193 F-G). The seriousness is again underlined in rule 89 read with rule 89.11 of the applicant's rules which provides that it is unprofessional; or dishonourable or unworthy conduct on the part of a*

[2] 1989(4) SA 389 at p 395 E-F

practitioner to contravene the provisions of the Attorneys Act or the applicant's rules."

[13] The respondent's response to the curator's report as contained in his letter of 19 December 2010 is superficial and does not deal with the contraventions of the applicant's rules. I must also state that his actions illustrate that he does not merely lack the necessary bookkeeping skills, but impact directly on the question of whether he is a fit and proper person to practise as an attorney. It is clear that he does not take responsibility for his actions nor does he show any insight in his failure to act professionally. The respondent pertinently refrained from dealing with the facts and allegations contained in the applicant's affidavit and the curator's report.

[14] After evaluating all the facts I am satisfied that the offending conduct has been established. The nature of the respondent's conduct is of such a nature and deviates to such an extent from what is required of an attorney that I am satisfied that he is not a fit and proper person to practise as an attorney.

[15] In the exercise of that discretion, and having due regard to the facts in this case, I am satisfied that the respondent's name should be removed from the roll. The contraventions especially his abuses of his trust account and his inability to take responsibility for his conduct supports this conclusion. His conduct poses a real threat to clients and cannot be condoned or tolerated.

R G TOLMAY

JUDGE OF THE HIGH COURT

I agree, and it is so ordered:

B R SOUTHWOOD

JUDGE OF THE HIGH COURT