



**IN THE HIGH COURT OF SOUTH AFRICA**  
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 77836/09

In the matter between:

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

Applicant

and

**JOHN ADVANCE BALOYI**  
**CORAM SPIRE et EBERSOHN AJJ**  
**DATE HEARD 12<sup>th</sup> OCTOBER 2010-10-11**  
**DATE JUDGMENT HANDED DOWN 13<sup>th</sup> OCTOBER 2010**

Respondent

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**JUDGMENT**

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**EBERSOHN AJ.**

[1] This is an application to the Court in terms of Section 22(1)(d) of the Attorneys Act 53 of 1979 (the Act) for the suspension of the respondent's name from the roll of attorneys together with the ancillary relief which is normally granted in applications of this nature, on the grounds that the respondent is no longer a fit and proper person to practice as an attorney.

[2] The respondent was admitted and enrolled as an attorney on 08 August 2002. He

practised as a professional assistant at Lux Khambule Attorneys from 08 August 2002 until 6 January 2003. He practised as a partner at Baloyi & Setsoalo Attorneys from 1 January 2003 until the firm closed down. He then practised as a professional assistant at Shai & Mgomezulu Attorneys as from 7 June 2004 until 31 July 2007. The respondent commenced practising as a single practitioner for his own account under the name and style of J A Baloyi Attorneys on 01 August 2007.

[3] The application was served on the respondent's mother at the respondent's business address on the 20th January 2010. He did not file a notice of opposition in the matter and he also did not appear when the matter was heard although the set-down notice was similarly served.

[4] The purpose of the application is to submit to this court facts which the Law Society contends would justify this court in ordering that the respondent be suspended and the application is based on the Law Society's contention that the respondent's conduct constituted such a deviation from the standards of professional conduct that he is not a fit and proper person to practise as an attorney.

[5] 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.

Hassim vs Incorporated Law Society of Natal, 1977(2) SA 757(A) at 767 C-G

Law Society Transvaal vs Matthews, 1989(4) SA 389(T) at 393 E

Cirota & Another vs Law Society Transvaal, 1979(1) SA 172(A) on 187H

**Prokureursorde van Transvaal vs Keynhans, 1995(1) SA 839(T) on 851E-F**

[6] 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.

**Law Society of the Cape of Good Hope vs C, 1986(1) SA 616(A) at 637 C-E**

**A vs Law Society of the Cape of Good Hope, 1989(1)SA 849(A) at 851 A-E**

**Law Society Transvaal vs Mathews, *supra* at 393 I-J**

[7] According to the authorities the nature of the enquiry which the court must conduct is threefold, namely:

- 7.1 The court must first decide as a matter of fact whether the alleged offending conduct by the attorney has been established.
- 7.2 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.

**Kaplan vs Incorporated Law Society, Transvaal, 1981 (2) SA page 762 at page 782 A – C**

**Reyneke vs Wetsgenootskap van die Kaap die Goeie Hoop 1994 (1) SA page 359 at page 369 – 370**

- 7.3 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 practice.

Law Society of the Cape of Good Hope vs Buddricks 2003 (2) SA Page 11 at Pages 13 I and 14 A to B

Malan v The Law Society of the Northern Provinces (568/2007) [2008] ZASCA 90 (12/09/2008) at [4 - 9]

- 7.4 The court's discretion must be based upon the facts before it and facts in question must be proven upon a balance of probabilities.

Law Society Transvaal vs Mathews, supra at 393 I-J

Olivier vs Die Kaapse Balie-Raad 1972(3) SA 485(A) at 496 F-G

Summerley vs Law Society Northern Provinces 2006(5) SA 613(SCA) at 615 B-E

Malan v The Law Society of the Northern Provinces (568/2007) [2008] ZASCA 90 (12/9/2008) at [9]

[8] The standard of conduct which is expected from an attorney of this court against which the conduct of the respondent as set out hereunder must be measured, is set out in paragraph 8.1 of the founding affidavit. This conduct can, insofar as it relates to the Respondent, be summarised as follows:

- 8.1 An attorney is a member of a learned, respected and honourable profession and, by entering it, he pledges himself

with total and unquestionable integrity to society at large, to the courts and to the profession.

8.2 Only the very highest standard of conduct and repute and good faith are consistent with membership of the profession which can indeed only function effectively if it inspires the unconditional confidence and trust of the public.

8.3 The image and standing of the profession are judged by the conduct and reputation of all its members.

8.4 The attorneys' profession can only fulfil its obligations to the community and comply with its role in the administration of justice in the land if it inspires and maintains the unconditional confidence of the community and if its members devote their absolute integrity to the conduct of their profession and to the fulfilment of all the requirements demanded of the profession and its members.

[9] RULE 70 AUDIT REPORT:

The requirements concerning an attorney's financial obligations to the applicant can briefly be summarised as follows:

9.1 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 practice to enable the council to decide whether or not a disciplinary enquiry into the conduct of such attorney should be conducted.

- 9.2 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.
- 9.3 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.
- 9.4 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 (Six) 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.
- 9.5 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.
- 9.6 Failure to submit a Rule 70 report and to practise without a Fidelity Fund Certificate is a criminal offence under Section 81(10).

[10] MERITS OF THE APPLICATION:

The facts and circumstances which prompted the Law Society to bring this

application include, among others, the following:

- 10.1 The respondent failed to cause his auditor to lodge an opening audit report as required by the applicant's Rule 70.4 read with Rule 70.3 for the period ending 31 October 2007 (from the commencement of the respondent's practice to the end of the third calendar month following the commencement of his practice which opened on 01 August 2007).
- 10.2 The respondent also failed to cause his auditor to lodge an unqualified audit report for the period ending 29 February 2008.
- 10.3 In a letter dated 11 February 2008 the applicant reminded the respondent that his firm's opening audit report for the period ending 31 October 2007 was still outstanding.
- 10.4 In a letter dated 27 March 2008 the respondent was again reminded of his firm's outstanding opening audit report.
- 10.5 The respondent was called upon to appear before a Disciplinary Committee of the applicant on 06 November 2008 to answer to charges arising from his failure and/or neglect to cause the required audit reports to be lodged. The respondent failed to attend the disciplinary hearing.
- 10.6 In a letter dated 17 February 2009 the respondent was again advised of the fact that he failed to submit his audit reports. The respondent was cautioned about the provisions of sections 41(1) and 41(2) of the Attorneys Act which prohibits a practitioner from practising for his own account without being in possession of a Fidelity Fund Certificate and while practising or acting as such, to receive and accept fees, rewards and disbursements from clients. The respondent was also cautioned about the provisions of Section 83(10) of the Attorneys Act. The

respondent was at that stage also advised that, in the event that he persisted in his failure to obtain a Fidelity Fund Certificate, application would be made to this court relief against him.

10.7 On 2 June 2009 the applicant received a letter from Baloyi Attorneys regarding the respondent's outstanding audit reports. Mrs Gerne Patterson who is employed by the applicant phoned on the mobile number as reflected on the letterhead and spoke to a certain Mr Moses Masinga who advised her that the respondent was no longer practising as an attorney as he suffers from a mental illness. According to Mr Masinga, he was requested by the respondent to draft the letter and to forward same to the applicant.

10.8 The respondent also failed to pay his outstanding annual subscription fees totalling an amount of R4 571.50.

[11] REPORT BY SWART DATED 17 AUGUST 2009

Mr De Leeuw Swart who has expertise in conducting investigations into attorneys' practices, the manner in which they maintain their accounting records and the manner in which they operate on their trust banking accounts was instructed by the applicant to conduct an investigation into the respondent's firm. Swart provided the applicant with a report wherein he indicated that he initially experienced difficulty in contacting the respondent. Swart visited the respondent's firm on 13 February 2009. According to Swart, the signboard outside the respondent's offices indicated that the offices were occupied by Baloyi Masinga Attorneys. Swart's investigation was directed at establishing why no opening audit report for the period ending 31 October 2007 and no audit report for the year ending 29 February 2008 were submitted to the applicant by the respondent. A Mr Masinga was found at the said offices and he informed Swart that the respondent had not been practising for the last six months or more at the firm and that he never attended at the offices during that period. Swart indicated that Mr Masinga

appeared not to be practising as an attorney and reckoned that the name as appeared on the signboard outside the offices might be misleading to the public. Swart confirmed that, according to the records of the applicant, there is no attorney Masinga practising in the Thulamahashe area. The last Fidelity Fund Certificate issued to the respondent was for the year 2008. If the respondent was therefore still practising, he would be practising without being in possession of a Fidelity Fund Certificate from 1 January 2009.

[12] Attempts by Swart to acquire the trust account details and the trust bank statements of the respondent's firm proved fruitless.

[13] The respondent accordingly has contravened the following provisions of the Attorneys Act and the Applicant's Rules:

- i. Rule 3.1 in that he did not, within 30 days after the change of his address and the closure of his offices, inform the secretary of the Applicant in writing of same;
- ii. Rule 89.17 in that he abandoned his practice without prior notice to clients and without arranging with them for the dispatch of their files and/or any other business and/or property in his possession or under his control;
- iii. Rule 70.3 in that he did not ensure that his firm's outstanding Rule 70 accountant's report to be furnished by an accountant in terms of Rule 70.4 is so furnished within or at the required time;  
**and**
- iv. Sections 41(1) and 41(2) of the Attorneys Act in that he practised without being in possession of a Fidelity Fund Certificate and while practising or acting as such, received and accepted fees, rewards and disbursements from clients. In

terms of Section 83(10) of the Act, any practitioner who does not comply with the provisions of Section 41 of the Act shall be guilty of an offence and on conviction liable to a fine not exceeding R 2 000,00 or imprisonment not exceeding six months or both.

[14] It is clear that it has been established by the applicant that the respondent has indeed contravened numerous of the provisions of the Attorney's act and the Applicant's Rules. If all 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 Honourable Court and that the respondent is no longer a fit and proper person to practice as an attorney and should be suspended pending the return day of a rule nisi.

[15] 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 19 of the Founding Affidavit.

**Prokureursorde van Transvaal vs Kleynhans 1995(1) SA, 839 at page 865**

[16] The following order is accordingly made:

- 1.1 The respondent is is called upon to show cause, if any, at 10:00 on Friday the 26<sup>th</sup> November 2010 why his name shall not be removed from the roll of attorneys.
- 1.2 As per the draft order marked "X" which shall operate as an interim order pending the return date.

  
**P.Z. EBERSOHN**  
**ACTING JUDGE OF THE HIGH COURT**

I AGREE AND IT IS SO ORDERED:

*S. Sapiere*  
S.SAPIRE  
ACTING JUDGE OF THE HIGH COURT

Applicant's counsel

Me. S. L. Magardie

Applicant's attorneys

Damons, Magardie, Richardson Attorneys

Tel. 012 – 342 9281

Ref. LAW1/0030/SLM/rz

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~~DRAFT~~ COURT ORDER

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

**IT IS ORDERED**

1. That **JOHN ADVANCE BALOYI** (hereinafter referred to as the respondent) be suspended in his practice as an attorney of this Honourable Court, pending the finalisation of a striking application.
2. That respondent immediately surrenders and delivers to the registrar of this Honourable Court his certificate of enrolment as an attorney of this Honourable Court.

3 That in the event of the respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate and to hand it to the Registrar of this Honourable Court.

4. That respondent be prohibited from handling or operating on his trust accounts as detailed in paragraph 5 hereof.

5. That Johan van Staden, the head : members affairs of applicant or any person nominated by him, be 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 estate and any estate under curatorship connected with respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by respondent at a bank in the Republic of South Africa in terms of section 78(1) of Act 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 accounts have been invested by virtue of the provisions of the said sub-sections or in which monies in any manner have been deposited or credited (the said accounts being hereafter referred to as the trust accounts), with the following powers and duties:

5.1 immediately to take possession of respondent's accounting records, records, files and documents as referred to in paragraph 6 and subject to the approval

of the board of control of the attorneys fidelity fund (hereinafter referred to as the fund) to sign all forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which respondent was acting at the date of this order;


5.2 subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests 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 to the credit of the trust account(s);

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

- 5.4 to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of, the board of control of the fund, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of respondent and, if so, the amount of such claim;
- 5.5 to admit or reject, in whole or in part, subject to the approval of the board of control of the fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;
- 5.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the board of control of the fund;
- 5.7 in the event of there being any surplus in the trust account(s) of respondent after payment of the admitted claims of all trust creditors in full, to 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 of control of the fund, to respondent, if he

is solvent, or, if respondent is insolvent, to the trustee(s) of respondent's insolvent estate;

- 5.8 in the event of there being insufficient trust monies in the trust banking account(s) of 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 Attorneys Fidelity Fund;
- 5.9 subject to the approval of the chairman of the board of control of the fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and
- 5.10 to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of respondent has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.
6. That respondent immediately delivers his accounting records, records, files and documents containing particulars and information relating to:

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- 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 Corporations 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 5 hereof, provided that, as far as such accounting records, records, files and documents are concerned, respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.

7. That should respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on respondent (as the case may be), the sheriff for the district in which such accounting records, records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator.

8. That the curator shall be entitled to:

8.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;

8.2 require from the persons referred to in paragraph 8.1 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or respondent and/or

respondent's clients and/or fund in respect of money and/or other property entrusted to respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof.

9. That respondent be and is hereby removed from office as -
  - 9.1 executor of any estate of which respondent has been appointed in terms of section 54(1)(a)(v) of the Administration of Estates Act, No 66 of 1965 or the estate of any other person referred to in section 72(1);
  - 9.2 curator or guardian of any minor or other person's property in terms of section 72(1) read with section 54(1)(a)(v) and section 85 of the Administration of Estates Act, No 66 of 1965;
  - 9.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;
  - 9.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973;
  - 9.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;

9.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984.

10. That respondent be and is hereby directed:

10.1 to pay, in terms of section 78(5) of Act No. 53 of 1979, the reasonable costs of the inspection of the accounting records of respondent;

10.2 to pay the reasonable fees of the auditor engaged by applicant;

10.3 to pay the reasonable fees and expenses of the curator, including travelling time;

10.4 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid; and

10.5 to pay the costs of this application on an attorney-and-client scale.

11. That 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 longer period as the curator may agree to in writing, shall satisfy the curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to him (respondent) in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to

such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof;

12. That a certificate issued by a director of the Attorneys Fidelity Fund shall constitute *prima facie* proof of the curator's costs and that the Registrar be 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**