IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 12072/2012

Date: 7 December 2012

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

7/12/2012
DATE SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES Applicant

And

ROLAND NDLOVU Respondent

JUDGMENT

PRETORIUS J.

[1] The applicant is applying for the suspension of the respondent from the roll of attorneys. Although the respondent filed a notice of intention to oppose, he failed to serve and file an opposing affidavit.

[2] The applicant alleges that the respondent is no longer a fit and proper person to practice as an attorney. The respondent was admitted as an attorney of this court on 23 July 2007 and his name is still on the roll. He is currently practising as an attorney of this court as an associate of the firm Ntabeni attorneys at 509 Central Office Towers, 286 Pretorius Street, Pretoria.

[3] The reason for alleging the respondent is no longer fit and proper to practise as an attorney is that he failed to cooperate with the Law Society in a proposed inspection of his accounting records and practise affairs; failed to timeously submit his Rule 70 auditor's report for the year ending 28 February 2009 to the Law Society; failed to comply with an order of a disciplinary committee of the Council; failed to pay the Law Society a fine imposed by a disciplinary committee of the Council; failed to honour an undertaking to the Law Society to pay an outstanding fine; failed to notify the Law Society of his change of address; failed to attend meetings of a disciplinary committee of the Council.

[4] Mr AWP van Rooyen, a management consultant and forensic investigator, was instructed by the applicant on 12 January 2010 to visit the respondent and to conduct an inspection of his accounting records and practice affairs. Mr van Rooyen reported to the society in writing on 19 April 2010. According to Mr van Rooyen's report the respondent

failed to cooperate with Mr van Rooyen and to furnish the Law Society with his proper accounting records.

[5] On 19 August 2010 the applicant notified the respondent to appear before a disciplinary committee of the Council on 15 September 2010 to answer to the charges of contravention of Rules 89.25; 70.4 read with 70.3; 76.2 read with Rules 76.1.2 and 76.1.3.1.

[6] The respondent failed to attend the disciplinary hearing on 15 September 2010. On 17 December 2010 the respondent was notified to appear before a disciplinary committee of the council on 16 February 2011 on the abovementioned charges, as well as a charge that he is guilty of unprofessional or dishonourable or unworthy conduct on the part of a practitioner in that he failed to appear before a disciplinary committee of the Council of the Law Society of the Northern Provinces at a meeting held on 15 September 2010, although he was duly requested to do so.

[7] Once more the respondent failed to attend the disciplinary proceedings of the committee on 16 February 2011. On 18 February 2011 a meeting took place between the respondent and Mr Jaco Fourie, a senior legal official in the employ of the Law Society. The respondent undertook to pay the fine. He furthermore undertook to furnish the required information.

[8] Thereafter the respondent did not contact the applicant at all, which resulted in the applicant to proceed with further disciplinary proceedings. After notification of a disciplinary hearing which would take place on 20 July 2011, the respondent failed to attend.

[9] The disciplinary committee proceeded with the hearing in the absence of the respondent and found him guilty of not co-operating with the applicant's investigator (Rule 89.25); failing to pay the fine imposed by the disciplinary committee on 24 November 2009 (Rule 89.25); failing to honour his undertaking to Mr Fourie on 18 February 2011; failing to supply the applicant with his change of address (Rule 3); conduct unbecoming an attorney by failing to attend the disciplinary hearing on 15 September 2012; and failing to attend a disciplinary hearing on 16 February 2011.

[10] The respondent was informed of these findings by the disciplinary committee by letter on 26 July 2011. A written report in terms of rule 101 was compiled by the disciplinary committee on 16 August 2011.

[11] On 24 August 2011 the applicant addressed a letter to the respondent furnishing him with the report and inviting him to furnish the applicant with his comments, if any, by 23 November 2011. The respondent failed to do so.

[12] The conduct which amounts to unprofessional, dishonourable or unworthy conduct is that the respondent contravened at least the following provisions of the Attorney's Act and the Law Society's Rules: failed to cooperate with the Law Society in an inspection (Section 70); failed to notify the Law Society of his change of address (Rule 3); failed to submit a Rule 70 report timeously (Rule 70); failed to submit a closing auditor's report (Rule 76); failed to reply to correspondence (Rule 89.23); failed to cooperate with the Law Society; failed to return telephone messages; failed to comply with an order of a disciplinary committee; failed to pay a fine imposed by the disciplinary committee (Rule 89.23)

[13] In **Jasat v Natal Law Society 2000 (3) SA 44 (SCA)** the Supreme Court of Appeal held that there are three stages in an application for suspension or striking off the roll of an attorney:

> *""First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities. The second inquiry is whether, as stated in s 22(1)(d), the person concerned 'in the discretion of the Court' is not a fit and proper person to continue to practise. The third inquiry is whether in all the circumstances the person 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.'"*

[14] The court has taken all the charges and the respondent's lack of explanation since February 2009 into consideration. The respondent has had several chances to redeem himself, but has failed to do so. He has not communicated with the respondent at all since his meeting with Mr Fourie. A person who does not comply with the Law Society's rules and do not defer to the Law Society should not be allowed to practice as there is no guarantee that the public will not be prejudiced by the applicant's actions. The only conclusion the court can draw is that the respondent is no longer a fit and proper person to practice as an attorney and he should be suspended.

[15] It is ordered:

1. That Roland Ndlovu (the respondent) is suspended from the roll in his practice as an attorney of this Honourable Court.

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 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); 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 delivers 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; 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, first 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; 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 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 (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.

Judge C Pretorius

I agree,

Judge EM Kubushi

Case number	: 12072/2012
Heard on	: 7 December 2012
For the Applicant / Plaintiff	: Mnr Bloem
Instructed by	: Rooth Wessels Attorneys
For the Respondent / Defendant	:
Instructed by	:
Date of Judgment	: 7 December 2012