

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 58532/19

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED.</u>
.....
DATE	SIGNATURE

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

CATHARINA JOHANNA VAN DER MERWE

Respondent

J U D G M E N T

This matter was enrolled for hearing on 29 October 2020. It was dealt with or determined on the papers in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020, 11 May 2020 and 18 September 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 10:00 on 18 December 2020.

TEFFO, J (LENYAI, AJ CONCURRING)

[1] The applicant seeks an order for the striking of the respondent's name from the roll of attorneys together with ancillary relief sought in the notice of motion.

[2] The respondent filed a notice of intention to oppose the application. However, she failed to file an answering affidavit. The application is therefore not opposed.

[3] On 5 May 2020 this Court suspended the respondent from practising pending the finalisation of the application and further ordered the respondent to show cause on or before 29 October 2020 why her name should not be struck from the roll of attorneys. The respondent still did not file any opposing papers.

The parties

[4] The applicant is the South African Legal Practice Council ("*the Council*"). The Council was established in terms of section 4 of the Legal Practice Act¹ ("*the LPA*") as a body corporate with full legal capacity to exercise jurisdiction over all legal practitioners as contemplated in the LPA. The LPA came into effect on 1 November 2018.

[5] Section 116(2) of the LPA provides that any proceedings in respect of the suspension of any person from practice as an advocate, attorney, conveyancer or notary, or in respect of the removal of the name of any person from the roll of advocates, attorneys, conveyancers or notaries which have

¹ Act 28 of 2014

been instituted in terms of any law repealed by the LPA, must be continued with and concluded as if that law has not been repealed. For this purpose, a reference to the Law Society in the provisions that deal with suspension or removal, must be construed as a reference to the Council.

[6] The respondent is Ms Catharina Johanna Van der Merwe. She was admitted as an attorney of this Court on 5 March 2007. Her name still appears on the roll of legal practitioners.

[7] The respondent, until her suspension, was practising as a single practitioner for her own account under the style of Katy Van der Merwe Attorneys ("*the firm*" or "*practice*") at No 40 Van Graan Road, Casseldale, Springs, Gauteng Province.

Background

[8] The respondent's firm was established on 1 July 2012 with the respondent as the sole director. The last Fidelity Fund Certificate issued to her was for 2017.

The facts

[9] The Law Society/Council alleges that the respondent contravened the provisions of the Attorneys' Act, the LPA, the Law Society Rules, the Rules of the Attorneys' Profession, the Legal Practice Council ("*LPC*") Rules and the Code of Conduct in that:

- 9.1 She failed to submit her auditor's report for the financial period ending 28 February 2017 to the Law Society/Council timeously.

- 9.2 For the above reasons, the respondent did not qualify for and was not issued with a Fidelity Fund Certificate for 2018. Despite this, she continued practising as an attorney without being in possession of a Fidelity Fund Certificate as from 1 January 2018.
- 9.3 The respondent also previously practised without being in possession of the Fidelity Fund Certificates for the periods 1 January 2012 to 26 July 2012, 1 January 2013 to 22 January 2013, 1 January 2015 to 21 January 2015, 1 January 2016 to 12 April 2016 and 1 January 2017 to 3 May 2017.
- 9.4 Pursuant to the respondent's abovementioned conduct, on 6 November 2017 she was notified to appear before a disciplinary committee of the Council on 29 November 2017. She failed to appear. The disciplinary inquiry was postponed and the Committee recommended that an additional charge relating to the respondent's failure to appear before it on 29 November 2017 be formulated.
- 9.5 On 3 January 2018, the Law Society/Council notified the respondent to appear before its disciplinary committee on 14 February 2018. She again failed to appear.
- 9.6 A report in terms of Rule 50.18.1 was compiled and a letter was addressed to the respondent to which the report of the disciplinary committee was attached. The respondent was requested to furnish the Law Society/Council with her comments

on the report on or before 24 August 2018. She failed to reply to the letter. The Law Society/Council instructed its chartered accountant and auditor, Mr Ashwin Reddy to inspect the respondent's professional affairs.

9.7 On 7 August 2018 the respondent eventually submitted her auditor's report for the period ending 28 February 2017 to the Law Society/Council. The report had to be submitted to the Law Society/Council on or before 31 August 2017. It was therefore one year late. This report was qualified and reflected that the respondent failed to update her accounting records monthly and to balance them at least on a quarterly basis. The auditors also reported that they were unable to determine the existence of the firm's trust creditors or any amounts due to them.

9.8 Subsequently, on 29 August 2018, the respondent submitted another qualified auditor's report for the financial period ending 28 February 2018 to the Council.

9.9 She failed to pay her membership fees for 2018 and 2019 in the sum of R5 521,00 to the Law Society/Council.

[10] Various complaints from clients were lodged with the Law Society/Council.

10.1 Albasini Attorneys

The Law Society/Council received a complaint from Albasini Attorneys of Boksburg who acted on behalf of a certain Mr V A

Odgers. Mr Odgers first consulted with the respondent on 20 April 2018 and instructed her to handle a matter on his behalf which related to the custody of a minor child. He paid a total amount of R65 005,00 for services. He challenges the respondent's fees and disbursements. He complained that the respondent failed to properly account to him and that he did not receive the services. He eventually terminated the respondent's mandate and requested her to repay his money. The respondent failed to do so and she also failed to reply to Mr Odgers' correspondence. The complaint was referred to the respondent and she was asked to furnish her comments thereto on or before 21 June 2019. The respondent failed to reply to the letter and therefore did not comment on it.

10.2 Ms J du Plooy (Vulcania Trucks)

During October 2018 the Law Society/Council received a complaint from Ms J du Plooy. Ms Du Plooy instructed the respondent in March 2018 to act on her behalf or on behalf of her company (Vulcania Trucks) and collect arrear amounts from a debtor. The debtor paid the monies due to Ms Du Plooy or Vulcania Trucks into the respondent's trust banking account. The respondent made two payments to Ms Du Plooy but retained the amount of R24 000,00 and failed to pay it over to her/Vulcania Trucks. She acknowledged her indebtedness to

Ms Du Plooy/Vulcania Trucks and made several undertakings to pay the amount. She, however, failed to do so.

[11] Reddy, an inspector employed by the Council, investigated the complaint and established that the respondent could not pay the funds due to Ms Du Plooy (Vulcania Trucks) as the funds were no longer available in her trust banking account.

Mr M E Kotze

[12] The respondent acted on behalf of Mr Kotze in a debt collection matter where Mr Kotze was a debtor. On 9 October 2015, Mr Kotze deposited an amount of R16 351,82 into the respondent's trust banking account to be paid to his creditors to settle a debt owing by him and legal costs. Mr Kotze considered the debt settled until the sheriff attempted to attach his property on 23 January 2018. He found out that the respondent did not pay his funds to the creditor's attorneys as instructed. She had instead staggered the payment of the debt and legal costs over several payments between 2 November 2015 and 3 April 2017. The respondent had also not paid the full amount to the creditor's attorneys. He only paid the amount of R14 351,00 towards the debt. Mr Kotze had to effect further payments to the creditor for further interest and costs as a result of the respondent's conduct. Reddy investigated the complaint during his inspection of the respondent's professional affairs. The respondent confirmed the staggered payments made to Mr Kotze's creditor's attorneys. Reddy found that four of the eleven payments made by the respondent to Mr Kotze's creditor's attorneys were not paid from her trust banking account. According to Reddy, the respondent's

trust bank statements indicate that the respondent used Mr Kotze's funds to effect various transfers and pay various disbursements, and the trust account reflected a nil balance as at 1 February 2016. When accounting for Mr Kotze alone, the account ought to have held an amount of R7 851,82. Reddy found that the respondent's misappropriation of these funds resulted in a trust deficit.

Court Manager, Springs

[13] On 13 June 2018 the Law Society received a complaint from the Court Manager of the Magistrate's Court, Springs. The Court Manager made allegations that the respondent appeared in court in several matters during 2018 despite her not being in possession of a Fidelity Fund Certificate.

[14] Mr Ashwin Reddy (Reddy), a chartered accountant and auditor in the employ of the Council's Risk and Compliance Department, conducted an inspection of the respondent's professional affairs. He met with the respondent on 9 April 2019, 6 May 2019 and 27 June 2019.

[15] Reddy's inspection revealed the following:

15.1 The respondent's accounting records were updated until 29 February 2016 (more than three years prior his inspection). She failed to keep proper accounting records.

15.2 The respondent had continued practising without a Fidelity Fund Certificate.

- 15.3 She had been using her Nedbank trust bank account as a business bank account after opening her FNB bank account.
- 15.4 The respondent made several business and personal payments from her trust banking accounts (Nedbank and FNB) for which no explanation was proffered.
- 15.5 The respondent did not provide Reddy with all the documents he requested.
- 15.6 Trust deficits existed in relation to the complaints investigated by Reddy. The respondent misappropriated trust funds.
- 15.7 Reddy agreed with the findings of the respondent's auditors, in addition to his own findings.

[16] Pursuant to the court order of 5 May 2020 in terms of which the respondent was suspended from practising, Mr Johan van Staden, the Head of the Department, Practitioners Affairs (Risk and Compliance) and the Acting Director of the Legal Practice Council, Gauteng Provincial Office, was appointed as the *curator bonis* for the respondent's practice with the powers, functions and duties outlined in the court order.

[17] On the instructions and supervision of Mr Van Staden, Ms Fikile Mbatha, a legal official employed by the LPC, executed the *curator's* duties and subsequently compiled a report which was confirmed by Mr Van Staden.

The *curator's* report

[18] The report states that on 22 September 2020 the respondent sent an email to the office of the LPC and advised that she ceased practising in 2017. She had returned the files of her practice to her clients and the remainder of her clients were handed over to Alida Rossouw Attorneys in Springs. She has not had any new clients or appearances since then. She does not have any active files and all her investments, estate accounts were closed in the year 2019. She does not intend to practise. She has informed the LPC in the beginning of 2019 that she is not practising. She is employed in the administration field and not in any legal field, or as a practising attorney. She does not intend to oppose the application.

[19] The respondent advised that she had two trust accounts at Nedbank and FNB. Both accounts were not operational since 2017/2018. According to the records of the LPC, the firm only had one trust account with Nedbank. The account was closed on 16 October 2018.

[20] The *curator* did not receive any client files from the respondent.

[21] The respondent requests the court to have her name “*removed*” and “*not struck*” from the roll of attorneys.

[22] The LPC contends that the respondent did not fully comply with the court order of 5 May 2020 in that she failed to hand any of her accounting records and certificate of enrolment as an attorney to the *curator*.

[23] On 2 October 2020 the respondent sent an affidavit to the office of the *curator*. The affidavit was not served on the Council’s attorneys nor filed with this Court. She states in the affidavit that she is in agreement with the

Council's application. She does not oppose it and will therefore not be filing an answering affidavit. She further mentions that she is willing to agree to a consent order that she be removed and not be struck from the roll of attorneys.

[24] The respondent admitted that she was not in possession of a Fidelity Fund Certificate during 2018, however she continued practising as an attorney during 2018. In the same affidavit, she contradicted herself and denied that she practised as an attorney during 2018.

[25] For the following reasons, the *curator* is convinced that the respondent was practising as an attorney during 2018:

25.1 She admitted that she attempted to obtain a Fidelity Fund Certificate on 15 January 2018 and on the dates that followed.

25.2 She kept certain accounting records relating to 2018.

25.3 She informed the Council on 1 August 2018 of her practice details, the opening of her new trust banking account with FNB, and the fact that her Nedbank trust account would be closed.

25.4 She does not deny that she informed Mr Reddy, the Council's inspector, that she took a leave of absence from practice during 2017, returned to the office during 2018 and then ceased practising during March 2018.

[26] The respondent admits that her auditor's report for the period ending 28 February 2017 was submitted to the Council one year late and that her

auditor's reports for the period ending 28 February 2017 and 28 February 2018 were both qualified. She does not accept responsibility for the state of her accounting records and, instead, blames her bookkeeper and auditor.

[27] With regard to her trust accounting records, the respondent admits that:

27.1 Reddy found that she failed to update her accounting records and to maintain proper trust accounting records during the period 1 March 2016 to 28 February 2018.

27.2 Her accounting records for the 2017 and 2018 financial years were prepared incorrectly and inappropriately and had to be redone.

27.3 She failed to produce her trust accounting records to Reddy for inspection on 9 April 2019, as she was requested to do.

27.4 The accounting records that were subsequently presented to Reddy were prepared in an incorrect and inappropriate manner.

27.5 She did not maintain a trust creditor's ledger or a trust creditor's listing. Despite her admission that she received payments in her trust banking account, she stated that she never had any trust creditors.

[28] The respondent admits that she paid her business and personal expenses from her trust banking account. Further that she used her Nedbank trust banking account as a business account.

[29] She admits that she did not pay her membership fees as she did not have the funds.

The respondent's comments to the complaints against her

Albasini Attorneys

[30] The respondent admits in her affidavit sent to the *curator* that she was instructed to handle a matter relating to the custody of a minor child on behalf of Mr Odgers. She contends that she performed in terms of her mandate. Mr Odgers terminated her mandate. She received correspondence from Albasini Attorneys with an account that indicated that she overcharged Mr Odgers and requesting her to repay him.

[31] She admits that she was not at the time in a position to pay the money back. She agreed to pay the money in monthly instalments. She eventually signed an acknowledgement of debt. She further alleges that Albasini Attorneys undertook to withdraw the complaint. According to her the matter was settled.

J du Plooy

[32] The respondent states in her affidavit that she was not aware of the complaint as it was lodged at the time she was in the process of getting her affairs in order. She further mentions that she knows and admits that there was a complaint and it was not replied to. According to her the complaint was eventually resolved.

Mr Kotze

[33] The respondent contends that the complaint was *mala fide* and lodged to put her name in a bad light. She submits that after she had replied to the complaint, Mr Kotze never communicated with the LPC and/or commented on her reply. She states that she initially undertook to pay the agreed amount to the attorneys of the plaintiff and that at some stage she was advised not to pay the entire amount. She further mentions that the matter was eventually settled with De Jager Kruger van Blank. According to her, Mr Kotze should not have lodged the complaint with the LPC. He was ill-advised. The respondent further states that Mr Kotze complained after he received her account for the services she had rendered. The reasons for the staggered payments were not that she was not able to pay the attorneys but as a direct result of Mr Kotze's instructions.

Court Manager Springs

[34] The respondent denies the allegations made against her. She reiterates that as she had explained in her affidavit, either her files were finalised by a fellow colleague or an advocate to whom she had referred her clients. She further states that if it was her on record in the matters, she apologises to the court and the LPC.

The issue

[35] The issue for determination is whether or not the respondent has shown cause for her name not to be struck from the roll of legal practitioners.

[36] In exercising its discretion, the court is faced with a three-stage enquiry:

- (a) Whether or not the alleged offending conduct has been established on a preponderance of probabilities;
- (b) Once the court is satisfied that the offending conduct has been established, the second inquiry is whether the practitioner concerned is a fit and proper person to continue to practise;
- (c) If the court is of the view that the practitioner is not a fit and proper person to practise as an attorney, the third enquiry is whether in all the circumstances the practitioner in question is to be removed from the roll of attorneys, or whether an order suspending him/her from practice for a specified period will suffice.

Applicable legal principles

[37] The application was brought in terms of the provisions of section 44(1) of the LPA. The provisions of the LPA do not derogate in any way from the inherent power of the court to adjudicate upon and make orders in respect of matters concerning the conduct of legal practitioners².

[38] Applications for the striking off of an attorney's name from the roll of practitioners are not ordinary civil proceedings. They are proceedings of a disciplinary nature and are *sui generis*³. In *Solomon v Law Society of the Cape of Good Hope*⁴, the following was said regarding the nature of the disciplinary proceedings:

² Section 44(1) LPA

³ *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 393D-E

⁴ 1934 AD 401 at 408-409

“Now in these proceedings the Law Society claims nothing for itself ... It merely brings the attorney before the court by virtue of a statutory right, informs the court what the attorney has done and asks the court to exercise its disciplinary powers over him ... The Law Society protects the interests of the public in its dealings with the attorneys. It merely submits to the court facts which it contends constitutes unprofessional conduct and then leaves the court to determine how it will deal with this officer.”

[39] Where allegations and evidence are presented against an attorney, they cannot be met with mere denials by the attorney concerned. If the allegations are made by the Law Society and the 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 explanation⁵.

[40] When the court admits an attorney to the profession, he is put in a position to conduct matters of trust with the public. He occupies a position of great confidence and power, and the court is entitled to demand a very high standard of honour from him in the profession. The law exacts from him *uberimma fides* where he acts as agent for others; that is the highest possible degree of good faith. It is, therefore, essential that the public should be able to rely implicitly on the integrity and good faith of any attorney they may wish to employ. If the court, having regard to all the circumstances brought before it, is no longer justified in regarding an attorney as a fit and proper person to be entrusted with the important duties and gave responsibilities which belong to

⁵ *Hepple v Law Society of the Northern Provinces* 2014 JDR 107-8 at par 9

an attorney, it should either remove him from the roll of attorneys or suspend him from practise. For the sake of the public, and no less the profession, it is of utmost importance to enforce on all the attorneys the high standard of duty which rests upon them and demand the great integrity which is expected of them⁶.

[41] In *General Council of the Bar of South Africa v Geach & Others*⁷, the SCA said in relation to legal practitioners:

“After all they are the beneficiaries of a rich heritage and the mantle of responsibility that they bear as the protectors of our hard-won freedoms is without parallel. As officers of our courts, lawyers play a vital role in upholding the constitution and ensuring that our system of justice is both efficient and effective. It therefore stands to reason that absolute personal integrity and scrupulous honesty are demanded of each of them. It follows that generally a practitioner who is found to be dishonest must surely in the absence of exceptional circumstances expect to have his name struck from the roll.”

[42] The court and the applicant have a duty to act where a legal practitioner’s conduct falls short of what is expected, and to curb the erosion of values in the profession. The protection of the public goes hand in hand with the court’s obligation to protect the integrity of the courts and the legal profession. Public confidence in the legal profession and the courts is

⁶ *Incorporated Law Society, Transvaal v Visse and Others, Incorporated Law Society v Viljoen* 1958 (4) SA 115 (T) at 131D-G

⁷ 2013 (2) SA 52 (SCA) at para 87

necessarily undermined when the strict requirements for membership to the profession are diluted.

[43] The keeping of proper accounting records underpins the legislature's endeavours to protect the interests of the public. Failure by an attorney to do so is a serious contravention⁸. It is a fundamental duty of every practising attorney to ensure that the books of the firm are properly kept and that there are sufficient funds at all times to meet the trust account claims⁹.

Discussion

Whether or not the offending conduct has been established on a preponderance of probabilities

[44] This is a factual enquiry. All the facts should be considered in their totality. The application was served on the respondent. She filed a notice of intention to oppose the application but failed to file her opposing affidavit. In an affidavit attached to the *curator's* report dated 1 October 2020, which affidavit was only sent to the office of the *curator* and not served on the Law Society/Council and the court, the respondent has admitted most of the allegations made against her in this application. She clearly stated that she does not intend to oppose the application and therefore will not file an opposing affidavit.

[45] Furthermore, in relation to the complaints lodged against her, the respondent alleges that they have been resolved but fails to attach any proof

⁸ *Holmes v Law Society of the Cape of Good Hope and Another, Law Society of Good Hope v Holmes* 2006 (2) SA 139 (C) at 152B-F

⁹ *Incorporated Law Society (OFS) v V* 1960 (3) SA 887 (O) at 890C

in that regard. She does not explain how they were resolved. She also does not explain why she did not furnish her comments on the complaints to the Law Society/Council when she was requested to do so. In relation to the complaint by Albasini attorneys on behalf of Mr Odgers, the fact that the respondent has agreed to pay back the money paid by Mr Odgers in her trust banking account, is an indication that she admitted the misconduct. She fails to explain why she was not able to pay the money when it was demanded from her.

[46] Regarding the complaint by Ms Du Plooy, the respondent does not explain what happened to the amount of R24,000,00 that she retained in her trust account on behalf of Ms Du Plooy.

[47] With regard to the complaint by Mr Kotze, it does not make sense that after she had agreed to repay the money that was held in her trust account on behalf of Mr Kotze, the respondent was according to her, advised not to pay the entire amount. She also does not tell how much she had paid if ever there was any amount that she had paid. The respondent does not explain why she failed to execute her instructions, why she did not pay the attorneys of Mr Kotze's creditors in full and eventually causing him to incur further and unnecessary interests and costs thereby prejudicing him. She failed to explain what she did with Mr Kotze's trust funds and why they were not there when they were demanded. She did not dispute the trust deficit.

[48] As regards the complaint by the Court Manager in Springs, there is no reason why the Court Manager could make such allegations against the respondent. He does not have anything to gain. We find that the allegations

made by the respondent are not true. They are therefore rejected as false. We therefore conclude that the Law Society/Council has established the offending conduct on a preponderance of probabilities. We are persuaded that the respondent has contravened the provisions of the Attorneys' Act, the LPA, the Law Society Rules, The Rules of the Attorneys' Profession, the LPC and the Code of Conduct.

Whether the respondent is a fit and proper person to continue to practise

[49] This enquiry entails a value judgment which involves the weighing up of the conduct complained of against the conduct expected of an attorney. The allegations against the respondent are very serious. A legal practitioner must scrupulously observe and comply with the provisions of the LPA, the Code of Conduct and the Rules promulgated thereunder. The respondent has contravened the fundamental obligations of a legal practitioner. She has therefore made herself guilty of unprofessional conduct. The respondent is a member of the learned, respected and honourable profession and, by entering it, she pledged herself with total and unquestionable integrity to the society at large, to the courts and to the profession. Her conduct does not meet the very high standard of honour that is expected from practitioners who practise the profession. Her conduct does not display the *uberimma fides* and the integrity that the public can rely on where she acts as their agent. In our view the respondent can no longer be considered as a fit and proper person to be allowed to practise as a member of the legal profession.

The appropriate sanction

[50] In determining the appropriate sanction, the court is not imposing a penalty. The main consideration is the protection of the public¹⁰.

[51] It is never easy to impose the ultimate sanction on an attorney as it has the effect of terminating his means of livelihood, with adverse consequences to himself, and his family. Before imposing such a sanction, a court must be satisfied that the lesser stricture of suspension from practise will not achieve the court's supervisory powers over the conduct of the attorney. These objectives have been described as twofold: first, to discipline and punish the errand attorney and, second, to protect the public, particularly where trust funds are involved¹¹.

[52] An attorney's duty in regard to the preservation of trust money is a fundamental, positive and an unqualified duty. Neither negligence nor wilfulness is an element of a breach of such duty. Where trust money is paid to an attorney, it is his/her duty to keep it in his/her possession and use it for no other purpose than that of trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. It is imperative that trust money in the possession of an attorney should be available to his/her client the instant it becomes payable. Trust money is generally payable before and not after demand¹².

¹⁰ *Malan & Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) par 7. See also *Law Society of Cape Good Hope v Budricks* 2003 (2) SA 1 (SCA), *Jasat v Natal Law Society* 2003 (3) SA 44 (SCA)

¹¹ *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) at para 19

¹² See: *Law Society, Transvaal v Matthews (supra)* at 394, *Incorporated Law Society v Visse and Others, Incorporated Law Society v Viljoen supra* at 118F-H, *Incorporated Law Society, Transvaal v Behrman* 1977 (1) SA 904 (T) at 905H

[53] It is clear from the facts relating to how the respondent handled the trust funds of the complainants, Ms Du Plooy (Vulcania Trucks) and Mr Kotze that she has misappropriated them. Reddy found that there were no funds available in the respondent's trust banking account at the time of his inspection of her professional affairs to meet the complainants' claims. The respondent used funds held on behalf of Mr Kotze in trust to effect various transfers and disbursements which were not related to Mr Kotze's matter. This is pure theft of trust money and proves that the respondent was dishonest.

[54] In *Malan*¹³, it was held that if the court finds dishonesty in the conduct of a legal practitioner, the circumstances must be exceptional before a court will order a suspension instead of a removal.

[55] The conduct of the respondent in the above matters and the extent to which it reflects on her character, clearly proves that she is not worthy to remain in the ranks of the profession. The court has to protect the public from this kind of conduct. We cannot find any exceptional circumstances that would justify a lesser sanction. We therefore find that the appropriate sanction under the circumstances is to have the name of the respondent struck off the roll of attorneys (legal practitioners).

Costs

[56] In an affidavit sent to the *curator*, the respondent contends that she should not be liable for the costs of the application. She states that she made it clear from the onset that she was prepared to work with the Law Society/Council to finalise the matter and had tendered the costs of the

¹³ *Supra* at 221D-F, see also General Bar Council of South Africa v Geach & Others *supra*.

application up to the date before the hearing of the matter. She has admitted her wrongdoing which according to her was only administrative in nature. She is financially not able to carry any costs and believes that unnecessary costs were incurred by the attorneys of record of the Law Society/Council. This would not have been the case if the Law Society/Council attorneys had brought her correspondence to the attention of the court and the Law Society/Council. She asks for an order that each party pay its/her own costs.

[57] The above argument loses sight of the fact that where the Law Society/Council after adequate investigation and consideration, has come to the conclusion that the misconduct has been committed by an attorney, it is its duty to bring the matter to the attention of the court¹⁴.

[58] The resultant hearing is an inquiry conducted by the court into the attorney/legal practitioner's fitness to remain on the roll of attorneys¹⁵. The Council/Law Society fulfils the role of *amicus curiae*¹⁶. The award of attorney and client costs in these matters is not punitive.

[59] The Council/Law Society is entitled to its costs, even if unsuccessful, and usually on an attorney and client scale¹⁷.

[60] As indicated the respondent's affidavit is dated 1 October 2010. The respondent was suspended from practising on 5 May 2020. Prior to her suspension she had not responded to the Law Society/Council's correspondence and notices that invited her to appear before the disciplinary

¹⁴ *Incorporated Law Society v Taute* 1931 TPD 12 at 17

¹⁵ *Law Society of the Northern Provinces v Le Roux* 2012 (4) SA 500 (GNP) at 502E-F

¹⁶ *Ibid*

¹⁷ *Law Society of the Northern Provinces v Mogami & Others* 2010 (1) SA 186 (SCA) at para 31. See also *Law Society of the Northern Provinces v Sonntag* 2012 (1) SA 372 (SCA) at para 20

committee of Council. The application was served on her personally but she elected not to file her opposing papers. When she sent her affidavit to the *curator*, she was well aware that the application was already before court, a court order suspending her from practise and ordering her to show cause why her name should not be struck from the roll of attorneys, was served on her. She still elected not to participate in the application. She cannot blame anybody for the election she has made.

[61] Having regard to the conduct of the respondent that prompted the Law Society/Council to launch this application, I cannot find any reason to deviate from the general rule of granting costs on attorney and client scale against the respondent.

[62] In the result the following order is made:

1. The Draft Order marked "X" is made an order of court.

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:

**M M D LENYAI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date of hearing	29 October 2020
Date of hand down	18 December 2020
For the applicant	Rooth & Wessels Inc