REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 28523/2008

Date of Hearing: 02 December 2016

Date of Judgement: 12/12/2016

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED: YES / ~~NO~~

9/12/2016
DATE

SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES Applicant

and

ALEXANDER EVAN Respondent

JUDGEMENT

DE VOS J:

The Application:

[1] This is an application for the removal of the name of the Respondent from the roll of attorneys ito section 22(1)(d) of the Attorneys Act, incorporating the court order of 06 February 2009, which suspends the Respondent from practise as an attorney.

[2] The application suspending the Respondent from practicing as an attorney was served on the Respondent's practise on 23 June 2008. The Respondent opposed the application on 07 July 2008. Between the period 04 August 2008 and 14 October 2008, requests were made to the Respondent to file his answering affidavit. The Respondent failed to do so.

[3] The Applicant proceeded to enroll the application for hearing on 06 February 2009. The Notice of Set Down was served on the Respondent's attorneys on 04 August 2008. The Respondent's attorneys withdrew as attorneys of record on 07 January 2009. The indexes were faxed to the Respondent and also sent to him by registered mail.

[4] On 06 February 2009, the court granted an order suspending the Respondent from practise as an attorney, pending the removal of his name from the roll of attorneys. On 11 May 2011, the Applicant resolved to have the name of the Respondent removed from the roll of attorneys.

[5] The matter was enrolled for final determination on 02 October 2012. On 28 February 2012, the Applicant transmitted the Notice of Set Down to the Respondent by fax and e-mail. It was also served at the Respondent's place of employment on 15 May 2012. The Respondent was therefore sufficiently informed of the date of the hearing of the application.

[6] At the hearing of the matter on 02 October 2012, the Respondent brought an application to have the matter postponed in order to file an answering affidavit. The court *inter alia* ordered the Respondent to file his answering affidavit within 14 days. The matter was postponed *sine die*. On 09 October 2012, the Respondent served a Notice ito Rule 35(12). On 02 November 2012, the Applicant filed its reply to the said notice. The Respondent served his answering affidavit on 16 November 2012. The Applicant filed its replying affidavit on 11 December 2012.

[7] The matter was enrolled for final determination on 11 October 2013. On 04 March 2013, the Applicant served the Notice of Set Down on the Respondent's attorneys. On 20 September 2013, the Applicant filed its Practise Note and Heads of Argument. The Applicant filed Supplementary Heads of Argument on 08 October 2013. On 10 October 2013, a day before the hearing of the application for his removal, the Respondent filed a supplementary affidavit together with his firm's outstanding audit reports for the periods ending February 2007, February 2008 and February 2009. On the same day, the Respondent also filed his Heads of Argument.

[8] At the hearing of the matter on 11 October 2013, the court postponed the matter *sine die* and ordered the Respondent to ensure that the Applicant has full access to the books of account which are in possession of his auditors. The Applicant then instructed its auditor, Mr Ashwin Reddy, to conduct an investigation into the Respondent's firm's accounting records as per the order of 11 October 2013, and to verify the accuracy of the audit reports submitted by the Respondent on 10 October 2013. Mr Reddy's findings are dealt with in the Applicant's replying affidavit which was filed on 13 July 2016.

[9] The matter has again been enrolled for final determination on 02 December 2016. The Applicant filed the Notice of Set Down on the Respondent's attorneys on 19 August 2016. On 26 August 2016, the Respondent filed a Notice ito Rule 35(3). The Applicant responded to the said notice on 12 September 2016. As at date hereof, the Respondent has failed to grant the Applicant access to the accounting records as directed by the order of court dated 11 October 2013.

The Respondent's Supplementary Affidavit filed on 10 October 2013 and the Applicant's reply thereto:

[10] The Applicant furnished its auditor, Mr Reddy, with the Respondent's audit reports with the instruction to verify the reliability and conclusions arrived at by the Respondent's auditors. Reddy

subsequently filed a report dated 04 February 2014, in which he deals with his findings on the execution of the mandate that the Applicant gave him.

[11] It is clear from Reddy's report that he was not given access to the Respondent's firm's trust accounting records, making it impossible for him to determine the firm's trust position. Reddy's exercise was limited to reviewing certain of the bank statements of the Respondent's trust account. Reddy reported that the Respondent transferred monies from the firm's trust account in rounded amounts into the firm's business account. Insofar as no supporting documents were furnished to him, Reddy could not determine if such transfers constituted fees. Reddy also identified some transfers and came to the conclusion that such were suspicious payments insofar as they were described as loans that were made from the firm's trust account to the firm's business account. Reddy was also handicapped by the Respondent's failure to furnish him with the firm's fee journal.

[12] In conclusion, Reddy stated that, in the absence of a complete set of trust accounting records, it was impossible to perform a detailed inspection with a view to making concise conclusions. Further, that information and explanations from the Respondent were required in order to provide a fair inspection of the firm's accounting records. From the foregoing, it is clear that the Respondent did not comply with the court order, thereby obstructing the Applicant in its process of verifying the firm's audit reports. To this extent the Respondent's firm's audit reports cannot be relied upon and are of no assistance to the court.

Merits:

Outstanding Rule 70 audit report:

[13] The Respondent was last issued with a Fidelity Fund Certificate in 2006. The Respondent failed to cause his auditor to lodge an unqualified audit report for the year ending February 2007. The Respondent was called upon to appear before the Applicant's Disciplinary Committee on 07 November 2007 to answer to charges arising from his failure to cause the audit report, for the year ending February 2007, to be lodged and for

practising without a Fidelity Fund Certificate. The Respondent failed to attend the disciplinary enquiry. The hearing was re-scheduled for 29 November 2007 and the Respondent again failed to attend same.

Investigations by Geringer:

[14] Geringer, on behalf of the Applicant, conducted an investigation into the Respondent's practise. Geringer battled since September 2007 for an appointment with the Respondent. She addressed a fax to him advising him that she will visit his offices on 21 November 2007. The Respondent was not present when she arrived and she spoke to Mrs Odendaal, the secretary. No accounting records were available for inspection. Odendaal advised Geringer that the firm's accounting records were with the firm's accountant. Geringer enquired where the firm's trust banking account was held and Odendaal provided Geringer with the account details which in fact were a business account. As no trust accounting records could be found, Geringer was unable to express any opinion in regard to the firm's trust position. The Respondent closed his previous firm Evan & Scop Incorporated on 9 August 2004 but never closed the firm's trust account.

[15] The Respondent contravened:

15.1 Section 41 of the Attorneys Act, Act 53 of 1979 in that he practised without a Fidelity Fund Certificate since 01 January 2007.

15.2 Rule 68.4.2 in that no accounting records were available in the office of the Respondent for inspection.

15.3 Rule 70 in that he failed to file a Rule 70 report for the period ending 28 February 2007.

Complaint by H Van Dyke Attorneys obo L Van Der Spuy:

[16] The essence of the complaint is that the Respondent neglected and failed to give proper attention to the affairs of this client and failed to perform professional work, or work of a kind commonly performed by an attorney with such a degree of skill, care and attention, or of such a quality or standard, as may be reasonably

expected. Further, the Respondent failed to account to client and failed to answer to correspondence sent to him by the Applicant.

[17] The Respondent failed to appear before the Disciplinary Committee on 28 February 2007. The Respondent was again called to appear before the Disciplinary Committee on 01 August 2007. In a letter dated 11 July 2007 the Respondent advised that he will not be in a position to attend the scheduled hearing due to the fact that he will be overseas during that time. The Respondent was requested to furnish the Applicant with proof of same which he failed to do. The Respondent however attended the scheduled hearing and was found guilty of charges relating to the contravention of the Applicant's Rules 68.7, 89.23 and 89.25. A fine was imposed on the Respondent. This conduct constitutes a contravention of the Applicant's Rules 89.15 and 89.30; 89.23 & 89.25

Complaint by Stein Scop Attorneys obo Mr R Fehrsen:

[18] The Respondent failed to carry out instructions given to him by the complainant. The Respondent also continued to act on behalf of the complainant in circumstances where he was conflicted. The Respondent further failed to disclose to the complainant, timeously or at all, that such conflict of interest existed; such conflict resulted in the Respondent failing to protect the interest of the complainant and thereby causing the complainant to suffer financial loss. This complaint was referred to the Respondent for comment but he failed to respond thereto. The essence of the complaint is that the Respondent neglected to give proper attention to the affairs of the complainant and further, that the Respondent, without reasonable cause or excuse, failed to perform professional work, or work of a kind commonly performed by a practitioner, with such a degree of skill and care or attention, or such a quality of standard as may be reasonably expected of an attorney. This conduct constitutes a contravention of the Applicant's Rules 89.15 and 89.30; 89.23 & 89.25.

Complaint by Deon De Bruyn Attorneys obo VRG Telecommunications and Projects (Pty) Ltd:

[19] The essence of the complaint is that the Respondent neglected to give proper attention to the affairs of the complainant and further, that the Respondent, without reasonable cause or excuse, failed to perform

professional work, or work of a kind commonly performed by a practitioner, with such a degree of skill and care or attention, or such a quality of standard as may be reasonably expected of an attorney. The complainant instructed the Respondent to bring a Review Application in the Labour Court against an arbitration award of R230 000.00 which was granted against the company. The Respondent failed to execute his mandate and the complainant was shocked when the sheriff attended at its offices to execute a warrant issued against it for its non-compliance with the award.

[20] As a result of the Respondent's conduct and omissions the complainant's position with regards to the review application was prejudiced and weakened to such an extent that a reasonable apprehension existed that the complainant would not be successful in bringing the review application. Furthermore, additional legal costs had to be incurred by the complainant to remedy or correct, or endeavour to explain the defects or omissions of the Respondent. Senior counsel advised the complainant to settle the matter and an amount of R96 000.00 was paid and a further amount of R15 000.00 in legal fees.. This complaint was referred to the Respondent for comment and the Respondent failed to respond thereto. This conduct constitutes a contravention of the Applicant's Rules 89.15 and 89.30; 89.23 & 89.25.

The Respondent's contentions:

[21] The Respondent contends with the information that Ms Odendaal furnished to Geringer. In his contentions, the Respondent's version is that:

21.1 He maintained separate offices for his practise. His office at Simeka was just down the corridor from Ms Odendaal's.

21.2 Clients who wanted to see him would be brought to one of the boardrooms at Simeka offices for consultation.

21.3 There were books of account and financial system in the computer available in Odendaal's office.

21.4 Odendaal did not have access to the firm's bank accounts and finance records.

21.5 Had the Applicant sought to engage the Respondent, he would have made himself available for that purpose.

[22] It must be borne in mind that the Respondent's version only came after an interim order was granted, in circumstances where the Respondent chose not to contest the version presented by the Applicant when the interim order was granted. Suddenly, on the same papers, not even amplified, the Respondent comes belatedly to contest the veracity of Ms Odendaal's version.

[23] The pertinent question is whether the Respondent's contradiction of Ms Odendaal's version does substantively upset the Applicant's version. Put differently, the question is whether the dispute of fact is relevant to the issues central to the determination of the question whether the Respondent is a fit and proper person to remain on the roll of attorneys.

[24] Another aspect of note is that Geringer reported that there were no accounting records stored at the Respondent's practise. The Respondent contends with Geringer's version by stating that he kept financial records for his practise. However, he does not mention where such records were kept. Such connection is nothing more than a bare denial of the allegation made against him. This is more so in that the Respondent alone could have assisted the court with sufficient details of where the financial records were kept; however, he chose not to do so. It was Odendaal's version given to Geringer that the monies were received into the firm's business account, not the trust account. Even considering the late stage at which his answering affidavit was filed, the Respondent has not produced the financial records of the firm.

[25] The Respondent also disputes that he abandoned his practise. The fact of the matter is that the Applicant had to liaise with Odendaal with regard to the complaints against him. The Respondent was never available to interact with the Applicant despite various calls and appointments made to meet with him.

[26] The Respondent attempted to take issues with Odendaal's version that moneys of the firm were deposited into the business bank account. He contended that Odendaal had no access to the firm's bank account. However, it is not easily understood who had access to the financial records of the firm if Odendaal didn't have, more so when regard is had to the fact that, according to the Respondent, the records were kept at the same office used by Odendaal. It is also worth pointing out that the Respondent did not use the firm's offices; the firm's offices were used by Odendaal. The Respondent also attempted to contradict Odendaal's version as told to Geringer, by alleging that a Ms Anthea Johaar was the one that captured information from accounting source documents. However, no confirmatory affidavit of Ms Johaar was even annexed. Ms Odendaal already informed Geringer that no accounting records were available at the firm. It is surprising that the Respondent, who already alleged that Odendaal had no access to the firm's financial records, would suddenly have electronic records of the firm in her computer in which case she was supposed to grant Geringer access thereto.

[27] The Respondent was not available to engage with the Applicant on any aspect of this matter. Suddenly, after the fact, the Respondent would have this court believe that, had the Applicant engaged him, he would have presented the accounting system and record. With all the opportunities he has had since the start of this litigation, it is surprising that the Respondent has not done such to date. The Respondent would have this court believe his say-so that the firm's books balanced. There were no books available for inspection; consequently, the Applicant could not formulate an opinion on the balancing of the firm's books. Even to this date, and notwithstanding the provisions of the court order of 11 October 2013, the Respondent has not laid his books bare for inspection. It is only the Respondent who could prove a contrary point about the balancing of the books, by subjecting them to an independent audit, which he has not done. Even with the Respondent's convoluted version about appointments made with Odendaal to meet with him, he does not deny that that Odendaal made appointments on his behalf to meet with the representatives of the Applicant.

[28] Insofar as the complaint made by HL van Dyke Attorneys was concerned, the Respondent was found guilty and duly fined. Now, the Respondent claims that he duly accounted to Mr van der Spuy and paid the credit to the client. However, there was no proof of such payment having been made. Such a fact is within the Respondent's personal knowledge and he should have taken the court into his confidence by presenting proof, if it exists at all. It must be remembered that it was in relation to the Van Dyke complaint that the Respondent alleged he was going overseas in order to avoid the disciplinary hearing. However, when taxed with the production of proof of the trip, the respondent could not produce any, and suddenly made an about turn by attending the hearing.

[29] The Respondent now contends that none of the complainants instituted civil claims against him. The Respondent cannot use the fact that the complainants did not elect to prosecute civil claims against him in order to avoid disciplinary proceedings and prescription of claim. The fact of the matter is that there was a complaint made against the Respondent relating to his unprofessional handling of an instruction. Disciplinary action against a practitioner is not dependent on prescription of claim and/or the complainant's pursuit of civil suit against a practitioner. If anything, the Respondent is good at blaming others for his own wrongs. A further example is the Respondent's blaming of his auditor for failure to submit an audit report. It is the responsibility of the Respondent to ensure that such report was submitted.

Determination of a real, genuine and *bona fide* dispute of fact preventing the adjudication of the matter on papers:

[30] There is no genuine dispute of fact preventing the adjudication of the matter on the papers as they stand. Although the Respondent has, to some extent, attempted to contest the contents of Geringer's report, he did no more than to present a bare denial of such averments. In such situation the rule established in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints Pty Ltd* 1984 (3) SA 623** applies. The Respondent did not present any substantive fact to place such issues genuinely in dispute.

[31] In ***John Cecil Wightman t/a JW Construction v Headfour Pty Ltd & Another*** **(66/2007) [2008] ZASCA 6 (10 March 2008)** the following was said:

> *"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."*

See in this regard also ***National Scrap Metal Cape Town & Another v Murray & Roberts Ltd & Another*** **(809/2011) [2012] ZASCA 47 (29 March 2012).**

[32] In order to succeed, the Respondent should have presented facts, which are within his personal knowledge, to counter the Applicant's version. The Respondent's failure to do so means that the court can proceed to accept the Applicant's version.

[33] Three things stand out when regard is had to the Respondent's version, viz:

33.1 He denied that he abandoned his practise.

33.2 He claimed that the accounting records and books were kept at his offices. In addition, he further denies that Odendaal had access to the firm's books and financial records. Further, that the records were at all material times available in Odendaal's office for inspection.

33.3 He denied that he acted unprofessionally in handling client's instructions. Further that neither of the complainants had instituted any civil claims against him.

[34] As already stated hereinbefore, this court should have regard to the fact that the dispute of these issues only came up when the Applicant decided to enroll the application for the removal of the Respondent's name from the roll of attorneys. The Respondent did not have any issues with the facts as contained in the Applicant's founding papers when he decided not to oppose the order for his suspension from practicing as an attorney. The motivation for the dispute now raised by the Respondent is the prevention of loss of livelihood given the fact that the Respondent is now a fulltime director in a company. It appears that he is afraid that if he were to be removed from the roll of attorneys it may result in him losing his employment. It is not explained as to whether the Respondent's current employers are aware of the fact that he was suspended from practising as an attorney. The Respondent also wants the court to believe that Odendaal and the filing clerk only left the Respondent's employ as a result of the court order. There is no merit in this contention. By the time the court order was served at the Respondent's offices, he had already abandoned his practise and was in full-time employment of another company.

[35] The Respondent has not filed any closing audit report as required by the Applicant's Rules. There are no financial records before us today to determine whether the Respondent's books balanced at the time. The absence of any further complaint or civil claim against the Respondent is not decisive on the issue of balancing of trust account books of the firm.

[36] There was no suggestion that Odendaal was fabricating any story for any reason or that Odendaal had an axe to grind with the Respondent, nor was there any suggestion that Geringer did not correctly record her conversation with Odendaal. Geringer's version is supported by correspondence and also the fact that she visited the Respondent's office and found no accounting records. There is therefore no genuine dispute of

fact that this court may refer to oral evidence. The application can be decided on the papers as they stand. Further, the Respondent's version insofar as it attempts to contradict that of the Applicant, should be rejected.

Audit Reports:

[37] The requirements concerning an attorney's financial obligations to the Applicant can briefly be summarised as follows:

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

37.2 Rule 68 obliges every firm of attorneys (which includes a sole practitioner for his own account) to 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.

37.3 Section 78(5) of the Attorneys Act gives the Applicant the power 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.

37.4 Rule 70.4 read with Rule 70.3 requires every attorney who practises for his own account to cause his auditor to lodge a report with the Applicant within 6 months of the annual closing of his accounting records to the effect that the attorney has kept such records as required by the Attorneys 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 liability to trust creditors.

37.5 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.

Applicable Legal Principles:

[38] It is trite law that applications of this nature are *sui generis* and of a disciplinary nature. There is no *lis* between the Law Society and the Respondent. The Law Society, as *custos morum* of the profession merely places facts before the court for consideration. The question whether an attorney is a fit and proper person in terms of Section 22(1)(d) of the Act is not dependent upon factual findings, but lies in the discretion of the court.

[39] In matters of this nature the enquiry which the court must conduct is threefold, namely:

39.1 The court must first decide as a matter of fact whether the alleged offending conduct by the attorney has been established.

39.2 If the court is satisfied that the offending conduct has been established, a valued judgment is required to decide whether the person concerned is not a fit and proper person to practise as an attorney.

39.3 If the court decides that the attorney concerned 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.

The court's discretion must be based upon the facts before it and facts in question must be proven upon a balance of probabilities. The facts upon which the court's discretion is based should be considered in their totality. The court must not consider each issue in isolation. See in this regard ***Law Society of Transvaal v Matthews* 1989 (4) SA 389 (T).**

The Postponement Application:

[40] At the hearing of this application, the Respondent served an application for the postponement of this matter based on a review by the his auditor, who finds no trust deficits for the years 2007 – 2009. Adv.

Oosthuizen SC, who appeared on behalf of the Respondent, contended that the Respondent should not be removed from the roll, but instead be suspended from practise for a further given time. He relied on the decision of ***Malan & Another v Law Society, Northern Provinces*** **2009 (1) SA 216 (SCA)** and specifically on what was said in para 11 thereof. He compared the position of the Respondent to that of an attorney who failed or was unable to administer and conduct his trust account within the prescribed rules of the Society. He contends that although there was a failure to submit the audited trust account timeously, nobody laid a charge against the Respondent that his or her trust monies have gone missing or was lost or stolen. Adv. Oosthuizen also argued that the decision of ***Summerley v Law Society, Northern Provinces*** **2006 (5) SA 613 (SCA)** is authority for the proposition that unless a court finds dishonesty during the first leg of the enquiry it ought not to remove the attorney concerned from the roll. I disagree with this proposition. There is nothing exceptional about the facts before us. This matter has been pending for several years. It was postponed on several occasions to enable the Respondent to prepare and file his audit reports. On 02 December 2016 the Respondent sought a further postponement of the hearing of this matter. After hearing both parties, the application for a postponement was refused for *inter alia* the following reasons:

40.1 The Respondent did not file an affidavit in support of the application for a postponement but relied on the facts contained in the affidavit of Mr Djurle Venter, a registered chartered accountant. Mr Venter's statement is vague. He declares that at the time he signed the "Forms of Insurance Reports by Independent Auditor" in terms of Rule 70 of the Rules of the Law Society of the Northern Provinces for the financial years 2007 to 2009 (the relevant period), he was in possession of the accounting records relating to the attorneys trust accounts of the business of Alex Evan Incorporated (the firm). The Applicant's version is that no such records were received by them. For that very reason the matter was postponed in order to give the Respondent an opportunity to file such audit reports, which was never done in spite of the court order dated 11 October 2013. According to Mr Venter's statement the erstwhile accounting firm "GTV", of which he was a member, only dissolved in 2015. No specific date

is stated. If a file of accounting records and source documents did exist as alleged by Mr Venter (which allegedly cannot be located), it would mean that the Respondent had at least a whole 14 months from 11 October 2013 until the end of December 2014 to obtain such reports from "GTV", which he simply failed to do. In the absence of any explanation from the Respondent one can only conclude that he deliberately failed to comply with the court order.

40.2 Mr Venter does not state where, when and in what form did he receive the information pertaining to the Respondent's trust account. He does not say when he conducted the audits nor does he say when the certificates were issued. Copies of the certificates are glaringly absent.

40.3 Mr Venter's statement, and his calculations, does not contain any actual finding of fact. He says he needs more time before a final report can be submitted. His submission is that there was never any trust deficit. The onus is on the Respondent to prove that there was no trust deficit. The Respondent has failed to do so. The Respondent has also failed to explain where the information relied on by Mr Venter came from. In my view the Respondent is solely to be blamed for the situation. He is abusing the court process and such an attitude should not be allowed as said in the ex-tempore judgment refusing the Respondent's application for a postponement.

40.4 Advocate Oosthuizen's contention that the Respondent's trust account appears to be in order cannot be accepted. In the court order of 11 October 2013, the Respondent was ordered to make his firm's accounting records available to the Applicant. The Applicant furnished Mr Reddy, who is employed by the Applicant, with the Respondent's audit reports for the years ending 2007, 2008 and 2009, with the instruction to verify the reliability and conclusions arrived at by the Respondent's auditors. Reddy filed a report dated 04 February 2014. It is clear from Reddy's report that he was not given access to the Respondent's firm's trust accounting records, making it impossible for him to determine the firm's trust position.

Reddy's exercise was limited to only reviewing certain of the bank statements of the Respondent's trust and business accounts. Reddy identified certain transfers and came to the conclusion that such were suspicious payments insofar as they were described as loans that were made from the firm's trust account to the firm's business account. In this regard Reddy specifically referred to two transactions in the firm's trust account which occurred on 23 October 2007 and on 01 August 2008. From the description of the transactions as appear on the firm's bank statements, it is evident that amounts of R100 000 and R15 000 were transferred from the firm's trust account into the firm's business account as loans. It must be remembered that trust funds do not form part of the assets of a practitioner. If one considers the forgoing transactions then there exists *prima facie* proof of theft of trust funds. This also turns on the dishonesty of the Respondent. On this score alone there is clear evidence of theft and misappropriation of trust funds on the part of the Respondent which, on its own, warrant the removal of his name from the roll of attorneys.

Conclusion:

[41] The facts and allegations set out in the Founding Affidavit constitute sufficient and satisfactory evidence that Respondent has been, and is, guilty of unprofessional or dishonourable or unworthy conduct and, as such, is not a fit and proper person to continue practising as an attorney. If the Respondent's misconduct is taken cumulatively, it has been established that the Respondent's conduct does not meet the standard which is required from an attorney and that his misconduct reveal character defects which cannot be tolerated in an officer of this court. In my view the Respondent is no longer a fit and proper person to practise as an attorney. There is nothing of substance contained in the Respondent's answering affidavit to sway this court to exercise any discretion in his favour. If anything, the Respondent's answering affidavit buttresses the point that the Respondent does not have any regard for the Rules of the Applicant.

[42] The Applicant acts as the *custos mores* of the profession. It is required by law to protect the interests of the public. The Law Society is of the opinion that the Respondent should be struck from the roll. I have duly considered the reasons stated by the Applicant as to why the Respondent should be struck off.

[43] The conduct of the Respondent is to say the least, shockingly brazen. He blatantly failed to comply with the Rules of the Applicant, he ignored the court order granted in 2013, and he abused the court processes. It is clear from the application that the Respondent was uncooperative and that the degree of openness required from an attorney in proceedings of this nature was not complied with. **See *Botha & Others v Law Society, Northern Provinces* 2009 (3) SA 329 (SCA) at p18.**

[44] In my view the facts overwhelmingly prove that no audit reports were filed by the Respondent for the years 2007 to 2009. There is no explanation why this was not done. When the Applicant investigated the matter, the Respondent failed to cooperate. No books could be found and no explanation was forthcoming. During the course of the court process the Respondent deliberately delayed the proceedings seeking a postponement at the last moment thereby abusing the court process. An attorney stands in a trust relation towards his profession and the public. The Rules of the Applicant require an attorney to be scrupulous in is observations and compliance with the Act and the Rules. Rule 88 stipulates that any contravention of the Act or the Applicant's rules, would constitute unprofessional, dishonourable and unworthy conduct. Rule 68 provides that an attorney should keep complete and accurate accounting records, which must explain the transactions and financial position of the firm, and which must distinguish in readily discernible form between business account transactions and trust account transactions. Section 78(5) of the Act empowers the applicant to inspect the accounting records of the Respondent and Rule 70.4, read with Rule 70.3, requires every attorney to lodge a report with the Applicant within 6 months of the annual closing of his accounting records, to the effect that the attorney has kept records as required by the Act and the Rules and to the effect that there were at all relevant times sufficient monies in his trust bank account to cover his trust liabilities. It

is common cause that the Respondent has failed to comply with all these provisions of the Act and the Rules. Even when a disciplinary hearing was constituted, the Respondent failed to attend.

[45] The Respondent also demonstrated a particularly untenable attitude towards the Applicant. Such was manifested by his total disregard of the court order in terms of which he had to file his answering affidavit. Instead of filing his answering affidavit, the Respondent decided to seek discovery of non-existent documents ito Rule 35. Even after it was explicitly explained to the Respondent that the documents contained in the application were all that the Applicant had in the matter, the Respondent insisted on being furnished with non-existent documents. Such attitude even resulted in an aborted application to force the applicant to furnish the documents.

[46] I am satisfied that there is ample proof that the Respondent is not a fit and proper person to remain on the roll of practising attorneys. Not only is he in contempt of a court order dated 11 October 2013, he also failed to file is firm's outstanding Audit Reports for the years 2007, 2008, and 2009. He has not been in possession of a Fidelity Fund Certificate since 2006 and has no intention of obtaining such a certificate. His failure to appear before the Disciplinary Committee and his deliberate omission to cooperate with the Applicant's requests is further evidence of his unfitness to practise as an attorney of the High Court.

Costs

[47] In the Notice of Motion the Applicant seeks an Order that the Respondent should pay the costs of this application on the scale as between attorney and client. Justification for this prayer is found in paragraph 16 of the Founding Affidavit. The Respondent's conduct does not meet the standard which is required from an attorney and that his misconduct has indeed been established. Furthermore, the Respondent's conduct and his omissions reveal character defects which cannot be tolerated in an attorney of this court. The Respondent is in contempt of the order of 11 October 2013 in that he persisted with his failure to allow the Applicant

access to his firm's accounting records, which are allegedly in the possession of his auditors. The Applicant submits that the above Honourable Court should show its displeasure at the conduct of the Respondent in this regard by mulcting him with a punitive cost order. I agree with the Applicant's submissions. There is no reason why other practising and law-abiding attorneys should be held liable for the costs of this application.

I THEREFORE PROPOSE THE FOLLOWING ORDER:

[a] The Draft Order marked "X", which corresponds with the Notice of Motion, is made an Order of Court in terms of which the Respondent's name is removed from the roll of attorneys of this Court.

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

I agree and it is so ordered.

RANCHOD J
JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT OF SOUTH AFRICA

FOR THE APPLICANT: S MAGARDIE

INSTRUCTED BY: DAMONS MAGARDIE RICHARDSON ATTORNEYS

FOR THE RESPONDENT: ADV H OOSTHUIZEN SC

INSTRUCTED BY: RICHARD MEADEN & ASSOCIATES