

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT
PRETORIA

23/5/14

CASE NO: 67016/2013

(1)	REPORTABLE: YES <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES <input checked="" type="radio"/> NO
(3)	REVISED: <input checked="" type="checkbox"/>
<p>26/05/14 DATE</p> <p>..... SIGNATURE</p>	

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

Applicant

and

THEBEYANTWA PETRUS HOTANE

Respondent

JUDGMENT

LAMMINGA AJ:

[1] This is an application by the Law Society of the Northern Provinces for an order in terms of s 22(1)(d) of the Attorneys Act 53 of 1979, as amended, for an the removal of the Respondent's name from the roll of attorneys. The application is unopposed.

[2] The Respondent was admitted and enrolled as an attorney of this court on 11 July 2005. He practised as a partner at the firm of Grobler-Ramalepe & Partners with effect from 11 July 2005 until 3 October 2005. The Respondent commenced practising for his own account under the name and style of T P Hotane Incorporated Attorneys currently situated at 2nd Floor, Office No. 7, 347 ILO House, Cnr Hilda & Arcadia street, Hatfield, Pretoria, with effect from 3 October 2005. The Respondent also practiced as a partner at the firm Hotane Snyman & Taljaard Incorporated Attorneys with effect from March 2007 until March 2010.

The Respondent is still on the roll of attorneys of this Court although this Court already granted an order for his suspension from practice on 12 November 2013 pursuant to an urgent application for said relief.

[3] The Law Society is the *custos morum* of the profession and merely places facts before the court for consideration.

[4] The following circumstances were placed before this Court by the Applicant in support of the application:

- (a) The Applicant received twenty nine complaints against the Respondent. These ranged from failure to execute the mandate of clients, failure to respond to Applicant's correspondence, transacting on deceased estate account without consultation or knowledge of clients, failure to account to clients and misappropriation of funds.

- (b) In all of the complaints received by the Applicant, the Respondent was called upon to furnish his explanation, but in most instances Respondent failed to respond to Applicant's correspondence, thereby contravening Applicant's rules.
- (c) Respondent in some instances failed to revert to Applicant after undertaking to do so.
- (d) On several occasions the Respondent appeared before the Disciplinary Committee of the Applicant, was found guilty and sanctioned with fines and cost orders, but failed to pay the fines and cost orders.
- (e) Three disciplinary hearings had been postponed at the request of the Respondent.
- (f) There has been thirteen complaints which represents possible misappropriation of funds:

(i) **Ms R M Masemola:**

The complaint was received on 15 November 2012 the Applicant received a complaint from Ms Masemola in that the Respondent was appointed as executor of the estate of Mr M F Khalo who passed away on 29 May 2007, but he failed to institute a claim against the insurance company and the claim lapsed on 31 October 2009. On 24 August 2012 the Respondent agreed to sell to Ms Masemola the immovable property she had been staying in with the deceased and their two children since 1998 and an amount of R108 000.00 was deposited into the Respondent's firms trust account. The Respondent was to pay this amount over to the attorneys for First National Bank. During August 2012 Ms Masemola received a notice for the sale of the property since First National bank did not receive payment. The Master's Office instructed the Respondent to make the payment, which he failed to do. It was through the intervention of the Master's Office that the

sale was held in abeyance. The Respondent failed to provide an explanation when requested to do so by the Applicant and through his failure to respond contravened the Applicant's rules. A claim has been lodged against the Attorneys Fidelity Fund. Respondent, it was submitted, thus contravened Rules 89.23, 89.25, 89.15, 89.30 and 89.7 of the Applicant.

(ii) **Ms G Maphila**

Applicant received a complaint during August 2013 from Ms Maphila stating that during October 2007 she consulted with Respondent and in her capacity as guardian of a minor child gave instructions for a claim for maintenance against the child's deceased father's estate. On 23 June 2011 she received a letter from Respondent confirming that R58 065.00 had been collected, but she did not receive payment from Respondent. Respondent also neglected to pursue a claim against Nedbank. Therefore it was submitted that the Respondent contravened Rules 89.15, 89.30, 89.7 and 68.8 of the Applicant.

(iii) **Ms M J Kekana**

Ms Kekana's complaint was received by the Applicant on 20 September 2012. She stated that during 2007 the Respondent was instructed to assist her to collect money due to her after the death of her son. Despite various undertakings by the Respondent to make payment to her, she has not received any communication from him since 2009 and no payment was made to her by Respondent. On 25 September 2012 the Respondent was requested to comment on this complaint, but he failed to respond to the Applicant's correspondence. Respondent therefore contravened Rules 89.23, 89.25, 89.15, 89.30, 89.7 and 68.8 of the Applicant.

(iv) **Ms H L Legodi**

On 15 August 2013 the Applicant received a complaint from Ms Legodi to the effect that during 2009 the Respondent was instructed to assist her to claim her portion of her deceased husband's provident fund in terms of a divorce settlement. During June 2009 the proceeds were allegedly paid into the trust account of Respondent but Respondent failed to effect payment to her. Again this complain was forwarded to the Respondent for his comment on 26 August 2013, but he failed to respond. Applicant submits that the Respondent contravened Rules 89.23, 89.25, 68.7, 89.7 and 68.8 of the Applicant.

(v) **Mr T N Moeketsi**

On 12 April 2013 Mr Moeketsi filed a complaint with the Applicant, stating that during 2006 he instructed the Respondent to institute a claim against the Road Accident Fund ("RAF") on his behalf, following injuries he had sustained in a motor vehicle accident. Payment was allegedly paid by the RAF to the Respondent in December 2012, but Respondent has not made any payment to Mr Moeketsi and attempts to contact the Respondent had been unsuccessful. Applicant requested Respondent's comment on 29 April 2013, but Respondent failed to respond. In a letter dated 26 June 2013 Respondent advised that the file is with a cost consultant, and undertook to pay Mr Moeketsi upon receipt of the file. Applicant submitted that the Respondent contravened Rules 89.23, 89.25, 68.7, 89.7 and 68.8 of the rules of the Applicant.

(vi) **Mr I S Makgobe**

On 28 June 2013 Mr Makgobe lodged a complaint with the Applicant alleging that during 2008 Mr Makgobe instructed the Respondent to institute claim against the

RAF on his behalf. Respondent failed to report any progress to him and attempts to contact the Respondent were unsuccessful. Eventually Mr Makgobe learnt from the RAF call centre that the claim had been finalized and the payment has been made to the Respondent, but Respondent did not make payment to Mr Makgobe. On 04 July 2013 the Respondent was requested to comment on the complaint but he responded with a letter dated 12 August 2013 advising that he was in the process of arranging an appointment with Mr Makgobe and undertook to advise the Applicant of the outcome. The Respondent, it was submitted, contravened Rules 68.7, 89.7 and 68.8 of the rules of the Applicant.

(vii) **Ms C Mabena**

Ms Mabena filed a complaint with the Applicant on 19 June 2012 alleging that during 2010 she instructed the Respondent to institute a claim on her behalf against the RAF. According to her an amount of R273 329.00 was paid to Respondent on 30 January 2012 and Respondent refused to pay out the money to her alleging that the RAF has not paid his cost. The Applicant requested the Respondent's comment on 25 June 2012 and the Respondent replied with a letter dated 23 July 2012 stating that the said amount was received, that R14 500.00 constituted funeral costs and the rest was to be paid into the Guardians Fund on behalf of the two minor children. Respondent alleged that he was awaiting forms from the Master's Office to enable payment into the Guardian's Fund. One of the said children had already attained age of majority and Applicant submitted that there was no good reason for the delay in payment and no requirement that the money had to be paid to the Guardians Fund. A claim has been lodged against the Attorneys Fidelity Fund in an amount of R258 829-00. It was submitted that the Respondent contravened Rules 68.7, 89.7 and 68.8 of the rules of the Applicant.

(viii) **Vorster & Brandt Attorneys on behalf of Mr Njosana**

The firm of Vorster & Brandt Attorney ("the firm") lodged a complaint with the Applicant on behalf of Mr Njosana alleging that Mr Njosana had instructed the Respondent in to attend to his claim against the RAF. The matter was set down for trial on 11 October 2011, but since then Mr Njosana did not hear from Respondent and attempts to contact Respondent was unsuccessful. Correspondence addressed to Respondent by the firm also went unanswered and eventually upon enquiry at the RAF on 25 October 2012 it was established that the RAF paid an amount of R30 000-00 to Respondent on 14 December 2011. Respondent confirmed during a telephone conversation on 25 October 2012 that he was unable to effect payment as he was unable to contact Mr Njosana. Respondent undertook to attend to the matter that day but failed to do so. On 31 October 2012 the firm received a letter from Respondent confirming that an amount of R25 981.74 was due to Mr Njosana and he was requested to effect payment into the firm's trust account, which he did not do. Attempts to contact Respondent afterwards were unsuccessful. On 18 December 2012 the Applicant requested the Respondent's comment, which he failed to respond to. A claim has been lodged against the Attorneys Fidelity Fund for R25 981.74. Applicant submitted that the Respondent contravened Rules 89.23, 89.25, 89.7 and 68.8 of the rules of the Applicant.

(ix) **Boonzaaier & Du Plessis Attorneys on behalf of Ms Burger**

On 24 January 2012 the Applicant received a complaint from Boonzaaier & Du Plessis Attorneys ("the firms") on behalf of Ms Burger who had instructed the Respondent to attend to the administration of her late husband's estate. The firm had made several enquiries via correspondence to determine what happened to a cash amount of R86 000-00 but Respondent did not respond. The Applicant

requested the Respondent's comment on the complaint on 30 January 2012 but Respondent failed to respond. A claim has been lodged against the Attorneys Fidelity Fund in an amount of R86 000-00. Applicant submitted that the Respondent contravened Rules 89.23, 89.25, 68.7, 89.7 and 68.8 of the Rules of the Applicant.

(x) **Ms L B Matlhage (Mapuru)**

On 22 November 2011 the Applicant received a complaint from Ms Matlhage alleging that the Respondent was instructed to attend to the finalization of her claim against the RAF. An amount of R240 000-00 were paid into the Respondent's Trust account on 15 December 2010 but Respondent has failed to make any payment to Ms Matlhage. The Applicant requested Respondent on 29 November 2011 to comment on the complaint, but this went unanswered. As did the Applicant's correspondence dated 1 February. On 27 September 2011 Respondent was advised that disciplinary action will be instituted against him and in a letter dated 16 April 2012 Respondent was called to appear at a disciplinary hearing on 4 June 2012. At the hearing on 4 June 2012 Respondent requested a postponement as he had to attend to an urgent application regarding money fraudulently transferred from one of his estate accounts and the hearing was postponed. In a letter dated 23 July 2012 Respondent advised that Ms Matlhage was paid R200 000-00 and the matter had been resolved. He was requested to furnish the Applicant with proof of payment, which he failed to do. An investigation of the Respondent's firm's accounting records revealed that only an amount of R140 000-00 were paid to Ms Mathlage (Mpuru). Therefore it was submitted that the Respondent contravened Rules 89.23 and 89.25 of the Applicant.

(xi) **Mr I D Msimango**

Mr Msimango lodged a complaint with the Applicant on 8 June 2011 alleging that he instructed the Respondent to institute a claim against the RAF on his behalf. The Respondent undertook to effect payment to him on 30 September 2009, but failed to do so. Upon enquiry at the RAF Mr Msimango was informed that the RAF had paid an amount of R51 500-00 to the Respondent on 16 July 2009. The Applicant requested the Respondent to comment on the complaint on 28 June 2011, which he failed to do. On 25 August the Respondent was cautioned that disciplinary action would be taken against him, unless he responded, again he failed to respond and on 4 October 2011 Respondent was informed that disciplinary action will be instituted against him. Respondent was called to appear at a disciplinary hearing on 27 February 2012 which he attended. Respondent was found guilty of contravening Rule 89.25 of the Applicant's rules and fined R5000-00 of which half was suspended for three years on condition that Respondent not commit a similar offence during the period of suspension. Respondent had to pay the R2500-00 fine within 12 months which he failed to do. Applicant submitted that the Respondent contravened Rules 89.23, 89.25, 68.8 and 89.8 of the rules of the Applicant.

(xii) **Mr M Nkwe**

On 22 August 2012 Mr Nkwe filed a complaint with the Applicant stating that during 2009 he instructed Respondent to represent him in divorce proceedings and paid to Respondent fees in excess of R80 000-00. An amount of R216 000-00 was due to Mr Nkwe, and Respondent failed to effect payment. The Applicant requested the Respondent to comment on the complaint on 11 September 2012 to which Respondent replied that he was attending to payment. On 18 December 2012 Respondent was cautioned that should he fail to respond with more detail,

disciplinary action would be instituted against him. On 1 July 2013 Respondent was advised that disciplinary action will be instituted against him. The Respondent, it was submitted, contravened rules 89.23, 89.25, 89.7 and 68.8 of the rules of the Applicant.

(xiii) **Mr R I Molefe**

Mr Molefe filed a complaint with the Applicant on 4 May 2011 alleging that during 2005 he instructed the Respondent to institute a claim on his behalf against the RAF. He alleges that his claim was settled on 28 July 2010 and an amount of R164 611.37 was paid to the Respondent but Respondent never made any payments to him. He also alleges that the Respondent borrowed R3000-00 from him in 2005 to start his practise and that the loan was never repaid. Applicant requested the Respondent to comment on the complaint on 5 May 2011, but Respondent failed to respond. In a letter dated 26 July 2011. Respondent denied having borrowed money from Mr Molefe and stated that the delay in payment of the proceeds from the RAF was due to him being too busy. Eventually Respondent paid R109 207.37 to Mr Molefe on 13 June 2012. The Applicant requested the Respondent to provide reasons for paying R3000-00 to Mr Molefe and why he took the attorney and own client fees as well as the party-and-party fees paid by the RAF. Respondent did not reply. In a letter dated 23 April 2012 the Applicant informed the Respondent that he is required to appear before a disciplinary hearing on 30 May 2012. That hearing was postponed sine die as Respondent briefed council the day before. An investigation of the Respondent's firm's accounting records reveal that an amount of R605 451.13 was received by Respondent in May 2012 but only R228 230.98 was paid to Mr Molefe. Applicant submitted that the

Respondent contravened Rules 89.23, 89.25, 89.7 and 68.8 of the rules of the Applicant.

(g) The accounting records of the Respondent's firm were investigated by a chartered accountant duly qualified to conduct such investigation, Mr Vincent Faris. He found that the Respondent contravened:

- a. Section 78(1) of the Act read with Rule 69.1 in that the Respondent failed to keep sufficient funds in the trust account to meet his obligations to trust creditors, since there were trust deficits at the end of each month;
- b. Section 78(4) of the Act read with section 78(6)(d) of the Act in that he failed to keep proper accounting records as contemplated in the subsection as he found data had been manipulated.
- c. Rule 68(1) read with Rule 68.5 in that Respondent failed to keep proper business account records as he found that business account records were not up to date.

Due to the circumstances set out above, the Applicant submits that the Respondent is not a fit and proper person to practice as an attorney and his name should be removed from the roll of attorneys of this court.

[5] Section 22(1)(d) of the Attorneys Act 53 of 1979 ('The Act") reads as follows:

'Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the Court within the jurisdiction of which he practises -

....

(d) if he, in the discretion of the Court, is not a fit and proper person to continue to practise as an attorney.'

This section confers a discretion on the court in the determination of whether or not an attorney is a fit and proper person. This discretion must be exercised based on facts placed before it and these facts must be proven on a balance of probabilities and these facts should be considered in their totality, not in isolation. (***Law Society of Transvaal v Mathews*** 1989 (4) SA 389 (T))

[6] The court must first determine whether the offending conduct has been established. Once the facts are established, a value judgment is required to decide whether the person is a fit and proper person to practice as an attorney. If the court decides that the person is not a fit and proper person to practice 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 practice. Ultimately it is a question of degree. The facts upon which the court is to exercise its discretion must be proved on a balance of probabilities and the court should consider the facts in their totality and not consider each issue in isolation. (See ***Mathews*** case *supra*)

[7] The law requires from an attorney to *uberrima fides* – the highest degree of good faith – in his dealings with his clients which implies that at all times his submissions to his clients should be accurate, honest and frank. This also requires from an attorney never to abuse his position of trust and the fiduciary relationship that exists between an attorney

and client. The Act and the Rules of the Applicant requires an attorney to be scrupulous in his observations and compliance with the Act and the said Rules.

[8] Rule 89 stipulates that any contravention of the Act or the Applicant's Rules would constitute unprofessional, dishonourable and unworthy conduct.

[9] Rule 68 provides that attorneys should keep complete and accurate accounting records, which must explain the transactions and financial position of the firm and which must distinguish in readily discernable form between business account transactions and trust account transactions.

[10] Section 70 of the Act empowers the Applicant to direct an attorney to provide it with any document which is in the possession of such an attorney and which relates to his practice to enable the council to decide whether or not a disciplinary enquiry into the conduct of such attorney should be conducted.

[11] Section 78(5) of the Act empowers the Applicant to inspect the accounting records of any attorney in order to satisfy itself that the provisions relating to keeping of trust banking accounts and maintaining of proper accounting records relating to trust monies have been observed.

[12] Rule 70.4 read with Rule 70.3 requires every attorney who practices 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 to the effect that the attorney has kept such

records as required by the Act and the Applicant's Rules and further to the effect that there were at all relevant times sufficient monies in his trust bank account to cover his liabilities to trust creditors. Lodging of an auditor's report is a prerequisite for an attorney to be issued with a fidelity fund Certificate for the commencement of the new year.

[13] The other rules relevant to this application are quoted below:

"Rule 68

68.7 Every firm shall within a reasonable time after the performance or earlier termination of any mandate account to its client in writing. Each account shall contain—

68.7.1 details of all amounts received by it in connection with the matter concerned, appropriately explained;

68.7.2 particulars of all disbursements and other payments made by it in connection with the matter;

68.7.3 fees and other charges charged to or raised against the client and, where any fee represents an agreed fee, a statement that such fee was agreed upon and the amount so agreed;

68.7.4 the amount due to or by the client; and the firm shall retain a copy of each such account for not less than five years.

68.8 Payment of amounts due to clients.

A firm, unless otherwise instructed, shall pay any amount due to a client within a reasonable time."

"Rule 89:

Unprofessional or dishonourable or unworthy conduct on the part of a practitioner shall include, inter alia, the following acts and omissions:

...

89.7 without lawful excuse delaying the payment of trust money after due demand;

...

89.15 neglecting to give proper attention to the affairs of his/her clients;

...
 89.23 failure to answer or appropriately to deal with within a reasonable time any correspondence or other communication which reasonably requires a reply or other response;
 ...

89.25 failure to comply with an order, requirement or request of the council or a request of the secretary;
 ...

89.30 without reasonable cause or excuse, failing to perform professional work, or work of a kind commonly performed by a practitioner, with such a degree of skill, care or attention, or of such a quality or standard, as in the opinion of the council may reasonable be expected.”

[14] In this case the facts placed in evidence are undisputed and I find that, on a balance of probabilities the facts have been proved. From the facts so proved it is established that the Respondent on several occasions contravened the Rules of the Applicant in that:

- (a) He failed to, within a reasonable time, after performance or earlier termination of the mandate received from the client, to furnish the client with a written statement of account setting out with reasonable clarity full details and descriptions of all monies received, all disbursements and other amounts paid, fees and charges and the amount due to or by the client;
- (b) He failed to pay the amount due to a client within a reasonable time;
- (c) He, without lawful excuse, delayed the payment of trust money after due demand;
- (d) He neglected to give proper attention to the affairs of his client;
- (e) He failed to respond to, or appropriately deal with, within a reasonable time, any communication which reasonably required a response;

- (f) He failed to comply with an order, requirement or request of the Applicant;
- (g) He failed, without lawful cause or excuse to perform work of a kind commonly performed by a practitioner, with such degree of skill, care and attention, or of such a quality or standard, as in the opinion of the council may reasonably be expected;
- (h) He had failed to keep proper accounting records;
- (i) He failed to keep sufficient funds in his trust account to meet his obligations to trust creditors and failed to keep proper accounting records of his business account.

[15] The conduct of the Respondent is to say the least, shockingly brazen. He blatantly neglected his duty towards his clients, behaved in an extremely dishonourable way and showed no regard or respect for the provisions of the Act or the Rules of the Applicant. There is no excuse for receiving money on behalf of a client and not accounting to the client as to the proceeds and deductions or not paying out the money due to a client on demand. I am not going to deal with each of the complaints separately as I have already found that on each instance he contravened the Act and or the Applicant's rules, but I will refer to some instances just to underline the gravity of the Respondent's dishonourable and unworthy conduct. In some instances like for example the complaint by Mr Molefe, he only made payment to the client two years after the money was paid to him by the RAF and then only after the complaint was filed. In Ms Matlhage's case he was blatantly dishonest. He reported to the Applicant that he paid R200 000-00 to her, but his accounting records reflect that he only paid her R140 000-00, again two years after he received the money and payment was only made after the Applicant intervened. The fact that he clearly, on the evidence tried to avoid or delay making payments to clients, that he did not respond when the clients and the Applicant made enquiries, made false reports as

to the amounts paid, failed to provide proof of payment when requested, and failed to make payments to clients after giving an undertaking to pay coupled with the fact that he had a trust deficit each month, is indicative of a strong likelihood of misappropriation of funds.

[16] It is further clear from the Curator's report that the Respondent was not co-operative and actually delayed and frustrated the curator's efforts in not making files and accounting records available. It was only after the Curator had put a hold on the Respondent's trust account that the respondent made contact with the Curator. All previous efforts by the Curator to communicate with the Respondent were unsuccessful.

It was stated in ***Botha and Others v Law Society, Northern Provinces*** 2009 (3) SA 329 (SCA) at [18]

" The iniquity of an attorney being dishonest is self-evident. The degree of disclosure and openness required of an attorney in proceedings of this nature has been stated repeatedly. In Prokureursorde van Transvaal v Kleynhans 1995 (1) SA 839 (T) at 853G - H it was eloquently stated as follows:

Uit die aard van die dissiplinêre verrigtinge vloei voort dat van 'n Respondent verwag word om mee te werk en die nodige toeligting te verskaf waar nodig ten einde die volle feite voor die Hof te plaas sodat 'n korrekte en regverdige beoordeling van die geval kan plaasvind. Blote breë ontkenning, ontwykings en obstruksionisme hoort nie tuis by dissiplinêre verrigtinge nie."

[17] Considering the facts and circumstances in its totality I find that the Respondent has shown on several occasions that he does not adhere to the *uberrima fides* expected of an attorney. He has no regard for the Act and Rules and his conduct amounts to a material deviation from the standards of professional conduct. He is not a fit and proper person to practice as an attorney.

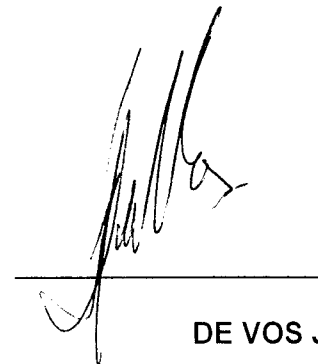
Accordingly, I propose the following order:-

That 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's name is removed from the roll of practicing attorneys of this court.



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

I agree and it is so ordered



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