

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

1. Reportable: ~~Yes~~/No
2. Of interest to other Judges: ~~Yes~~/No

**CASE NO: 7184 /18  
15/8/2019**

**THE LAW SOCIETY OF THE NORTHERN PROVINCES**      Applicant

and

**OJ STOLTZ**      First Respondent

**STOLTZ INCORPORATED ATTORNEYS**      Second Respondent

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**JUDGMENT**

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**MAKHUBELEJ**

***Introduction***

[1] The applicant, who I shall henceforth refer to as 'the Law Society' is the predecessor of the Legal Practice Council, a statutory body established in terms of section 4 of the Legal Practice Act, No. 28 of 2014 (LPA) with amongst others, powers to continue actions initiated in terms of the repealed Attorneys Act, No 53 of 1979 and various other statutes that regulated the profession of attorneys before they were repealed by the LPA.

[2] The first respondent, who I shall henceforth refer to as 'Mr. Stoltz' was admitted as an attorney of this court on 11 September 2006. He has, since 2008, been practising as a director in the second respondent, Stoltz Inc. Attorneys, with its principal place of business at 1<sup>st</sup> Floor, 223 Beyers Naude Drive, Rustenburg, North

West Province.

[3] This application was launched on an urgent basis during October 2018 by virtue of the resolution of the Council of the applicant dated 27 July 2018 in terms of which authorization was given to apply for urgent removal of the name of Mr. Stoltz from the roll of attorneys, alternatively for his urgent suspension pending finalization of the application to remove him from the roll.

[4] The relief sought in the Notice of Motion accords with this resolution and also provides for ancillary relief in line with the consequences for removal and or suspension of an attorney from the roll of attorneys. The relief sought on the hearing of this matter was for the striking out of his name from the roll of attorneys. In terms of the Notice of Motion, the matter was initially setdown for hearing in the urgent court roll of 30 October 2018, but there is no indication from the record that it was in fact enrolled. The respondents filed a notice to oppose the application on 22 October and their opposing affidavit was filed on 29 October 2018.

[5] The applicant did not file a replying affidavit. Its Counsel, Ms M Nieuwoudt informed the court that it did not deem it necessary to do so because the averments in the opposing affidavit do not absolve Mr. Stoltz in any way.

[6] There was no appearance for the respondents, either through their attorneys of record or by Mr. Stoltz's physical presence in court. There has been a proper notice of setdown. The court was also informed that Mr. Stoltz was aware that the matter would proceed because he communicated with the applicant's attorneys of record that morning by what is referred to as 'Whatsapp' message. He was asked if he would be in court. Apparently he told the applicant's attorneys that he was not going to attend the proceedings because he was going to attend to one of his client's matter at Brits Magistrate's Court. Counsel offered to transcribe the electronic messages, however, it was not necessary because there was evidence of a proper setdown as I have indicated above.

[7] The court was satisfied that the applicant has complied with the Practice Directives for setting down opposed matters, and that despite this, the respondents chose not to appear. The matter then proceeded on an unopposed basis and on consideration of the affidavits before the court.

### ***The legal framework***

[8] Section 22(1)(d) of the Attorneys Act 53 of 1979 provides that any person who has been admitted and enrolled as an attorney may be struck off the roll of attorneys or suspended from practice on the application of a law society that has jurisdiction if in the discretion of the court that person is not a fit and proper person to continue to practice as an attorney.

[9] It is trite that the exercise of the court's discretion entails a three-stage enquiry that has been formulated by Brand JA in **Summerley v Law Society, Northern Provinces**<sup>1</sup> as follows:

*"It has now become settled law that the application of s 22(1)(d) involves a threefold enquiry (see eg Jasat v Natal Law Society 2000 (3) SA 44 (SCA) para 10 at 51C-I and Law Society of the Cape of Good Hope v Budricks 2003 (2) SA 11 (SCA) para 2 at 13/-14B). The first enquiry is aimed at determining whether the law society has established the offending conduct upon which it relies, on a balance of probabilities. The second question is whether, in the light of the misconduct thus established, the attorney concerned is not a 'fit and proper person to continue to practise as an attorney'. Although this has not always been the position, s 22(1)(d) now expressly provides that the determination of the second issue requires an exercise of its discretion by the court (see eg A v Law Society of the Cape of Good Hope 1989 (1) SA 849(A) at 851C-E). As was pointed out by Scott JA in Jasat (at 51E-F), the exercise of the discretion at the second stage 'involves in reality a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment' (see also eg Budricks supra at 14A). The third enquiry again requires the court to exercise discretion. At this stage the court must decide, in the exercise of its discretion, whether the person, who has been found not to be a fit and proper person to practise as an attorney, deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice."*

[10] The principles were re-iterated by Harms DP in **Law Society of the Northern Provinces v Mogami and Others**<sup>2</sup>

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<sup>1</sup> 2006 (5) SA 613 (SCA) at paragraph 2 / (2006) SCA 59 (RSA)

<sup>2</sup> 2010 (1) SA 186 (SCA) at para 4

*"Applications for the suspension or removal from the roll require a three-stage enquiry. First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. Second, it must consider whether the person concerned is 'in the discretion of the Court' not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. And third, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice (Jasat v Natal Law Society 2000 (3) SA 44, [2000] 2 All SA 310 (SCA); Malan and Another v Law Society of the Northern Provinces [2008] ZASCA 90; 2009 (1) SA 216; [2009] 1 All SA 133.(SCA) at para 10))"*

[11] It is trite that the nature of the proceedings are *sui generis* and not criminal or civil. The law society is exercising its oversight role and disciplinary powers to bring an officer of court who has misconducted himself for the court to enquire into the matter and if it finds that indeed the offending conduct has been established, to exercise its discretion as to whether such an officer should be met with the ultimate sanction of removal from the roll or be given another opportunity to correct his errors. It is for this reason that the court is expected to consider the evidence placed before it properly and where the attorney has made submissions or given answers, to consider the issues in a proper perspective.

Mthiyane DP put it as follows in *Hepple v Law Society of the Northern Provinces* (507/2013) [2014] ZASCA 75 (29 May 2014)<sup>3</sup>

*"In considering whether a case has been made out against an attorney sought to be struck from the roll it is necessary to bear in mind that the evidence presented by the law society is not to be treated as though one was dealing*

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<sup>3</sup> At para 9.

Footnote [4] *Cirola & another v Law Society Transvaal* 1979 (1) SA 172.(A) at 173A

Footnote [5] *Malan & another v Law Society, Northern Provinces* [2008] ZASCA 90, 2009 (1) SA 216.(SCA) para 27-28 .

*with 'a criminal case' or 'an ordinary civil case'. The proceedings in applications to strike the name of attorneys from the roll are not ordinary civil proceedings. They are proceedings of a disciplinary nature and are sui generis.[4] It follows therefore that where allegations and evidence are presented against an attorney they cannot be met with mere denials by the attorney concerned. If allegations are made by the law society and underlying documents are provided which form the basis of the allegations, they cannot simply be brushed aside; the attorneys are expected to respond meaningfully to them and to furnish a proper explanation of the financial discrepancies as their failure to do so may count against them. In this regard the remarks of Harms ADP in *Malan v The Law Society of the Northern Provinces* are apposite:*

*'If one turns to the bookkeeping charges, the position is simply that there is no allegation of a realisation of the seriousness of the offences. They are brushed off on the basis that the society failed to prove a trust shortage that the bookkeeper had erred, that they did not know the rules, that their auditors had erred, or simply by not dealing with the pertinent allegations. Furthermore, instead of dealing with the merits of the allegations, the appellants conducted a paper war and they attacked the Society and its officers, they attacked the Fidelity Fund and they attacked the attorneys who had to take over the files - in short, their approach on the papers was obstructionist. . . . These factors are "aggravating" and not extenuating because they manifest character defects, a lack of integrity, a lack of judgment and a lack of insight.' (My emphasis.)"*

### ***Failure to cooperate with the investigations***

[12] The factual background leading to the resolution of the applicant to institute these proceedings appear from the founding affidavit deposed by its President, Mr. Sibusiso William Mavela Gule. He outlined the complaints that were received against Mr. Stoltz between April and October 2017. The applicant decided to appoint a Mr. Swart, a chartered accountant with expertise in conducting financial investigations to visit the second respondent's firm with a mandate to conduct an inspection of their

accounting records and practice affairs, and to investigate the specific complaints.

[13] Mr. Swart received the instructions on 13 November 2017. It is indicated in the affidavit that he made several phone calls to Mr. Stoltz between 1 November 2017 and January 2018 in his cellphone and also at the second respondent's office phone, left messages for him to call but he did not return the calls.

[14] On 05 February 2018, after numerous other failed attempt to speak to Mr. Stoltz, the investigator decided to write an email to him. It reads as follows:

*" Dear Mr. Stoltz*

*I have received instructions from the Law Society to inspect your firm's accounting records and certain complaints against your firm received by the Law Society. I attach the letter from the Law Society.*

*I have now attempted on numerous occasions to speak to you to arrange for a date for my visit, but you were not available and did not return my messages. Could you please contact me at this email address or at (083) 499-5747 so that we can agree on a date and time for my visit. I await your communications.*

*Thank you*

*Leo (D) Swart*

[15] Mr. Stoltz did not reply to the email. He also failed to return messages on calls that Mr. Swart left with his office. Sometimes when he call he would be told that Mr. Stoltz was busy and not taking calls.

[16] On 22 March 2018 Mr. Swart sent another email to Mr. Stoltz, this time informing him that he would be visiting his offices on 28 March 2018 at 10:00. There was no response. Mr. Swart decided to visit the second respondent's offices at the recorded physical address without an appointment on 23 March 2018 at 10:00. He found a receptionist who informed him that she was the only staff member present at that time as Mr. Stoltz went to court and did not leave any documents for him.

[17] He later received a telephone call from Ms Lizelle Swart, who according to records is the professional assistant at the second respondent. She wanted to know which documents he was looking for as she claimed that they (the office of the

second respondent ) did not receive the email. Mr. Swart forwarded the email and letter that he had previously sent.

[18] Mr. Swart did not receive the documents that he had requested. On 18 April 2018 he telephoned the second respondent's office and requested to speak to Mr. Stoltz. He was advised that he was not available. On requesting to speak to Ms Swart, he was advised that she was at their Hartebeespoort branch on that day. He telephoned the number that he was given. No one answered.

[19] He visited the Hartebeespoort branch on 14 June 2018 after obtaining the address from the second respondent's office by telephone. This branch is situated at 7 Hertzog Street, Hartebeespoort. He observed the second respondent's name and other particulars were displayed on the front glass door. He did not enter. The Law Society does not have any detail of this branch office.

[20] Swart was not able to communicate with Mr. Stoltz and to inspect the firm's accounting records and investigate the complaints as he had been instructed.

### ***The complaints***

[21] There are seven (7) complaints from individuals and companies. They were lodged in the prescribed format and form part of the record.

### **Ms SC Roos**

[22] The second respondent was given instructions to collect an amount that was owed to Ms Roos by Labohlano Trading 137 (Pty) Ltd. A total amount of R67 295 00 was collected in eight payments from 10 November 2014 to 14 June 2016. Ms Roos made 28 calls to the second respondent's offices but her messages were not answered. She visited the firm several times and she was promised payment, which never materialized.

### **Mr. JM Ntshabele**

[23] This complaint was received on 14 December 2017. Mr. Ntshabele had instructed the second respondent to recover money from a firm known as Mobile Era that had fraudulently obtained a garnishee order against him and was paid an amount of R23 700.00. This money was not paid over to Mr. Ntshabele. He alleged

that Mr. Stoltz threatened him when he wanted his money. He is unemployed.

### **Ms PN Swartz**

[24] The complaint was received on 01 June 2017. She instructed the second respondent to attend to her 'application for sequestration' during 2013. After consulting with him, he told her to pay an amount of RS 000.00 towards his fees. She paid this amount in two instalments.

[25] He also told her to pay the balance of R98 000.00 which represented the value of her movable assets into the trust account of the second respondent. She paid this amount over a period of 24 months. The last payment was in January 2016. Her estate was 'sequestered' on 04 November 2013. Thereafter there was a communication blackout between her and the second respondent. He did not respond to messages that she left by telephone and emails.

[26] Yzel Trustees were appointed trustees for her insolvent estate. She told them about the R98 000.00 that she had paid to the second respondent. They also tried to communicate with Mr. Stoltz by email to no avail.

### **Ms S Saffy**

[27] The complaint, dated 27 July 2017 was lodged by Ms Saffy on behalf of Katleho Trust, the trustees of the insolvent estate of Wand JC Erasmus. The insolvents had paid money into the second respondent's trust account to repurchase their movable assets.

[28] The second respondent failed to pay over the money to Katleho Trust and ignored various email communication to discuss the matter. Katleho Trust is not prepared to finalize administration of the insolvent estate until it receives the outstanding funds.

### **Vezi De Beer Attorneys**

[29] The complaint, dated 22 May 2017 was lodged by Vezi De Beer on behalf of Tswelopelo Trust, the trustees of the insolvent estate of CJ Jacobs. The second respondent had received an amount of R62 0000.00 as proceeds of sale of their movable assets. The second respondent promised to pay the amount over but only



after making a deduction of its taxed bill of costs amounting to R21 500.00. The trustees agreed to this.

[30] However, the second respondent failed to pay the money over as agreed and ignored two formal letters and emails over a period of eight months.

### **Corporate Liquidators**

[31] The complaint is dated 06 April 2017. Corporate Liquidators were appointed trustees of the insolvent estate of M Swanepoel. There is a suspicion that the second respondent received an amount of R83 000.00 from proceeds of sale of the insolvents' movable assets. Corporate Liquidators could not verify this fact because the second respondent did not respond to their numerous emails and telephone calls.

### **Mr. JH Du Preez**

[32] The complaint is dated 30 October 2017. Mr. Du Preez had instructed the second respondent to collect rentals of R2000.00 from a tenant who was renting his property. The arrangement was that the second respondent would deduct a commission and pay him R1 886.00 per month. The second respondent collected rentals for 13 months, but only paid him RS 479.27. He is owed R19 038.23. His emails and telephone calls were not answered.

### **Possible trust shortage arising from money owed to the complainants**

[33] The investigator indicated in his report that the failure by the respondents to communicate and to reply to the complainants could be an indication that the funds were no longer available in the trust account. This could mean that there is a shortage, which on the evidence above **is R331 533.58.**

### ***The offending conduct***

[34] Based on the above evidence, Mr. Swart indicated in his report to the Law Society that Mr. Stoltz has contravened the following Rules;

[34.1] Rule 2.1.6 of the Attorneys Profession for failing to lodge details of his branch office.

[34.2] Rule 89.23 of the Rules of the Law Society and Rule 47.1 and 47.2 of the Attorneys Profession in that he failed to reply, within a reasonable time, to all communications that he was obliged to answer.

[34.3] Rule 35.19 of the Rules of the Attorneys Profession for failing to ensure that the accountant's report is furnished by an accountant within or at the required time.

[34.4] Rule 68.7 of the Rules of the Law Society and Rule 53.11 of the Rules of the Attorneys Profession in that he did not account to his clients within a reasonable time after performance or earlier termination of a mandate.

[34.5] Rule 49.13 of the Rules for the Attorneys Profession in that he did not perform professional work or work of a kind commonly performed by a practitioner with such degree of skill, care and attention, or of such quality or standard, as in the opinion of the council may be reasonably expected.

[34.6] Rule 89.7 of the Rules of the Law Society and Rule 35.12 of the Rules of the Attorneys Profession in that he did not, unless otherwise instructed, pay any amount due to a client within a reasonable time.

[34.7] Section 78(1) of the Act read with Rule 35.13.8 of the Rules for the Attorneys Profession in that he did not ensure that the total amount of money in his trust banking account, trust investment account and trust cash at any date is not less than the total amount of credit balances of the trust creditors shown its accounting records.

### ***The respondents' opposing affidavit***

[35] Mr. Stoltz complained about what he called the undue delay in launching these proceedings in view of the fact that the resolution of the applicant was issued in July 2018 and the founding affidavit signed more than two months later. The information of the applicant's intention to launch these proceedings against him was leaked, causing rumours that destroyed him financially.

[36] He denied knowledge of the complaints filed against him because the Law Society failed to tell him about them when he attended a disciplinary hearing on 14 February 2018 on charges relating to practising without a fidelity certificate. He was advised that there are no pending complaints against him. He has already been found guilty for not having a fidelity fund certificate and has paid a fine and as such

he does not understand how he could be investigated for this transgression again.

[37] On his failure to cooperate with the investigator, Mr. Swarts, he gives vague and guarded answers. Firstly, he denies receiving communication from Mr. Swarts, and then he gives an alternative answer, namely, that if it can be found that he refused to co-operate with the investigation, this should not be held against him because he was *'totally overworked, depressed and under immense pressure at the time, and that I did not willfully refuse to co-operate.'*

[38] He denies refusing the auditor access to his accounting records. This answer too is not seriously made because he blames the whole thing on his emotional state and that he was overworked at the time. He also blame his busy practice which has about 4000 files where he is expected to do everything in relation to office management.

[39] He also indicated that he was busy with the process of closing his practice at Rustenburg and handing over files to other practitioners, with the assistance of the applicant. He wants to change the nature of his practice and open a *'very small boutique firm, where I will focus on the drafting and appearances of Debt Counselling Applications, Insolvency Law and the Drafting of contracts.'*

[40] He also made it clear that he is no longer interested in his practice as it is and that he is handing over the clients' files *'for the image of the Law Society and the profession as a whole, as it will not cause clients to panic about their matters whilst protecting my reputation'*

[41] On failing to give the applicant details of his branch office, Mr. Stoltz again blames his work pressures as he is understaffed.

[42] He denies receiving messages from Mr. Swart on his cellphone because he does not have an active voice message system. He then offered a suggestion with regard to the nature of messaging that Mr. Swart should have used, such as a short SMS message or Whatsapp. Furthermore, he denies that messages were left at his office because their telephone system does not have an answering facility.

[43] On the emails sent to him, he first denied receiving them because Mr. Swart has not attached a "read receipt". He then turned around and blamed his often dysfunctional *'Outlookprogram as emails landed up in my junk mail folder and the program gave error messages'*

[44] On Ms Roos's complaint, he first denied owing her the money, but later on

changed tune and indicated that he did not receive the complaint, and if he had, he would have settled the dispute with her in an amicable way.

[45] He alleges that he has paid Mr. Ntshebele all his money in January 2018 and that the file has been closed. However, no proof to this effect was attached to the opposing affidavit.

[46] He admitted receiving an amount of R98 000 from Ms Swartz but denies having instructed her to pay this amount to his trust account. According to him, she requested to 'buy back' her assets from the trustees and he assisted her in goodwill after explaining that it would take about 3-12 months for the Master of the High Court to appoint a Trustee.

[47] The money is in his trust account and the reason he did not pay it out is because he did not know that Yzel Trustees had been appointed and they did not give him their banking details.

[48] He admitted the complaint that was lodged by Ms Saffy on behalf of the Trustees of the insolvent estate of W and JC Erasmus. that of receiving money to buy back their movable assess and failing to pay it to the trustees, Katleho Trust.

[49] His excuse is that he had been *'totally overworked and in an emotional state'*. He also attributed the failure to pay the money on moving offices and the process of handing over files to other legal practitioners. He also blames the applicant for failing to inform him about this complaint when he appeared before it for a disciplinary hearing on other matters on 14 February 2018.

He offered to pay the money of R29 000.00 that is held in his trust account as soon as he locates the file and on receipt of banking details.

[50] He could not deny or admit the complaint lodged by Vezi De Beer Attorneys because he could not locate the file to answer to the allegations. As with other complaints, his gripe with the applicant is that he was not alerted to the complaints when he appeared before it on 14 February 2018.

He sent an email to the complainant on 29 October 2018 and requested a *'formal letter of instruction to place the funds into the banking account of the insolvent estate'*.

[51] He did not address the complaint of Corporate Liquidators (paragraph 12.10 of the founding affidavit). However, in subsequent responses he admitted that there

were outstanding payments due to some of the complainants, including Corporate Liquidators. The amount due is R83 000.00.

[52] He denies owing Mr. Du Preez any money. According to him there was a legal process to recover the rentals and at the end of it there was not enough to pay as per initial agreement. In fact, according to him, Mr. Du Preez he owes his firm R4.11.

He attached a statement of account as well as an email to the complainant dated 18 August 2016, which appears to be an explanation to the complainant on the amount that would be due to him after deductions. Reading earlier emails from the complainant suggests that there appears to be a concern from the complainant who was apparently paid R745.00 instead of the expected R1186.00 per month. It is difficult to contextualize the nature of the complaint on the basis of these emails.

[53] He denied that there was a need for conducting an investigation on his accounting records because Mr. Swarts relies on assumptions for his conclusions on trust deficits. The only outstanding payments amount to R152 000, and not what Mr Swart has suggested in his report.

[53.1] He maintained that he has already been found guilty of practising without a Fidelity Fund certificate for the period ending December 2018 as well as failing to submit an accountant's report for the period ending February 2017. He attached a letter from the Law Society dated 19 February 2018 which confirms his attendance at a disciplinary hearing on 14 February 2018 on these charges and the fines imposed.

#### Findings on the offending conduct

[54] It is clear from his explanations that Mr. Stoltz has not seriously and convincingly replied to the allegations against him. His answers are not firm and final. He blames his busy schedules, the telephone lines, his depression and everything else.

[55] He has had enough opportunity even after launching of these proceedings to give meaningful responses to the allegations against him, but he was content that this matter should proceed with the opposing affidavit that is phrased on alternatives and no supporting documents with regard to issues that he has placed in dispute.

[56] Of importance, he admitted all complaints except for the Du Preez one where

there appears to be a dispute about the nature of deductions that should be made on the rental amounts. His defence on the complaints that he has admitted is that he did not have banking details, but he does not answer the real issue, why he failed to account to the clients for a long period of time, ignoring their correspondence and failing to return calls.

[57] It is also clear from his responses and on his own version that he no longer has the will or energy to perform his duties as an attorney with **skill**, care and diligence. He is in the process of closing down his firm and handing files to other practitioners as he wants to change his area of practice. The issue is that these complaints are still lingering, and he has not made available his books for inspection and investigation of the outstanding issues .

[58] Looking at some of his responses in the opposing affidavit, it is clear that he has not provided honest answers .

An example is the response he has offered to the complaint of Ms Swartz to the effect that he never instructed her to pay R98 000.00 into his trust account. His email dated 20 August 2013, ten days after the first consultation with Ms Swartz contradicts his response in the opposing affidavit. It reads as follows:

*“Morning Paige*

*Sorry for only getting back to you now but I was out of town yesterday and only got back today. You can initial each page and sign the last one.*

*I have also calculated your estate. Your total amount of debt is the sum of R271, 774.95, if we work on this amount your assets must then be valued for the sum of R98,000.00 in order to fulfil the requirements as set out in the Insolvency Act. ff you want to buy the assets from the estate, as discussed, your monthly instalment will be the sum of R4,100.00 for a period of 24 months.*

*My fee for the application is the sum of RB ,000,00, if you are unable to pay this amount once off you can pay it in two or three instalments. As soon as I receive the first part of my fee I will start with your application. As discussed as soon as you decide to proceed with the application you are not permitted to make payment to your creditors seeing that you will be under the protection of the Insolvency Act from the date when your advertisement appears in the Government Gazette.*

*You can deposit the money directly into my trust account. Account Name: Stoltz Inc*

*Trust Account*

*Account Number:     [...]*

*Branch: Rustenburg Square (202 009)*

*There is no breakdown of the R98, 000,00, that is the requirement as set out in the Insolvency Act.*

*Please let me know if you have any further questions.*

*Regards*

*Johan Stoltz*

[59] I am satisfied that indeed he has committed the offending conduct as alleged. The fact that his books were not inspected is of no consequence because he does not deny the complaints, particularly that he failed to account and to respond to the requests to do so.

***Whether he is a fit and proper person to continue to practice.***

[60] The enquiry at this stage entails making a value judgment based on a comparison of standards expected of an attorney and the conduct complained about.

[61] On his own version, he can no longer cope with the pressures of practice of an attorney and he wants to venture into what he calls a 'boutique law firm' specializing in the '*drafting and appearances of Debt Counselling Applications, Insolvency Law and the Drafting of contracts.*'

[62] Mr. Stoltz appears to think that the expectations or duties of an attorney towards his clients are lesser when he is in an environment that he considers less stressful.

[63] Four of the seven complaints are related to sequestration proceedings where he convinced the applicants for surrender of estates to pay money into his trust account for purposes of buying back their movable assets from the yet to be appointed trustees of their insolvent estate. There are many issues arising from his conduct which are not necessarily relevant for purposes of this judgment but illustrate the manner in which he conducts his so-called Insolvency applications practice.

There is no guarantee that the court will accept a surrender of an estate. From the evidence of Ms Swartz in particular it is clear that he adopts arbitrary methods of determining the value of movable assets. There is an outcry about abuse of surrender of estates applications, which I am entitled to take judicial notice of. The details in this matter are classic examples.

[64] His clients had entrusted him with money for what they believed was the correct advice in terms of the Insolvency Act. He abused the trust and exposed the clients to potential financial harm because in reality and in terms of Section 82(6) of the Insolvency Act, it is the duty of the Master to decide which assets would form part of the insolvent estate and may authorize some assets of a personal nature like bedding to be excluded. In the meantime, Mr. Stoltz collects money from his clients with a promise to buy back their movable assets. The amounts involved raise questions as to whether these people were indeed insolvent. It did not matter for him because the monetary value he attached to the valuations boosted his fee and was also deposited into his account, and he did not pay over to the trustees when they were subsequently appointed. In the case of Ms Swartz she paid for her assets for 24 months, even after trustees were appointed. In reality she should have paid to the trustees, if they indeed wanted to release some of the assets. Mr. Stoltz assumed the role of the Master. He failed to transfer the money he collected to the duly appointed trustees, thus jeopardizing proper administration of the clients' insolvent estates.

[65] Even though he did not allow an investigation on these complaints, it is clear from his own version that the results would not have been different, save , probably for the one lodged by Mr. Du Preez.

[66] There is no merit in his contention that the applicant failed to inform him about these complaints when he appeared in a disciplinary hearing on 14 February 2018. Mr. Swart had already attempted to make contact with him by telephone since his appointment in November 2018. On 05 February 2018, he addressed an email to him, informing him about his appointment and the documents that he required to conduct his investigations. He ignored this email and continued to evade talking to Mr. Swart or to allow a visit to his office.

[67] Taking into account all the above, I am satisfied that Mr. Stoltz is not a fit and proper person to remain on the roll of attorneys.



### ***Appropriate sanction***

[68] The public is the one that needs protection from attorneys that are not proper and fit to continue to practice as attorneys. Whether a suspension<sup>1</sup> or striking off sanction is competent depends on the nature of the complaints, the persistency thereof, and the reflection on the character of the attorney concerned and whether there are chances of repetition.

[69] The transgressions are very serious and as I have already stated, there is a repeating pattern with regard to allegations relating to how he dealt with applicants for surrender of estates. The nature of the remaining complaints are actually similar. He collects money as instructed by clients, but fail to pay over. The fact that he has prevented an investigation of his accounting records is an aggravating factor and supports a contention by the applicant that there is a possible shortage of trust money. His answers are vague and not supported by evidence that he should have easily attached.

[70] In my view, the appropriate sanction is that his name should be removed from the roll of practising attorneys of this Honourable Court.

### ***Costs***

[71] The applicant in bringing the application is acting as the *customs morum* of the attorneys' profession. The administration costs are borne by subscriptions from members. The practice is that the applicant should not pay costs incurred to enforce disciplinary standards because in reality it is members' funds. This would mean punishing each and every attorney for the misconduct of one. Accordingly, the costs should be borne by the respondents.

### ***Order***

[72] Consequently, the Draft order marked X is made an order of court.

**TAN MAKHUBELE J**

Judge of the High Court

I agree, and it is so ordered,

**N.M MAVUNDLA J**

Judge of the High Court

**APPEARANCES:**

**APPLICANT: ADVOCATE M NIEUWOUDT**

Instructed by: **MOTHLE JOOMA SABDIA INC**

**NO APPEARANCE FOR THE RESPONDENTS.**

**DATE: 23/08/19**

**IN THE HIGH COURT OF SOUTH AFRICA**  
**[GAUTENG DIVISION. PRETORIA]**

**CASE NO: 71894/18**

PRETORIA: **15 AUGUST 2019**

BEFORE THE HONOURABLE JUSTICE MAVUNDLA

BEFORE THE HONOURABLE JUSTICE MAKHUBELE

In the matter between:

**THE LAW SOCIETY OF THE NORTHERN PROVINCES**      Applicant

and

**OJ STOLTZ**      First Respondent

**STOLTZ INC ATTORNEYS**      Second Respondent

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**DRAFT ORDER**

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Having **read** and considered the papers and having heard counsel for the applicant it is ordered that:

1. The name of **OCKERT JOHANNES STOLTZ** (the first respondent) is struck off the roll of attorneys of this Court.
2. The first respondent shall surrender and deliver his certificate of enrolment as an attorney to the Registrar of this Honourable Court.
3. In the event of the first respondent failing to comply with the terms of this order detailed in paragraph within 14 days from the date of this order, the sheriff of the district in which the certificate is. is authorised and directed to take possession of the certificate and to deliver it to the Registrar of this Honourable Court.

4. The first respondent is interdicted and prohibited from handling or operating on his trust accounts as detailed in paragraph 6 hereof.
5. Johan van Staden, the Head of Members Affairs of the Applicant or any person nominated by him, is appointed as *Curator Bonis* (Curator) to administer and control the trust accounts of Respondent, including accounts relating to insolvent and deceased estates and any deceased estates and any deceased estate and any estate under curatorship connected with the Respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by Respondent at a bank in the Republic of South Africa in terms of section 78(1) of Act No 53 of 1979 and/or any separate savings or interest bearing accounts as contemplated by Section 78(2) and/or Section 78 (2A) of Act No. 53 of 1979, in which monies from such trust banking account have been invested by virtue of the said sub-sections or in which monies in any manner have been deposited (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, files and documents as referred to in paragraph 6 and subject to the approval of the Board of Control of the Fund (hereinafter referred to as "the Board") 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. to hand over any of the said records to any person entitled thereto, as soon as the Curator is satisfied that the fees and disbursements in connection therewith have been paid, or satisfactorily secured, or that same are no longer required;
  - 5.2. to require that any such records, so handed over, be delivered back to the Curator if, in the Curator's sole and absolute discretion, the Curator considers them to be relevant to any (including any possible, anticipated or threatened) claim against the Curator and/or the Respondent and/or the Respondent's clients and/or the Attorneys Fidelity Fund (hereinafter referred to as "the Fund");

- 5.3. subject to the approval and control of the Board to sign and endorse cheques and/or withdrawal forms and generally to operate upon the said trust accounts, but only to such extent and for such purposes as may be necessary to bring to completion current transactions in which the Respondent was acting as at the date of this Order;
- 5.4. subject to the approval of the Board, to recover and receive and, if necessary in the interest of persons having lawful claims upon the said trust accounts and/or against the Respondent in respect of monies held, received and/or invested by the Respondent in terms of sections 78(1) and/or 78(2) and/or 78(2A) of the Act (hereinafter referred to as the "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 in which the Respondent may have been concerned and which may have been wrongfully and unlawfully paid from the said trust accounts and to receive such monies and to pay the same to the credit of the said trust accounts;
- 5.5. to ascertain from the Respondent's records the names of all persons on whose account the Respondent appears to hold or to have received trust monies (hereinafter referred to as "trust creditors") and to call upon the Respondent to furnish the Curator within 30 days of the date of this Order or within such further period as the Curator may agree to in writing with the names and addresses of. and amounts due to, all trust creditors;
- 5.6. to call upon such trust creditors to furnish such proof, information and/or affidavits as the Curator may require to enable the Curator, acting in consultation with and subject to the requirements of the Board, to determine whether any such trust creditor has a claim in respect of money in the said accounts and, if so. the amount of such claim;
- 5.7. subject to the approval of the Board, to admit or reject, in whole or in part, the claims of any such trust creditor without prejudice to such trust creditor's right of access to the Civil Courts;
- 5.8. having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but always to the approval of

the Board;

- 5.9. subject to the approval and control of the Board and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive it, 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 to receive such monies and to pay the same credit of the trust account(s);
- 5.10. in the event of there being any surplus in the trust account(s) of Respondent after payment of the admitted of all trust creditors in full, to utilise such surplus to settle or reduce (as the case may be), firstly, any claim of the fund in terms of Section 78(3) of Act No 53 of 1979 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of Respondent, the costs, fees and expenses, referred to in paragraph 10 of this order, or such portion thereof, as has not already been separately paid by Respondent to Applicant. and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance subject to the approval of the Board, to Respondent, if he is solvent, or, if Respondent is insolvent, to the trustee(s) of Respondent's insolvent estate.
- 5.11. in the event of there being insufficient trust monies in the trust banking account(s) of the Respondent, in accordance with the available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which may be available in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the Fund.

- 5.12. in the event of their being insufficient trust monies in the trust banking account(s) of the Respondent, in accordance with the available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which may be available in the trust banking account(s) amongst the trust creditors, alternatively, to pay the balance to the Fund.
  - 5.13. publish this order or an abridged version thereof in any newspaper he considers appropriate;
  - 5.14. wind-up the Respondent's practice;
  - 5.15. subject to the approval of the Chairman of the Fund, to appoint nominees or representatives and/or consult with and/or engage the service of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist her in carrying out his duties as curator; and
  - 5.16. to render from time to time. as Curator, returns to the Board showing how the trust account (s) of Respondent has or have been dealt with, until such time as the Board notifies him that he may regard his duties as Curator as terminated.
6. The Respondent shall 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 practising as an attorney;
  - 6.2. any monies invested by respondent in terms of section 78(2) and/or section 78 (2A) of Act No 53 of 1979;
  - 6.3. any interest on monies so invested which was paid over or credited to respondent;
  - 6.4. any estate of a deceased person or an insolvent estate or an estate under curatorship administered by respondent. whether as executor or trustee or curator or on behalf of the executor, trustee or curator;
  - 6.5. any insolvent estate administered by respondent as trustee or on behalf of the trustee in terms of the insolvency Act, No 24 of 1936;

- 6.6. any trust administered by respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;
  - 6.7. any company liquidated in terms of the Companies Act, No 61 of 1973, administered by respondent as or on behalf of the liquidator;
  - 6.8. any close corporation liquidated in terms of the Close Corporation Act, 69 of 1984, administered by respondent as or on behalf of the liquidator: and
  - 6.9. Respondent's practice as an attorney of this Honourable Court, to the curator appointed in terms of paragraph 6 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. 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, is empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such Curator.
8. That Respondent is hereby removed from office as:
  - 8.1. executor of any estate of which respondent has been appointed in terms of section 54(1)(a)(v) of the Administration of Estate Act, No 66 of 1965 or the estate of any other person referred to in section 72(1);
  - 8.2. 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 Estate Act, No 66 of 1965;
  - 8.3. trustee of any insolent estate in terms of section 59 of the Insolvency Act, No 24 of 1936
  - 8.4. liquidator of any company in terms of section 379(2) read with 379 of the Companies Act, No 61 of 1973;



- 8.5. trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;
  - 8.6. liquidator or any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984; and
  - 8.7. administrator appointed in terms of Section 74 of the Magistrates Court Act, No 32 of 1944.
9. That Respondent is ordered:
  - 9.1. 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;
  - 9.2. to pay the reasonable fees of the auditor engaged by the Applicant;
  - 9.3. to pay the reasonable fees and expenses of the Curator, including travelling time;
  - 9.4. to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the Curator as aforesaid;
  - 9.5. to pay the expenses relating to the publication of this order or an abbreviated version thereof;
  - 9.6. to pay the costs of this application on an attorney-and-client scale.
10. If there are any trust funds available the Respondent shall within 6 (six) months after having been requested to do so by the Curator, or within such long period as the Curator may agree to in writing, satisfy the Curator, by means of the submission of taxed bill 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;
11. A certificate issued by a director of the Attorneys Fidelity Fund shall constitute *prima facie* proof of the Curator's costs and the Registrar is authorised to issue a writ of execution on the strength of such certificate in order to collect the Curator's costs.

BY ORDER OF THE COURT

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REGISTRAR

Counsel for the applicant: **M Nieuwoudt**

Group One, Sandton

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