

SOUTH AFRICA / JUDGMENT

**Law Society of the Northern Provinces v
Le Roux (49385/2010) [2012] ZAGPPHC 22;
2012 (4) SA 500 (GNP) (14 February 2012)
[2012] ZAGPPHC 22**

COURT

North Gauteng High Court, Pretoria

BEFORE

E Bertelsmann, N Tuchten

CASE / FILE NUMBER

49385/2010

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NOT

REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

GAUTENG DIVISION, PRETORIA

Case

Number: 49385/2010

Date: 14/02/2012

In

the matter between:

THE
LAW SOCIETY OF THE NORTHERN
PROVINCES.....

Applicant

And

IGNATIUS

STEFANUS LE

ROUX.....

Respondent

JUDGMENT

1. This application for the suspension of the respondent from his practice as an attorney and conveyancer is unopposed. As is evident

from the case number, the matter dates from 2010, the applicant's papers having been served on the respondent personally on the 1st September 2010.

2. It should be noted that the application was enrolled for the 11th November 2011. The significant delay in finalising an unopposed

application is indicative of the worrisome state of affairs that faces the legal professions. The sole reason for the delay appears to be the large number of applications for the suspension or striking off of attorneys from the roll that is pending in this division. This state of affairs is no different, apparently, from the number of cases of professional misconduct the Law Societies of other provinces have to deal with.

3. The position is exacerbated by the crowded state of the motion court roll in this division and the fact that it is established practice that two judges have to sit to consider an application for the suspension or striking off of a practitioner from the roll upon which her or his name has been entered as an officer of this court.

4. The respondent was admitted to practice as an attorney and conveyancer on the 29th May 2006. From the 1st June 2007 to the 4th

June 2009 he practised as a professional assistant of the professional firm Maponya Incorporated.

5. He left this firm under a dark cloud to start practising for his own account as Naas Le Roux Attorneys on the 5th June 2009.

6. Since that date he has failed to submit an audit certificate to the applicant society and is presently not in possession of a Fidelity Fund Certificate.

7. Even more disconcerting, however, is the fact that the respondent left his former employer after having confessed during an internal

disciplinary hearing to having misappropriated R 450 000, 00 from the employer firm's trust account.

8. A written admission was furnished to the employer and handed to the applicant society when the respondent failed to honour the

undertaking to repay the money he had unlawfully withdrawn from Maponya Incorporated's trust account.

9. The respondent failed to react to the applicant's enquiries and continued to do so after an official of the Society had investigated

his affairs and presented a damning report to him for his comments.

10. It is also uncontested that the respondent is presently being investigated by the police in connection with the alleged misappropriation of the trust funds. 11. It is against this background that the applicant Society resolved on the 23rd July 2010 to apply to this court for the respondent's suspension only.

12. When the matter was called we raised several concerns with Ms Magardie who appeared for the applicant. These touched upon matters

of practice and the policy the applicant Society has followed in recent years in matters of this nature. They were the following:

- a) On what basis did the applicant's Council resolve to apply for the suspension only of the respondent? Prima facie, and in the light of the uncontested evidence, the respondent has admitted theft of trust funds, which, apart from being a criminal offence, constitutes evidence of dishonesty of a degree which indubitably renders an attorney unfit to practice. A suspension allows the name of the attorney to remain on the roll of this court's officers and enables a dishonest individual to mislead unsuspecting members by failing to disclose that he is no longer allowed to practice as an attorney;
- b) On the evidence presented to us in this matter it would certainly offend against public policy and the public interest not to consider the ultimate sanction of striking the respondent's name off the roll of attorneys. The uncontested evidence establishes without doubt that he is unfit to be an officer of the court. The respondent "... committed about the worst professional sin that an attorney can commit by misappropriating trust funds...(b)earing in mind that ... the possibility of a repetition of his conduct if he were allowed to continue practising has not been excluded , the only appropriate penalty will ...be to strike him from the roll despite the dire consequences of such a step to him" (per Hefer AP in *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) at par {11};
- c) By applying for a suspension only - as the Society has to the court's knowledge done as a matter of course in recent years - against the background of the gravity of the respondent's conduct the applicant leaves the court with no option but to consider an order striking off the offending practitioner on its own initiative. It must be remembered that in disciplinary matters the Society may feature as applicant on the papers without being a party to the proceedings. As *custos morum* of the profession it brings offending behaviour to the court's notice, but the resultant hearing is an inquiry conducted by the court into the behaviour of its officer's fitness to remain on the roll of practitioners. The applicant fulfils the role of an *amicus curiae*. In principle, nothing prevents the court from initiating the inquiry into an errant attorney's conduct itself if it comes to the court's notice in whatever fashion. In the rare instance of severe professional misconduct in *facie curiae* a single judge is empowered to suspend or strike the offending practitioner off there and then. In an instance such as the present, however, the respondent is as yet unaware of the court's *prima facie* view that he should be struck off. It is not beyond the realm of possibility that the respondent may have

decided not to oppose an application for his suspension, but would oppose an application for his name being struck. He has a fundamental right to consider, and, if so minded, to pursue that course. The court can therefore only issue a rule nisi at this stage, calling upon the respondent to show cause why his name should not be struck off the roll, while suspending him pending the return date. This amounts to a waste of valuable resources of manpower and time. It also adds the costs of a second appearance by the applicant's legal representative to the punitive costs order that is usually issued against the respondent in proceedings of this nature; d) Prima facie, therefore, it would be preferable if the Society were in future, in all applications in which the gravity of the respondent's alleged misconduct is such that the court might consider a striking off order, to provide for this alternative in the notice of motion to accelerate the finalisation of disciplinary matters. The systemic delay that is evident from the unacceptably long period it took to bring this matter to finality is exacerbated if another appearance presided over by two judges of a very busy division becomes necessary. Dishonest attorneys must be laid by the heels as soon as possible. At present the earliest available court days for the enrolment of new disciplinary applications are in 2013. It is clear that this state of affairs is unacceptable and creates real dangers that unsuspecting member of the public fall prey to criminal conduct of the nature evident in this matter, because the opportunity for further nefarious conduct is created while applications for suspension or striking off of thieving practitioners have to take their place in the two year queue.

13. In order to better understand the challenges facing the respondent, the court reserved judgment and requested the applicant to indicate in an affidavit by its Director:
 - a) How many pending complaints of misconduct there were against attorneys at date of the hearing;
 - b) How many complaints still needed to be investigated;
 - c) How many indefinite suspension and striking applications there were pending before the court;
 - d) Did the Society regard the two year delay from the start of disciplinary proceedings to the final hearing as acceptable?
 - e) Did the Society have the capacity to deal with these matters?

14. The answers provided by Mr Grobler, who kindly responded to the court's inquiries, cast a very sorry reflection upon the state of affairs in the legal profession. There are no less than 4590 complaints pending against practitioners under the applicant's jurisdiction, of which 4117 were still under investigation at the date of the hearing; 473 of which still had to be heard by the applicant's disciplinary committee. 58 applications for suspension and 121 removal applications were pending with trial dates having been allocated to them.

15. Neither the applicant nor the court can be satisfied with these statistics. The Honourable Deputy Judge President has therefore

engaged the Council of the Society with an eye to adapt the practice manual of this Division in co-operation with the applicant's Council to address the existing backlogs and to accelerate the disposal of future disciplinary applications.

16. As far as the present matter is concerned there is more than sufficient evidence to come to the conclusion that a rule should issue calling upon the respondent to show cause why he should not be struck off. For the reasons set out above the following order is made:

1. A rule nisi is issued with return date on 9th May 2012 at 09h30 calling on the respondent to show cause why
 - a) He should not be struck off the roll of attorneys and conveyancers; and why
 - b) He should not be ordered to pay the applicant's costs on the scale of attorney and client;
2. Pending the return date of this order the respondent is suspended from practice as an attorney and as a conveyancer in terms of the draft order marked Annexure 'A' hereto.

Signed at Pretoria on this

E BERTELSMANN

Judge of the High Court

I agree.

N TUCHTEN

(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 49385/10

THE LAW SOCIETY OF THE NORTHERN PROVINCES..... APPLICANT

(Incorporated as the Law Society of the Transvaal)

and

IGNATIUS STEFANUS LE ROUX..... RESPONDENT

DRAFT ORDER OF COURT

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

IT IS ORDERED

1. That IGNATIUS STEFANUS LE ROUX (hereinafter referred to as the respondent) be suspended in his practice as an attorney and conveyancer of this Honourable Court.

2. That the respondent immediately surrenders and deliver to the registrar of this Honourable Court his certificates of enrolment as an attorney and conveyancer 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 certificates are, be authorised and directed to take possession of the certificates and to hand it to the Registrar of this Honourable Court.
4. That the 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:

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 REGISTRAR

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