IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
7/4/2014
DATE SIGNATURE

CASE NUMBER: 54719/2014

In the matter between:

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

AND

BENJAMIN MOODIE **RESPONDENT**

JUDGMENT

LEPHOKO AJ

[1] This is an application by the Law Society of the Northern Provinces (The Law Society) for the striking off of the respondent from the roll of practising attorneys of this court. The application is unopposed.

[2] The respondent was admitted as an attorney on 21 June 1960 and as a conveyancer on 12 February 1968. The respondent practised as an attorney for his own account under the name and style of Ben Moodie Attorneys and Conveyancers (the Firm) as well as a director of Van Den Bogert Goldner Incorporated Attorneys. He closed his practice with effect from 28 February 2014 and resigned as a director of Van Den Bogert Goldner Incorporated on the same day.

[3] After receiving various serious complaints against the respondent the Law Society instructed its auditors and chartered accountants Ms Mapfuno and Mr Reddy to conduct an inspection of the respondent's accounting records and practice affairs.

[4] It is alleged that through the inspection it was discovered that the respondent received moneys paid to him by the Road Accident Fund (RAF) in respect of personal injury claims he was handling on behalf of his clients, into his savings account and not into his trust banking account. The RAF payments received into his savings account included capital amounts and costs settled by the RAF. The respondent handled these moneys in contravention of section 78(1) of the Attorneys Act 53 of 1979 (the Attorneys Act). This rule makes it mandatory for a practising attorney to open and keep a separate

trust banking account for the deposit therein of the money held or received by him on account of any person.

[5] The respondent subsequently transferred the moneys deposited into his savings account to a money market account held by him in his personal capacity, alternatively to his firm's business banking account. He paid his clients from the business banking account and transfers were made from the money market account to the business banking account for the purpose of making payments to his clients. Depositing trust funds into a business banking account is a contravention of rule 68.6.1 of the rules of the Law Society.

[6] By depositing clients' moneys in a savings account and the money market account the respondent placed the trust creditors' deposits and the Attorneys Fidelity Fund at risk as the funds were not protected by sections 78(1), 78(2)(a) and 78(2A) of the Attorneys Act as the funds became open to attachment by creditors of his estate in the event of a claim against his estate.

[7] The respondent held several banking accounts including a trust banking account which he used to hold his personal funds. He held a savings account which he used as a "trust banking account" for receiving trust funds although this account is not recorded in the records of the Law Society.

[8] The respondent held the money market account which he used to receive trust funds. He retained the interest earned in this account despite the fact that this interest is payable to the Attorneys Fidelity Fund. His son who was not a partner or employee of his firm was also a signatory to the money market account and was authorized to effect transfers from the account. The respondent held a business banking account in which he received business funds, paid business expenses and also made payments to trust creditors.

[9] The respondent held an account in the name of Iceland Industrial Projects (Pty) Ltd (Iceland), through which he created his online banking profile. All his accounts were linked to the Iceland account and if he made payments from any of his accounts the payment receipts misrepresented that the payments were made from the Iceland account. The respondent transferred funds from the savings account and the money market account to the Iceland account and made payments from the Iceland account to the money market account. All interest earned on the savings account and the money market account, including interest on trust deposits made into these accounts was for the benefit of the respondent only.

[10] The respondent ignored advice by Mapfumo and Reddy on how to handle trust funds, failed to take corrective action and persisted in deliberately contravening the provisions of section 78(1) of the Attorneys Act long after this advice. He informed Mapfuno and Reddy that he had always handled trust funds in this manner. This

disclosure by the respondent is very disturbing given the fact that he had been in practise as an attorney for just over 54 years.

[11] The investigation revealed that the respondent did not keep cash books or prepare and keep detailed ledger accounts of his clients. He accounted for receipts and payments in respect of clients' funds in an Excel spreadsheet in a form of a reconciliation which left the information open to manipulation. It was difficult to establish the correct trust position of the firm as not all the firms' clients were accounted for in the money market account reconciliation. The rule 70 auditors report for the period ending 28 February 2013 was unreliable as it did not reflect the balances of the money market account. The respondent contravened section 78(4) of the Attorneys Act read with rule 68(1) of the Law Society's rules by failure to keep proper accounting records in respect of his practice. The respondent also failed to perform a trust creditor's reconciliation as required by rule 69.7.1 of the rules of the Law Society.

[12] The respondent credited fees and disbursements due to the firm to himself and the difference to the clients' accounts and took the interest earned. It was not possible to distinguish between fees due to the firm and recoverable disbursements as the respondent failed to keep a proper fee transfer journal in respect of fee transfers from the trust banking account to the business banking account. The respondent did not account to clients in respect of interest earned on the trust funds and the amounts paid by the RAF in respect of the party and party costs. This amounted to a contravention of

rule 68.7 of the rules of the Law Society. The investigation found that there was a trust deficit in the respondent's books in the amount of R2 908 800-02.

[13] The Law Society received an enquiry from the Special Commercial Crimes Unit regarding suspicion that the respondent was involved in irregular dealings concerning the way he accounted for moneys received from the RAF. It also received various complaints concerning the respondent which including a complaint by Mr GM Boshomane that the respondent had failed to account to him in respect of his third party claim. The RAF had paid his claim on 28 March 2012 and the respondent received the payment into the money market account on 30 March 2012 and only prepared a statement of account and transferred R517 900-00 to a trust established for the benefit of Boshomane on 15 October 2012. The respondent failed to pay the interest accrued on Boshomane's money to him. The manner in which the respondent dealt with Boshomane's money constitutes a contravention of section 78(4) of the Attorneys Act read with rule 68.1 of the Law Society's rules.

[14] Ms Jeniffer S Goodall complained that she instructed the respondent to act on her behalf in a third party claim. She alleged that the respondent was entitled to a fee of 25% of the capital amount paid by the RAF in terms of a contingency fee agreement but charged her in excess of what was allowed in terms of the contingency fee agreement. The respondent failed to fully account to Goodall in respect of all moneys received and paid on her behalf in the matter. There was no detailed ledger account in respect of this matter and the funds were not accounted for in the reconciliation of the money market

account. In so doing the respondent contravened the provisions of section 78(4) of the Attorneys Act and rule 68(1) of the rules of the Law Society.

[15] The Schalk Willem Vermaak Trust complained that the RAF had paid an amount of R740 384.96 to the respondent on its behalf and the respondent debited a percentage of the capital amount as a fee plus VAT where there was no contingency fee agreement in respect of the matter. The proceeds of the claim were also not paid into the firm's trust banking account. The respondent deducted disbursements in the amount of R103 023-50 from the amount due to Vermaak. He taxed the party and party costs at R135 933-92 but failed to account for the party and party costs to Vermaak although he had already recovered his fees. He also did not account to Vermaak in respect of interest earned on the moneys received and held by him on behalf of Vermaak. By this conduct the respondent contravened the provisions of rule 68.7 of the Law Society's rules.

[16] In the matter of LL Swart and the RAF the respondent had entered into a contingency fee agreement with Swart's *curator ad litem.* Swart complained, *inter alia*, that the respondent had not accounted to her properly in terms of the agreement as he charged her fees equal to 34.85% of the amount received from the RAF and had failed to account for the money received from the RAF in respect of party and party costs. The respondent received payments from the RAF into his savings account.

[17] These proceedings are of a disciplinary nature and *sui generis*. The Law Society brings the application as the guardian of morals of the attorneys' profession. It merely

places facts for consideration by the court in the exercise of its disciplinary function over attorneys as officers of the court to enable it to exercise its discretion as to the appropriateness of a sanction to be imposed in the event the allegation were found to be true. See: *Hassim v Incoprorated Law Society of Natal* 1977 (2) SA 757 (A) at 767C-G; *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 393E; *Cirota And Another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 187H and *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 851G-H.

[12] It has been repeatedly held by our courts that failure to keep proper accounting records is a serious contravention and renders an attorney liable to be struck off the roll of practitioners or liable to suspension from practice. See *Cirota And Another v Law Society, Transvaal* (*supra*) at 193; *Law Society, Transvaal v Matthews (supra)* at 395; Law Society, *Transvaal v Behrman* 1981 (4) 538 (AD) at 559E-F.

[13] In *Law Society, Transvaal v Matthews (supra)* at 394 the court stressed that 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 and that the very essence of a trust is the absence of risk. The court stated that an attorney's duty in regard to the preservation of trust money is a fundamental, positive and unqualified duty and that neither negligence nor wilfulness is an element of a breach of such duty. The court also noted the significance of section 83(13) of the Attorneys Act in terms of which a practitioner who contravenes the provisions relating to his trust account and investment

of trust money is guilty of unprofessional conduct and liable to be struck off the roll or suspended from practice.

[14] The opinion of the Law Society as guardian of the morals of the attorneys' profession is that the respondent is no longer a fit and proper person to practice as an attorney. This opinion of the Law Society carries great weight with the court, although the court is not bound by it. *See Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 78H; *Die Prokureursorde van die Oranje Vrystaat v Schoeman* 1977 (4) 588 (O) at 603A-B.

[13] The report by Mapfumo and Reddy was provided to the respondent for his comment. The respondent replied to the report on 08 May 2014 and did not deny any of the material allegations made against him by Mapfumo and Reddy regarding various serious contraventions of the Attorneys Act and the rules of the Law Society. He instead stated that he is no longer willing and able to practice as an attorney and that he has no objection against his name being removed from the roll of attorneys. The respondent did not deem it necessary to place his version before this court. Given the overwhelming and undisputed evidence of gross misconduct, serious contraventions of the Attorneys Act and the rules of the Law Society by the respondent, this court is satisfied that it has been established on a balance of probabilities that the respondent is not a fit and proper person to practise as an attorney.

In the premises following order is made:

1. The draft order handed in on 31 October 2014 and marked "X" is made an order of court.

A L C M LEPHOKO
ACTING JUDGE OF THE HIGH COURT

And

M ISMAIL
JUDGE OF THE HIGH COURT

Heard on: 31 October 2014.

Judgment delivered on: 07 November 2014.

For the Applicant: Ms M Van Rooyen tt(Attorney)

Applicant's Attorneys: Rooth & Wessels

For the First Respondent:

Instructed by: