REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

17/3/2017

CASE NO. 24663/2016

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

14 March 2017
DATE

SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES Applicant

(Incorporated as the Law Society of the Transvaal)

and

BONIFACE BANTHERILE MABUSELA Respondent

JUDGMENT

NOCHUMSOHN (AJ)

1. This is an application for the striking of the Respondent's name from the Roll of Attorneys together with ancillary relief. The Respondent launched a Counter-Application for the issue to him of a Fidelity Fund Certificate for the 2016 year.

2. Applications of this nature are *sui generis* and of a disciplinary nature. There is no *lis* between the parties. The Applicant, as custodian of the profession, merely places the facts before the court, for its consideration.[1]

3. In terms of Section 22(1)(d) of the Attorneys Act No. 53 of 1979 ("the Act"), any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck from the Roll or be suspended from practice by the court within the jurisdiction in which he or she practises, if, in the discretion of the court, he or she is not a fit and proper person to continue to practise as an attorney.

4. There are several criteria for the satisfaction of the relief, *viz*:

    4.1. It must be decided on the facts, whether the alleged offending conduct has been established.

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[1] ***Hassim v Incorporated Law Society of Natal 1977(2) SA 757 (A) at 767 C – G;***
Law Society of Transvaal v Matthews 1989 (4) SA 389 T at 393 E;
Cirota & another v Law Society Transvaal 1979 (1) SA 172 (A) on 187 H;
Prokureursorder van Transvaal v Keynhans 1995(1) SA 839 (2) on 851 E - F

4.2. In such event, the court must impose a value judgment upon such conduct to enable a decision as to whether or not such conduct renders the attorney fit and proper to remain in practice as an attorney.[2]

4.3. If in its discretion, the court determines that the attorney concerned is no longer a fit and proper person to remain in practice, it must decide, whether in all the circumstances, the attorney is to be removed from the Roll or merely suspended from practise. Such decision would turn on the severity and degree of the misconduct.[3]

4.4. The Court's discretion must be based upon the facts and such facts must be established on a balance of probabilities. [4]

4.5. Moreover, the facts upon which the Court's discretion is based should be considered in their totality rather than the consideration of each issue separately. [5]

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[2] ***Law Society of the Cape of Good Hope v C 1986 (1) SA616(A) at 637 C to A; A v Law Society of the Cape of Good Hope 1989 (1) SA 849 (A) at 851 A to E; Law Society Transvaal v Matthews supra at 393 I to J***

[3] ***Jussit v Natal Law Society 2000 (3) SA 44 (SCA) at 51 B to I; Law Society of the Cape of Good Hope vs Budricks 2003 (2) SA 11 (SCA) at 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)***

[4] ***Law Society Transvaal v Matthews supra at 393 I to J; Olivier v Die Kaapse Balie-Raad 1972 (3) SA 485 (A) at 496 F – G; Summerley v Law Society Northern Provinces 266 (5) SA 613 (SCA) at 615 B – F. Malan v Law Society of the Northern Provinces (568/2007) {2008} ZASCA 90 (12/09/2008) at {9}***

[5] ***Law Society Transvaal v Matthews supra at 393 I to J; Olivier v Die Kaapse Balie-Raad 1972 (3) SA 485 (A) at 496 F – G;***
Summerley v Law Society Northern Provinces 266 (5) SA 613 (SCA) at 615 B – F;
Malan v Law Society of the Northern Provinces (568/2007) {2008} ZASCA 90 (12/09/2008) at {9}

5. **THE OFFENDING CONDUCT**

5.1. There were several complaints lodged with the Applicant in relation to the conduct of the Respondent. Arising out of these complaints, the Applicant dispatched an auditor in the employ of its monitoring unit, a certain Ms Phossina Mapfumo ("Mapfumo"), who conducted an investigation, pursuant to which Mapfumo filed a Report with the Applicant which was annexed to the Founding Affidavit ("the Mapfumo Report"). Mapfumo deposed to a confirmatory affidavit, which was annexed to the Applicant's founding papers, in which she confirmed the contents of her report.

5.2. In the Mapfumo Report, Mapfumo summarised the basis of the complaints and recorded the Respondent's responses provided to her, during the course of her investigations and interviews with the Respondent, all of which we will deal with hereinbelow.

5.3. In addition, the complaints were all lodged with the Applicant, in its prescribed format, on affidavit, all of which affidavits were attached to the founding papers.

5.4. The details of the complaints received by the Applicant, are set out hereinbelow, in chronological order.

5.5. **THE FIRST COMPLAINT - MR ANDREW MOREME ("Moreme")**

1. On or about 07 March 2013, Mr Moreme lodged a complaint with the Applicant to the effect that he had been approached whilst in hospital, by or on behalf of the Respondent, whom he had instructed to institute a claim against the Road Accident Fund ("the RAF").

2. The main thrust of the complaint was that the Respondent had failed to execute the mandate, or to report any progress to Moreme.

3. The Respondent averred that he was not guilty of touting, his offices were in the same building as the hospital, he had not sent a tout to speak to Mr Moreme, he did not employ a tout and that Moreme had come into his office to convey the instructions.

4. He averred that he could not pursue the claim, as he was not given sufficient instructions, which he had conveyed to Moreme both telephonically and in letters. Moreme did not instruct him further.

5. The Respondent also alleged that his failure to have responded to the Law Society in relation to the complaint, was occasioned by him not having received the letter of complaint.

6. As this complaint was not taken any further, and the Applicant conceded in argument that it fell by the wayside, no regard whatsoever is had to the effect of this complaint upon the ultimate order handed down hereinbelow.

5.6. **THE SECOND COMPLAINT – MS MARTHA MSITHINI ("Msithini")**

1. Ms Martha Msithini lodged a complaint with the Applicant on 04 August 2013. The essence of the complaint (which was on Affidavit) was that during 2007, she had instructed the Respondent to institute a claim against the RAF. The Respondent accounted to her for R220 000.00. In such accounting, he presented to her that he had received the gross amount of R220 000.00 from the RAF.

2. Subsequent to receipt of the Respondent's accounting and payment, Msithini ascertained from the RAF that they had paid out the capital of the claim, in the amount of R250 000.00 to the Respondent and not the R220 000.00, for which the Respondent had accounted. In addition, she ascertained that the RAF had paid out an additional amount to the Respondent in February 2011 of some R112 761.00, in respect of costs.

3. On Msithini's version, she was initially paid R140 000.00, a further R8 750.00 and an additional R21 450.00, representing a total of R170 200.00, received by her from the Respondent.

4. On the Respondent's version, he confirmed that he had received R250 000.00 in respect of the capital and had erred in accounting to Msithini, for R220 000.00. This explanation is hardly acceptable, coming from an attorney in a position of trust. To short-change a client by R30 000.00 and ascribe the shortcoming to an error is hardly believable in the circumstances and is quite indefensible.

5. The Respondent further admitted receipt of the taxed costs in the sum of R112 761.00. He averred that there was no contingency fee agreement in place. In addition, the Respondent failed to account to Msithini for the costs. He stated in his answering affidavit that during his discussion with Mapfumo on 20 May 2015, she suggested that he should draw an attorney and own client bill. He then did so and forwarded such bill to his client, at this late stage. The Respondent attached a copy of the bill, reflecting that Msithini owed him an amount of R173 843.00 plus VAT, equating to R198 181.02. The Respondent went on to add that if one took the bill into account, Msithini would have been entitled to receive payment of R164 580.14, and alleged to have overpaid her the sum of R5 619.86. This is hardly a plausible explanation and not the

way for an attorney to deal with a client in the handling of their financial affairs.

6. The Respondent is silent as to whether, and if so how, he accounted for the costs received during February 2011, or what he did with the money, from the time of receipt until the discussion with Mapfumo in May 2015.

7. The Respondent appears to have charged a fee akin to 25%, but I must agree with the Applicant's submission made in the replying affidavit, that the Respondent would not have been entitled to charge a fee akin to 25%, absent a contingency fee agreement.

8. At a time after the complaint was lodged, the Respondent paid the shortfall of R30 000.00 in the capital to Msithini.

9. Highly relevant to this application is the fact that the Respondent attached to his second supplementary affidavit, deposed to by him on 06 December 2016, proof of payment of the shortfall in the capital of R30 000.00, in the form of a voucher issued by Nedbank, dated 15 August 2012, which served as acceptable evidence of such payment. The relevance of this attachment will feature further below in this judgment.

5.7. **THE THIRD COMPLAINT – MR MASIZAME MAKAULA ("Makaula")**

1. On 12 April 2014, Mr Makaula lodged a complaint with the Applicant on Affidavit, against Respondent, setting out that he had instructed the Respondent to lodge his claim with the RAF and to finalise his claim. It came to his attention that the RAF had paid R150 000.00 to the Respondent, who had only paid to him the sum of R49 750.00. He averred that the Respondent had failed to account for the balance received of R100 850.00, and that the Respondent had failed to provide him with the undertaking received from the RAF, for future medical expenses.

2. From the papers, it is clear that the RAF had paid R150 000.00 to the Respondent on 10 January 2011 and that the Respondent received the R49 750.00 on 05 November 2012.

3. The Respondent had failed to answer the Applicant's notification of the complaint dated 21 May 2014, again with an explanation of non-receipt.

4. However, in the answering affidavit, the Respondent denied having failed to account and attached to the answering affidavit, a detailed statement of account, dated 04 November 2012, reflecting the admitted amount paid to Makaula of R49 750.00, an additional payment to him of R20 000.00 and a further advance to him of R57 000.00. Whilst this was the version offered by the Respondent, such version is clearly inconsistent with that of the Complainant, Makaula, who alleged only to have received the R49 750.00.

5. The Respondent did not adduce any proof of payment whatsoever in respect of his alleged payments of R20 000.00 and R57 000.00, other than refer the court to his file cover, which he annexed to the answering affidavit, reflecting, inter alia, handwritten notes making reference to the payment of R20 000.00 as an advance. Absent the attachment of a trust ledger account, paid cheques, or proof of eft's, this evidence falls to be rejected, in the face of Makaula's affidavit lodged with the Applicant, which clearly states that he merely received the R49 750.00.

5.8. **THE FOURTH COMPLAINT – MR BONGANI HARRIS DLAMINI ("Dlamini")**

1. On 04 August 2014, the Applicant received a complaint under cover of a letter from Legal Wise, dated 16 July 2014, to which was annexed an affidavit deposed to by their client, the complainant, Mr Dlamini. The affidavit is deposed to at Witbank on 31 October 2013.

2. Dlamini had instructed the Respondent to represent him in a claim against the R.A.F.

3. In Dlamini's affidavit, he says that he was informed by the RAF, that an amount of R225 000.00 was paid to the Respondent in September 2012. He avers further that he had not heard from the Respondent ever since and that he had tried on numerous occasions to contact the Respondent regarding the non-payment, but could not get hold of him. He avers further that he had left messages for the Respondent, to no avail, and requested in such affidavit for the Applicant to order the Respondent to pay to him, the money that rightfully belonged to him, arising out of his involvement in an accident, for which he required his compensation.

4. The complaint was forwarded by the Applicant to the Respondent for comment, under cover of a letter dated 10 November 2014, which letter did not meet with a response.

5. In his answering affidavit, the Respondent admitted the receipt of the R225 000.00 from the RAF, but averred that to date, the costs had not been paid. In this regard, the Respondent explained that he incurred disbursements in the sum of R61 832.00, for which purpose he had transferred R64 124.00 to his business account, to meet costs. He alleged that the RAF had, as at date of signing of his answering affidavit not paid the costs and he awaited payment.

6. The Respondent alleged further in the answering papers that when the claim was initially lodged, Dlamini resided in Witbank and thereafter, without notifying him, moved to Ermelo. The Respondent alleged that it was difficult for him to trace Dlamini, in order to make the necessary payments.

7. Without offering any form of proof of payment whatsoever, the Respondent alleges to have paid Dlamini the sum of R164 000.00, over three payments, in the amounts of R100 000.00, R34 000.00 and R30 000.00, respectively upon 04 August 2014, 11 March 2015 and 04 May 2015.

8. No explanation is offered for the stagnated payments, for the late payment or for the failure to have both paid and accounted to Dlamini in September 2012, when the funds were received. All that the Respondent did was to annex to his answering affidavit, a detailed statement of account dated 05 May 2015, without proof of payment, or any explanation for such delay in accounting.

9. In Dlamini's affidavit, the name of his employer as well as his personal cellphone number are set out. Other than for the Respondent to have said that Dlamini was not traceable and hard to find, as a result of him having worked as a trucker, there was no evidence offered by the Respondent, as to any attempts made to contact Dlamini, through his employers or on his cellphone.

10. Not only do the Respondent's vague explanations for the late payments made on his version, fall to be rejected, but we are left in doubt as to whether or not such payments were made at all, absent the adducing of proof in respect of such payments and particularly in the context of Dlamini's allegation in his affidavit to the effect that the Respondent had received the R225 000.00 and he had not heard from the Respondent since.

11. The Respondent had it within his power to adduce proof of payment of the amounts allegedly paid by him to Dlamini, but failed to do so, leading to the conclusion that Dlamini's version must be accepted that he had not been paid.

12. Ms Magardie, who appeared for the Applicant, submitted in argument that this appeared to be a case of *"grand theft"*. On the evidence of the Respondent, in response to Dlamini's affidavit, there is nothing to suggest otherwise.

5.9. **THE FIFTH COMPLAINT – MR MPETANE SAMUEL NGONYAMA ("Ngonyama")**

1. On 29 August 2014, the Applicant received a complaint from Mr Ngonyama, on Affidavit who alleged that in June 2006, he had instructed the Respondent to sue the RAF.

2. Ngonyama alleged that in October 2009, the RAF had paid to the Respondent, R272 065.00, made up of general damages and past medical expenses.

3. On or about 09 November 2009, the Respondent paid R151 582.00 to Ngonyama.

4. The past medical expenses amounted to R52 466.09.

5. Judgement was taken against Ngonyama by his medical aid, as a result of the Respondent's failure to have refunded the past medical expenses. Ngonyama's car and furniture were attached by the sheriff.

6. The Respondent failed to pay the past medical expenses until August 2012, at a time after Ngonyama faced the wrath of a warrant of execution.

7. At this time, such payment was made to Mokwena Attorneys, (on behalf of Karl Els Attorneys), who had been instructed to collect the funds on behalf of Ngonyama's medical aid.

8. The Respondent's reason for the failure to pay the medical costs until August 2012, were that his former candidate attorney had forgotten to instruct him to pay the medical aid. Again, this is another example of indefensible and inexcusable conduct on the part of the Respondent.

9. Again, the Respondent failed to respond to the Applicant's letter notifying him of the complaint against him, and he again raised the alleged non-receipt of the complaint, as an excuse for having failed to respond.

10. In the Respondent's answering affidavit, he alleged that he accounted to Ngonyama, and attached a statement of account and attorney and own client bill to such affidavit, dated 15 February 2015, in which detailed accounting is reflected.

11. It begs to be asked why the Respondent only accounted on 15 February 2015, for monies that had been received some six years prior, and some years after his client faced the wrath of a judgement and attachment arising out of the non-payment of the medical expenses.

12. No explanations were offered or put forward for the initial failure to have accounted, or for the late accounting, which was done well after the complaint had been drawn to the Respondent's attention.

5.10. **THE SIXTH COMPLAINT – MRS REBIDITSHWE REBECCA SIBIYA ("Sibiya")**

1. On 07 May 2015, the Applicant received a complaint from Mrs Sibiya, on affidavit deposed to on 07 May 2015, the essence of which was that she had instructed the Respondent to lodge a claim against the RAF, arising out of the death of her child in a motor vehicle accident, and that she had received no contact from the Respondent.

2. On the Respondent's version, the plaintiff was a minor child, assisted by her mother, Ms Thembela Patricia Mahlungu ("Mahlungu), and that Sibiya was the child's grandmother.

3. The Respondent averred that Sibiya was not the plaintiff and was not his client. Consequently, he bore no obligation towards her.

4. The Respondent attached to his answering papers, an affidavit deposed to by the complainant, Sibiya, in which Sibiya confirms that she is the grandmother of the deceased minor child.

5. In further support of the Respondent's contention that he was not duty bound to report or account to Sibiya, he attached to the answering affidavit, a special power of attorney, purportedly granted in his favour by the mother of the child, Mahlungu. Whilst such power of attorney is signed by one Mahlungu, the name of the grantor was not reflected in such document.

6. Against the Respondent's contentions, a letter dated 26 October 2009 written by the Respondent to Sibiya was attached to the papers, thanking her for *her* {our emphasis} instructions.

7. The Respondent alleges to have accounted fully to Mahlungu and attached to his answering affidavit, a detailed account dated 04 February 2015, reflecting a list of paid disbursements, fees and payments to client, totalling R190 000.00.

8. Again, there is no proof whatsoever of the payments reflected in such account and neither is there a confirmatory affidavit deposed to by Mahlungu confirming receipt of such accounting and payments.

9. From the payment transaction schedule issued by the RAF dated 29 July 2015, annexed to the founding affidavit, it is clear that a series of payments were made by the RAF for this case, to the Respondent, during or about May 2013, which calls into question the Respondent's failure to have accounted to his client (on his version) Mahlungu, for some two years.

10. One would have expected the Respondent to have produced proof of payment to Mahlangu in order to clear the aspersions cast upon him by Sibiya. Absent proof of such payments, at the very least, one would have expected the Respondent to have annexed a confirmatory affidavit by Mahlangu, which he failed to do.

11. At the hearing on 19 January 2017, the Respondent handed up an Affidavit deposed to by him setting out his attempts and inability to have made contact with Mahlungu for purposes of obtaining a confirmatory affidavit from her. Yet, no proof of payment of the monies allegedly paid by him to her was attached which in the circumstances one would have expected.

5.11. COMPLAINT BY THE HONOURABLE FORMER DEPUTY JUDGE PRESIDENT VAN DER MERWE

1. On 30 September 2011, the Applicant received correspondence from the former Deputy Judge President of the North Gauteng High Court, the Honourable van der Merwe (DJP), in which he called upon the Applicant to investigate the circumstances under which the Respondent had double-briefed Advocate DP Mogagabe ("Mogagabe")

2. Such complaint pertained to the judgment by the full court that was handed down on 29 November 2011 by the Honourable Justices van Dijkhorst, Combrinck and de Villiers, in the matter of the ***Pretoria Society of Advocates and another vs B P Geach and others***,

3. The Respondent was the attorney of record on behalf of the Plaintiff in the matter of ***Tau April v RAF*** and had had briefed Advocate Mogagabe to attend at the trial, enrolled for hearing on 14 October 2009. The matter settled a day or two prior to the hearing. The Respondent's taxed bill of costs was furnished to the claims handler of the RAF reflecting that Advocate Mogagabe had charged a fee of R15 048.00, for the day.

4. The Respondent was also the attorney of record on behalf of the Plaintiff in the matter of ***Msithini v RAF***. Likewise, the Respondent had briefed Mogagabe to attend at the trial, also enrolled for hearing on 14 October 2009. Such matter also became settled a day or two prior to the hearing. The Respondent's taxed bill of costs reflected that Advocate Mogagabe charged a fee of R15 048.00, for the day.

5. The Honourable Judges found in the judgment that there had been conniving between counsel and the briefing attorneys in the practice of double-briefing and that there was no way that counsel could have been entitled to bill the RAF a double day fee.

6. The Applicant submitted in the Founding Affidavit that for the Respondent to have allowed the statements of account to pass through the Taxing Master as well as the RAF claims handler, in itself constituted disgraceful conduct on the Respondent's part, which served to bring the profession into disrepute.

7. In argument, Mr da Silva S.C. for the Respondent submitted that it would be wrongful to pay too much attention to this complaint, given that the Geach judgment had been substantially overhauled by the Supreme Court of Appeal, and, that such judgment of Appeal had not been released at the time of the complaint by the Honourable Deputy Judge President.

8. Mr da Silva submitted further that if any matter becomes settled immediately prior to the date of the trial, an advocate would be entitled charge for that day and to take a brief for a second matter, for the same day and would therefore be entitled to charge a trial fee in each of the two matters.

9. These submissions may be cogent, if those were the facts. On the face of it, such conduct creates an impression of impropriety, but without the detail of exactly what transpired, one cannot conclude that the Respondent had indeed connived with Mogagabe and it is not necessary for us to analyze the Supreme Court of Appeal judgement, in the ***Geach*** matter, in order to make any further findings.

5.12. STATE OF THE RESPONDENT'S ACCOUNTS

1. Mapfumo's report demonstrated that the Respondent's books, records and accounts were in an appalling state. Payments for disbursements for the period ending 28 February 2011 such as x-rays, and medical experts were not referenced to any specific matter.

2. The trust creditor's ledger accounts were updated in Excel spreadsheets but Mapfumo was only given records for 2011 and 2014, the Respondent's version being that his accounting records were with his bookkeepers. Mapfumo found that several ledger accounts reflected debit balances, some of which ledgers reflected the receipt of funds after payments were made. Such ledger accounts were deficient in their narration, without explanation for the transactions to which the entries related.

3. The 2014 ledger accounts also reflected that some of the clients' payments were allocated in other client's ledger accounts, indicating to Mapfumo that the funds were rolled and fragmented payments were made to clients.

4. The Applicant averred in the Founding Affidavit that the interest for the years 2013 and 2014 had not been paid by the Respondent to the Attorneys Fidelity Fund. The Respondent's audit report ending 28 February 2015 did not reflect the interest carried forward from the previous period. Mapfumo expressed the view that the Respondent's auditors did not verify the opening balances as the interest owing had not been carried forward.

5. Mapfumo had inspected the list of trust creditors for the period ending 28 February 2011 and 28 February 2014, which revealed at 28 February 2014 a trust deficit in the amount of R39 067.02. Mapfumo expressed the view that the manner in which the trust funds were handled posed a risk to trust creditors as well as to the Attorneys Fidelity Fund, a contention with which we unhesitatingly agree, in the absence of any suitable explanation whatsoever from the Respondent.

6. One would have expected the Respondent to have filed an Affidavit by his auditor to challenge these damning allegations, if he contested same. The Respondent did not do this, but chose to rather aver that he no longer had access to his records which were taken by Mapfumo. Whilst the Respondent painted a picture of having been denied access to his records by Mapfumo, we doubt that the Applicant would have so denied such access to any auditor appointed by the Respondent.

7. The Respondent's failure to have maintained adequate accounting records, or to have taken steps to have obtained same from his bookkeeper and to have given same to Mapfumo for inspection, is another example of the inexcusable and reckless conduct on the part of the Respondent.

5.13. **FIDELITY FUND CERTIFICATE**

1. It is common cause that the Respondent practised throughout 2016 without a Fidelity Fund Certificate.

2. In response to the Application, the Respondent launched a counter-application directing the Applicant to provide him with a Fidelity Fund Certificate for 2016, within five days from the date of the granting of such Order.

3. Such Counter-Application was predicated upon an application for a Fidelity Fund Certificate which the Respondent annexed to the Answering Affidavit, in its prescribed form without having inserted the bank balances in respect of the firm's trust banking accounts.

4. There was much dispute on the papers as to whether or not such application form had been received by the Applicant who denied having received same.

5. At the hearing of the Application on 29 November 2016, the Respondent handed up to the Bench a short Supplementary Affidavit to which was attached a letter from the Applicant dated 6 June 2016 headed "Confirmation of Compliance with Rule 70", which reads as follows:

"This letter serves as confirmation that the auditor's report / bank statement / Affidavit for your firm in compliance with Rule 70.4 read with Rule 70.7 has been received and endorsed by this office. Please note that no acknowledgement of receipt will be made to the auditors of your firm, and you are therefore requested to advise them of the contents of this letter".

6. In argument, Counsel for the Respondent submitted that such letter served as evidence that a valid application had been made for the issue of a Fidelity Fund Certificate, in compliance with the relevant rule.

7. In response to this submission, Mrs Magardie for the Applicant submitted that the letter was no more than a computer generated letter issued by the Applicant to all firms in response to all applications and did not in any way speak to the correctness and compliance by the Respondent to the requirements for the issue of a Fidelity Fund Certificate. There is nothing in the letter which serves to confirm that the contents

of the auditor's report is unqualified or that same would entitle the Applicant to the issue of a Fidelity Fund Certificate;

8. The dispute in relation to the delivery or non-receipt of such form is sterile, given the failure to have reflected the trust bank balances in the allocated space set out in the prescribed form. Absent the provision of such bank balances, it was incompetent for the Applicant to issue a Fidelity Fund Certificate, even if the form had been timeously received. The failure to have completed such form adequately, served to render the application fatal. In the result the counter-application for the issue of the Fidelity Fund Certificate must fail;

9. Absent the issue of a Fidelity Fund Certificate for the year 2016, it was incompetent for the Respondent to remain in practice, and by doing so, he was and is, in violation of the applicable rules of practice. The non-issue of a Fidelity Fund Certificate in and of itself disentitles the Respondent to remain in practice as an attorney.

6. THE HISTORY OF THE APPLICATION ARGUED BEFORE US ON 29 NOVEMBER 2016

6.1. The Application had initially been enrolled, as one of urgency, on or about 26 April 2016, when it was removed from the Roll for want of urgency.

6.2. On 29 November 2016, Mrs Magardie who appeared for the Applicant, concluded her argument after having fully presented the Applicant's case.

6.3. After having presented extensive argument for the Respondent, Mr da Silva S.C., in response to questions posed by us as to the reasons for the Respondent's failure:

1. to have explained the late payments made to the various complainants, and

2. to have annexed proof of the payments which he had allegedly made to such complainants in the face of evidence to the contrary from the complainants;

Mr da Silva applied for a postponement of the application. The reasons advanced for the postponement, were to afford the Respondent a further opportunity to file a Supplementary Answering Affidavit, adducing proof of such payments and explaining the inordinate delays in having made such payments and having accounted to the various complainants.

6.4. One could accept that the Respondent did not have sufficient time to prepare his Answering Affidavit prior to the first date being 26 April 2016, as the application had been launched by way of urgency.

However it is noteworthy that no attempt was made by him to file a more extensive response prior to the hearing on 29 November 2016.

6.5. Notwithstanding the lapsing of some seven months since the issue of the application, in the interests of justice, we granted the postponement sought, to avail the Respondent the opportunity of furnishing cogent explanations for the late payments, coupled with proof of such payments to the various complainants. Accordingly, we postponed the application to 19 January 2017 and ordered the Respondent to file a Supplementary Answering Affidavit by 05 December 2016, with the Applicant to file a reply thereto by 12 December 2016.

6.6. Pursuant to the Order, the Respondent filed a second Supplementary Affidavit, deposed to on 6 December 2016, in which the Respondent, for the first time, raised a point *in limine.*

7. THE POINT IN LIMINE

7.1. The nub of the point *in limine* was that:

1. the rules of the Law Society had been repealed in toto and replaced with a fresh set of rules, which came into operation upon 1 March 2016;

2. the application was issued on 30 March 2016, after promulgation of the new rules.

7.2. The rules of the Applicant made under authority of Section 74(1) of the Attorneys Act and promulgated in Government Gazette 7164 of 1 August 1980 and all the subsequent amendments thereto, were repealed *in toto*, and replaced by the Rules for the Attorneys Profession, published in Government Gazette Number 39740, 26 February 2016, being Notice No. 2 of 2016 and approved by the Chief Justice of South Africa in consultation with the Judges President of the Gauteng and North West Divisions of the High Court in terms of Section 74(2) of the Act, and such rules came into effect upon 1 March 2016.

7.3. At the continued hearing on 19 January 2017, the argument advanced on behalf of the Respondent was that the application was fatally defective, as same had been launched in accordance with the prior Rules, which were repealed and substituted on 1 March 2016, with the application having been launched subsequent to such date, upon 30 March 2016.

7.4. In support of the Respondent's point *in limine,* Mr da Silva placed reliance upon ***Unitrans Passenger (Pty) Ltd trading as Greyhound Coach Lines v Chairman, National Transport Commission 1999(4) SA 1 (SCA)*** and in particular paragraphs 16 and 17 of such judgment, which reads:

"[16] Even accepting that the matter under discussion relates to procedure, a useful and necessary distinction is that between the case where a statute amending existing procedures comes into effect before the procedure has been initiated, and the case where the amending statute comes into effect after the procedure has been initiated and is pending.

[17] In the first type of case, it has usually been held that the new procedure applies to any action instituted or application initiated after the date on which the amending statute takes effect unless a contrary intention appears from the legislation. The ratio of this rule is understandable. By the time the action is instituted or the application initiated, the old procedure is not part of the law any more. Even if the old procedure existed when the cause of action or the cause of the application arose, that in itself does not create a right to rely on procedure which no longer exists. Minister of Public Works v Haffejee NO (supra at 755B-E) make that clear."

7.5. Mr da Silva submitted further that for rights to have vested in the Applicant to rely on the old rules, the litigation must have been instituted prior to the date of repeal of the old rules, failing which the provisions of Section 12(2)(c) of the Interpretation Act 33 of 1957 could not be triggered as was considered and ruled in the judgment of ***Brown v Incorporated Law Society of Natal 1958(3) SA 535 (N)***.

7.6. In the course of his argument, Mr da Silva however conceded that the new rules mirror the old rules, to a large extent, and that the changes are of no major significance.

7.7. All that is required for us to determine, is whether or not the Respondent remains a fit and proper person to remain in practice as an attorney, as envisaged in terms of Section 22(1)(d) of the Attorneys Act.

7.8. Where an attorney fails to account to his client for several years, or in some instances, at all, it matters not whether the failure fits into the old rules or the new rules. Where an attorney fails to pay his client monies that he has received from the RAF for his client, timeously, or at all, it matters not whether such failure has been couched in terms of the old rules or the new rules. The argument advanced is a question of substance over form. In the same way that the court is not there for the rules of court, but, rather the rules of court are there for the court, the rules of the Law Society are there to assist in determining whether or not a party facing an application of this nature is a fit and proper person, as envisaged in accordance with Section 22(1)(d) of the Act.

7.9. Moreover, an attorney's failure to pay monies over to any client, to short-change clients without feasible explanation, to pay clients years after receiving their money without accounting to them and in some instances, only after having been reported to the Law Society for

professional misconduct, is indefensible. It is not necessary for misconduct of this nature to fit into the four corners of any one particular rule of the Applicant.

7.10. Mr da Silva submitted further that the new rules were not applicable at the time of receipt of the various complaints, with the result that the Respondent could not have been in violation of the new rules.

7.11. Conversely, Mr da Silva submitted that the old rules had been repealed and could not be relied upon as the application was issued subsequent to the date of promulgation of the new rules.

7.12. Such submissions are disingenuous and without any merit for the reasons already set out above. In any event, the application does not hinge upon the violation of any set of rules but rather the applicability of Section 22(1)(d) of the Attorneys Act.

7.13. Having regard to the aforegoing, we find that there is no merit in the point *in limine.*

8. DISCIPLINARY PROCEDURE

8.1. Mr da Silva argued further that the application was launched somewhat precipitously, without the Applicant having followed its own disciplinary process, in terms of its rules.

8.2. This submission falls down inasmuch as the court is empowered to grant the relief sought, in terms of Section 72(6) of the Attorneys Act, without the applicant having embarked upon its own disciplinary process. Such disciplinary process is not by any means mandatory, in all cases.

8.3. In the normal course of events, the process of the Applicant would be to convene an enquiry in terms of Section 71 of the Act. However, in terms of Section 71(1) of the Act, the Council of the Applicant may {our emphasis} enquire into cases of alleged unprofessional, or dishonourable or unworthy conduct on the part of any attorney. Such enquiries are usually conducted by committees of the Council, formed under Section 67 of the Act.

8.4. In terms of Section 67 of the Act, the council may {our emphasis} appoint committees to assist with the carrying out of its functions.

8.5. In the circumstances, it was not peremptory for the council to have pursued formal charges before disciplinary committees, if in the opinion of the council, the Respondent was no longer considered to be a fit and proper person to remain in practice as an attorney.

8.6. The complaints are all similar in nature, all relate to non-payment, late payment, short payment, and failure to account for monies received from the RAF, on behalf of the respective complainants. For whatever

reason, the Respondent did not acknowledge receipt of the complaints, or deal with same in any manner, most of which were received over a close period of time. One can understand the Applicant's approach, in seeking its relief from the courts directly, in circumstances where the complaints were most serious, the Respondent was practicing with a trust shortfall and without a Fidelity Fund certificate, placing both clients and the Fidelity fund at risk.

8.7. The Applicant passed a resolution to bring an application for the relief sought in these proceedings, as it was entitled to do, in accordance with Section 72(6) of the Act, which specifically provides that the provisions of Section 72, which sets out the Council's disciplinary powers, would not affect the power of the applicant to apply for the suspension from practice or the striking from the roll of any practitioner against whom an enquiry is being or has been conducted in terms of the Act, in respect of the conduct which forms or formed the subject matter of such enquiry.

9. PURPOSE OF POSTPONEMENT

9.1. The manifest purpose behind which the postponement was granted on 29 November 2016, was to afford the Respondent an opportunity to file a further Affidavit setting out the reasons for the late payments to his clients of the monies due to them, as well as to adduce proof of such payments.

9.2. In the second Supplementary Affidavit presented by the Respondent dated 6 December 2016, the only proof of payment furnished by the Respondent was the Nedbank EFT of R30 000 to Msithini, who had been short-changed R30 000.00 in her capital.

9.3. If the Respondent understood the importance of producing proof of this payment in order to satisfy us that the payment was indeed made, he ought to have understood the importance of producing proof of payment, in one form or other, by way of attachment of proof of the electronic transfer of funds, alternatively bank statements, to support his averments relating to the payments to the other complainants, and, in particular to Dlamini, who stated on Affidavit that the Respondent had received R225 000.00 from the RAF, but as at date of the complaint had not heard anything further.

9.4. The Respondent abused the purpose of the postponement by failing to adduce proof of such payments, by rather utilising the postponement and second Supplementary Answering Affidavit as a mechanism to raise his point *in limine*.

10. NATURE OF THE MISCONDUCT

10.1. All of the misconduct complained of relates to financial misconduct, in the form of non-payment, late payment, short payments and failing to account timeously or at all, coupled with failure to maintain proper accounting records, trust shortfalls and tainted ledger accounts.

10.2. Financial misconduct on the part of an attorney is the most serious breach of a fiduciary relationship that an attorney has with a client. Such conduct completely erodes the very trust which the public ought to be in a position to place in the legal practitioners who represent them and undertake their affairs.

10.3. Out of all the rules, codes of conduct, ethical standards and norms applicable to the attorneys profession, the most sacrosanct are those pertaining to the handling of trust monies.

10.4. All of the conduct complained of is serious in nature and, correctly contextualised, goes to the root of the standards expected of a legal practitioner.

10.5. The attorney's profession is an honourable profession and must comprise an honourable membership body. All of the conduct complained of is dishonourable and unworthy of an attorney.

10.6. Such conduct, both in isolation and when weighed up cumulatively, bring us, in terms of Section 22(1)(d) of the Act, to the conclusion, that the Respondent is no longer a fit and proper person to continue to practise as an attorney.

11. PUNITIVE PROVISIONS

11.1. Having found that the misconduct renders the Respondent no longer fit and proper to remain in practice, the only question which then springs to mind, is whether any purpose would be served in suspending the Respondent from practice, in lieu of removing him from the roll of attorneys.

11.2. In the judgement of Bertlesmann J (with Tuchten J concurring), in ***Law Society of Northern Provinces vs Le Roux 2012 (4) SA 500 (GNP)***, suspension *vs* removal from the roll was considered. It was found that suspension is not an appropriate sanction, where an attorney was guilty of theft of trust funds, which was a criminal offence and an act of dishonesty that rendered him unfit for practice.

11.3. There is nothing to suggest otherwise, in the case *in casu*, and by suspending the respondent, there is no guarantee that he could or would become rehabilitated upon the lapsing of any period of suspension.

11.4. The Respondent has shown no signs or remorse for any of his misconduct, was cavalier in his approach to all of the complaints, placed heavy reliance on a point *in limine*, which could not hold water, and barring in the case of Msithini, did not produce any evidence to answer all of the serious allegations of non-payment.

In the result, a suspension from practice would serve no purpose and would offer little or no protection to the public, the Fidelity Fund and the wider legal profession.

12. **THE ORDER**

The severity of the misconduct leaves us with no choice, but to make the following order:

1. The Counter-Application is dismissed;

2. The point *in limine* is dismissed;

3. The name **BONIFACE BANTHERILE MABUSELA** (the Respondent) be removed from the Roll of Attorneys of this Honourable Court.

4. That the Respondent immediately surrenders and delivers to the Registrar of this Honourable Court, his certificate of enrolment as an Attorney of this Honourable Court.

5. That in the event of the Respondent failing to comply with the terms of the order detailed above, 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.

6. That the Respondent be prohibited from handling or operating on his trust accounts, as detailed in paragraph 7 hereof.

7. 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:

7.1 immediately to take possession of Respondent's accounting records, records, files and documents as referred to in paragraph 8 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;

7.2 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);

7.3 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); 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.

7.4 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;

7.5 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;

7.6 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;

7.7 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 12.1.12.1 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;

7.8 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;

7.9 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

7.10 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.

8 That Respondent immediately delivers to the curator bonis mentioned in paragraph 7 above, his accounting records, records, files and documents containing particulars and information relating to:

8.1 any monies received, held or paid by Respondent for or on account of any person while practising as an attorney;

8.2 any monies invested by Respondent in terms of section 78(2) and/or section 78 (2A) of Act No. 53 of 1979;

8.3 any interest on monies so invested which was paid over or credited to Respondent;

8.4 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;

8.5 any insolvent estate administered by Respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No. 24 of 1936;

8.6 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;

8.7 any company liquidated in terms of the Companies Act, No. 61 of 1973, administered by Respondent as or on behalf of the liquidator;

8.8 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

8.9 Respondent's practise as an attorney of this Honourable Court, to the curator appointed in terms of paragraph 7 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.

9 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.

10 The curator shall be entitled to:

10.1 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;

10.2 require from the persons referred to in paragraph 10.1 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;

10.3 publish this order or an abridged version thereof in any newspaper he considers appropriate; and

10.4 wind-up of the Respondent's practice.

11 that Respondent be and is hereby removed from office as –

11.1 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);

11.1 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;

11.2 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No. 24 of 1936;

11.3 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No. 61 of 1973;

11.4 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No. 57 of 1988;

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

11.6 administrator appointed in terms of Section 74 of the Magistrates Court Act, No. 32 of 1944.

12 That Respondent be and is hereby directed:

12.1 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;

12.2 to pay the reasonable fees of the auditor engaged by Applicant;

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

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

12.5 to pay the expenses relating to the publication of this order or an abbreviated version thereof; and

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

13 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.

14 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.

NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

I AGREE

MOLOPA-SETHOSA, LM

JUDGE OF THE HIGH COURT

On behalf of Applicant:	Mrs Magardi
Instructed by:	Damons Magardi Richardson Attorneys
On behalf of the Respondent:	Advocate CA da Silva SC
With him:	Advocate B Motlape
Instructed by:	Thobela Phaleng Inc Attorneys
Date of Hearing:	29 November 2016 and 19 January 2017
Date of Judgment:	