



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

23/5/14.
CASE NO.: 58948/2011

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. ✓
<u>26/5/2014</u>	
DATE	SIGNATURE

In the matter between:

LAW SOCIETY OF THE NORTHERN PROVINCES

Applicant

and

MALROSE RAYMOND MOGONGO

Respondent

JUDGEMENT

DE VOS J:

[1] This is an application for the suspension of the Respondent from the roll of practice as an attorney of this Court. The application is unopposed.

[2] The Respondent was admitted and enrolled as an attorney of this Court on 3rd February 2004, whose name is still on the roll of practicing attorneys. The Respondent previously practiced as an attorney of this Court for his own account and is a single practitioner under the style of Malose Mogongo Attorneys at Suite 338, Central House Building, 278 Pretorius Street, Pretoria, Gauteng.

[3] The facts and circumstances which prompted the Law Society to bring the suspension application include the following:

3.1 The Respondent failed to submit the audit reports for the years ending February 2010 and February 2011.

3.2 The Respondent was summoned before the Disciplinary Committee on 11th November 2010 for failing to submit the auditor's report for the financial year 2010.

3.3 The summons could not be served as the Respondent could not be traced.

3.4 The Respondent has abandoned his practice.

[4] It is common cause that the Respondent's current whereabouts are unknown. Several attempts were made to serve this application on the Respondent without any success. On the 7th August 2013 the Applicant obtained a Court Order that service can be effected on the Respondent by publishing the Notice of Motion in this matter in short form in *The Star* and *Citizen* newspapers, which newspapers circulate in the province of Gauteng and South Africa. Subsequently the Notice of Motion was properly published in both *The Star* and *Citizen* newspapers as appears from the newspaper clippings attached to this application, marked "C" and "D" respectively. I have perused both publications and I am satisfied that the date of hearing, namely the 23rd May 2014, together with all other relevant information required by the Respondent, have been properly communicated to the Respondent and that the matter can proceed. The facts upon which the court's discretion is based should be considered in totality and must be proven upon a balance of probabilities. The court must therefore make a value judgment of the Respondent's character, with special reference to his integrity, the standards of conduct, repute and good faith required by his profession; and the standing and image of the

profession. This may be weighed up against the administration of justice in this country and it must be determined whether the Respondent's actions will inspire and maintain the unconditional confidence of the community and the profession's members.

- [5] The Law Society is the *custos morum* of the profession. The question whether an attorney is a fit and proper person in terms of s22(1)(d) of the Act is not dependent upon factual findings, but lies in the discretion of the court. In order to determine whether an attorney should be removed and/or suspended from the roll, the court must decide as a matter of fact, whether the alleged offending conduct by the attorney has been established. If such conduct has been established, a value judgement is required to decide whether the person concerned is not a fit and proper person to practise as an attorney. If the court decides that the person is not a fit and proper person to practise as an attorney, it must decide in the exercise of its discretion whether in all the circumstances of the case, the attorney in question is to be removed from the roll or merely suspended from practise. Ultimately, this is a question of degree.
- [6] The Attorneys' Act and the rules applicable thereto require of an attorney scrupulous observation and compliance with the provisions of the Act and its rules. In terms of Rule 89, any contravention of the provisions of the Attorneys' Act or its rules would constitute unprofessional, dishonourable, and unworthy conduct. The Act and the rules, read with the Common Law, expects from an attorney *uberrima fides* – the highest possible degree of faith – in his dealing with clients, which implies that at all times his submissions and representations to his clients must be accurate, honest, and frank.

- [7] Rule 68 provides that attorneys are required to keep complete and accurate accounting records, which must explain the transactions and financial position of the firm and which must distinguish in regular discernible form between business account transactions and trust account transactions.
- [8] Rule 70 makes further provision for every attorney who practises for his own account to cause his auditor to lodge a report with the applicant within six months of the annual closing of his accounting records. This implies that the attorney should keep proper record, as required by the Attorneys' Act, and further ensures that there should at all relevant times be sufficient funds in an attorney's trust bank account to cover his liability to trust creditors. The lodging of an auditor's report is a prerequisite for an attorney to be issued with a Fidelity Fund Certificate for the commencement of a new year. Failure to submit the Rule 70 report and to practise without a Fidelity Fund Certificate is a criminal offence in terms of the provisions of s81(10) of the Applicant's Rules.
- [9] The Applicant contends that it is of particular importance that the Respondent had to comply with the provisions of the Attorneys' Act and the Applicant's Rules in relation to trust funds of clients which were placed into his custody and control. Therefore, there is no excuse for an attorney not to comply with each and every one of these requirements which directly or indirectly relate to trust money. The unjustifiable handling of trust money is totally untenable and not only frustrates the legal requirements relating to trust money, but also undermines the principle that a trust account is completely safe in respect of money held therein by an attorney on behalf of another person.

- [10] It is common cause that the Respondent failed to submit the Rule 70 auditor's report for the period 2010 and 2011 respectively.
- [11] Section 41(1) of the Attorneys' Act provides that a practitioner shall not practice or act as a practitioner for his own account or in partnership unless he is in possession of a Fidelity Fund certificate. The stipulation is peremptory by nature and the contravention thereof is, in terms of Section 81(10) of the Attorneys' Act, an offence and punishable with a severe fine. The Respondent failed to obtain a Fidelity Fund certificate for the relevant periods referred to above.
- [12] 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 placed his trust creditors, who may suffer pecuniary loss as a result of misappropriation of trust monies, at risk.
- [13] The approach of the court in relation to trust shortages, and a duty of an attorney with regard to trust money, was stated in *Law Society Transvaal v Matthews*, 1989(4) SA 389 (T) at 394 as follows:

I deal now with the duty of an attorney in regard to trust money. Section 78(1) of the Attorneys' Act obliges an attorney to maintain a separate trust account and to deposit therein money held or received by him on account of any person. Where trust money is paid to an attorney, it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that an attorney should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. It is imperative that trust money

in the possession of an attorney should be available to his client the instant it becomes payable. Trust money is generally payable before and not after demand”.

- [14] In *Incorporated Law Society Transvaal v Visser & Others; Incorporated Law society Transvaal v Viljoen*, 1958(4) SA 115 at 118 F – H, it was held:

“An attorney’s duty in regard to the preservation of trust money is a fundamental, positive, and unqualified duty. Thus, neither negligence nor wilfulness is an element of a breach of such duty... It is significant that in terms of s83(13) of the Attorneys’ Act, a practitioner who contravenes the provisions relating to his trust account and investment of trust money will be guilty of unprofessional conduct and be liable to be struck off the roll or suspended from practise”.

- [15] The uncontested evidence against the Respondent is that he failed to submit the audit reports for the years ending 28 February 2010 and 28 February 2011 as required in terms of Rule 70. Secondly, he failed to appear before the Disciplinary Committee of the Applicant on the 11th November 2010. The Respondent was charged with failing to submit the audit certificate for the financial year 2010. However, the charge sheet could not be served on the Respondent, as he could not be traced. Thirdly, it appears that the Respondent has abandoned his practice, and is still failing to submit the required audit reports.

- [16] In my view the Respondent’s conduct amounts to such a material deviation from the standards of professional conduct that he is no longer a fit and proper person to continue to practice as an attorney. Accordingly, in my view, the name of the Respondent should be suspended from the roll of attorneys. I propose that an order be made as set out in prayers 1 – 12 of the Notice of Motion.

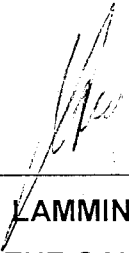
THE FOLLOWING ORDER IS MADE:

1. The Draft Order marked "X" which encapsulates prayers 1 -12 of the Notice of Motion is made an Order of Court in terms of which the Respondent is suspended from the roll of practicing attorneys of this Court.



DE VOS J
JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT

I agree.



LAMMINGA AJ
ACTING JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

PRETORIA on the 23rd DAY OF MAY 2014

BEFORE THE HONOURABLE JUDGE DE VOS & LAMMINGA AJ

CASE NUMBER : 58948/2011

In the matter between :-

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

APPLICANT

AND

MALOSE RAYMOND MOGONGOA

RESPONDENT



Having read the papers filed of record and having heard the attorney for the Applicant,

IT IS ORDERED

1. That **Malose Raymond Mogongoa** (hereinafter referred to as Respondent) be suspended from practice as an attorney of the above Honourable Court until such time as he satisfies the court that he is a fit and proper person to resume practice as an attorney.
2. That Respondent immediately surrender and deliver to the Registrar of this Honourable Court his certificate of enrolment as an attorney of this Honourable Court.

A handwritten signature in black ink, located at the bottom right of the page.

3. That should Respondent fail to comply with the provisions of the preceding paragraph of this order on service of this Order of Court, the Sheriff for the district in which such certificate of enrolments, is empowered and directed to take possession thereof and deliver it to the Registrar of this Honourable Court.
4. That Respondent be interdicted and prohibited from operating on his trust account(s) as defined in paragraph 5 hereof.
5. That **JOHAN VAN STADEN**, the head : members affairs of Applicant, be appointed as a curator to administer and control the trust accounts of Respondent, including accounts relating to insolvent 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 53 of 1979 and / or any separate savings or interest-bearing accounts as contemplated by section 78(2) and / or section 78(SA) 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 ;



- 5.2. 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 ;
- 5.3. subject to the approval and control of the board of control of the fund, to :-
- 5.3.1. recover and receive such funds which may be due to persons in incomplete transactions and to pay same to the credit of the trust account(s) of the Respondent ;
- 5.3.2. if necessary, in the interest 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 which may have been wrongfully and unlawfully paid from trust account(s) of Respondent.



- 5.4. to ascertain from Respondent's accounting records the names of all persons on whose account Respondent appears to hold or to have received trust monies (hereinafter referred to as trust creditors) and to call upon Respondent to furnish him, within 30(thirty) days of the date of service of this order or such further period as he may agree to in writing, with the names, addresses and amounts due to all trust creditors ;
- 5.5. 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 ;
- 5.6. 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 ;
- 5.7. 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 ;



- 5.8. 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 utilize 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 cost, 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;
- 5.9. in the event of there being insufficient trust monies in the trust banking account(s) of Respondent to pay in full the claims of trust creditors, to distribute the credit balance(s) in the trust banking account(s) pro rata amongst the trust creditors whose claims have been provide or admitted ;
- 5.10. 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

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

6. That Respondent immediately deliver his 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 practicing 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 any insolvent estate, or any estate placed under curatorship of which Respondent is the executor, trustee or curator or which Respondent is administering on behalf of the executor, trustee or curator of such estate; and

6.5. Respondent's practice as an attorney of this Honourable Court, to the curator appointed in terms of paragraph 5



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

7. That should Respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on Respondent (as the case may be), the sheriff for the district in which such accounting records, records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator.
8. That the curator shall be entitled to :-
 - 8.1. hand over to the persons entitled thereto all such records, files and documents as soon as he has satisfied himself that the fees and disbursements in connection therewith have been paid or satisfactorily secured or that same are no longer required, provided that a written and signed undertaking by a trust creditor to pay such amount as may be due to Respondent, either on taxation or by agreement, shall be deemed to be satisfactory security for the purposes of the preceding paragraph hereof; provided that such written and signed undertaking incorporated a ***domicilium citandi et executandi*** of such trust creditors ;



8.2. require that any such file, the contents of which he may consider to be relevant to 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 be re-delivered to him(the curator): provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof.

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, 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 traveling time, at the rate of R300-00 per hour ;
 - 10.4. to pay the reasonable fees and expenses of any person(s) consulted and / or engaged by the curator as aforesaid; and
 - 10.5. to pay the costs of this application on an attorney-and-client scale.
11. That Respondent, within 1(one) year of his 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 purporting to be signed by the curator specifying the number of hours spent by him, shall constitute *prima facie* proof of the number of hours spent by him on this matter.
13. That further and / or alternative relief be granted to the Applicant.

BY ORDER

REGISTRAR

