

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

1

APPLICANT

DATE: 27.2.2012

REVISOR: [Signature]

CASE NO: 2188/2011

24/2/2012

IN THE MATTER BETWEEN:

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

APPLICANT

And

CORNELIUS FREDRICUS JACOBUS SWANEPOEL

RESPONDENT

JUDGMENT

TOLMAY, J:

[1] On 1 February 2011 the applicant brought an urgent application in which it sought in terms of s 22(1)(d) of the Attorneys Act 53 of 1979 (the Act) the suspension from practice of the respondent. An order to that effect was

granted. The respondent did not oppose the application and no opposing affidavit was filed.

- [2] The applicant now seeks in terms of s 22(1)(d) of the Act, in accordance with Part B of the notice of motion, an order for the removal of the respondent's name from the roll of attorneys together with ancillary relief. The applicant contends that the respondent is no longer a fit and proper person to practise as an attorney. Once again the respondent failed to file an opposing affidavit.

- [3] An application in terms of s 22(1)(d) of the Act requires a three stage inquiry:
- (a) the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities; if so
 - (b) it must decide, in its discretion whether the person concerned is a fit and proper person to practise as an attorney this requires a value judgment; and if not
 - (c) it must decide in its discretion (this also requires a value judgment) whether the attorney should be suspended for a period or whether he/she should be removed from the roll¹.

¹ Jassat v Natal Law Society 2000(3) SA 44 (SCA) at 51 B-I; Law society of the Cape of Good Hope v Buddricks 2003(2) SA 11 (SCA) at 13 I and 14 A-B; Malan and Another v Law Society of the Northern Provinces 2009(1) SA 216 (SCA)

[4] As for the facts in this case, the affidavit filed by the applicant and the report by the curator show that the respondent misappropriated trust funds in the amount of R1 389 000-00 from three clients, Mr Van Der Walt (R800 000-00), Dr Schrooders (R289 000-00) and Mr J Pulen (R300 000-00). The respondent admitted this to the applicant's investigator, Mr Van Rooyen, when Mr Van Rooyen investigated the accounting records. The trust account showed a deficit of R1 389 000-00.

[5] The respondent contravened *inter alia* the following provisions of the Attorneys Act and the applicant's rules:

- Rule 3.1 in that the Respondent's firm did not within 30 days after the change of its address inform the Applicant in writing of such changes;
- Section 78(1) of the Act in that the Respondent failed to keep sufficient funds in his firm's trust banking account to satisfy his obligation to trust creditors;
- Section 78(4) of the Attorneys Act read together with Rules 68.1 and 68.2 of the Rules in that the Respondent's firm did not retain such accounting records as are necessary to represent fully and

accurately in accordance with generally accepted accounting practice the transaction and records containing particulars and information of all moneys received, held and paid by it for and on account of any person;

- Rule 68.7 in that the Respondent failed, within a reasonable time, after the performance or earlier termination of the mandate, account to clients in writing;
- Rule 89.7 in that the Respondent, without lawful excuse, delayed the payment of trust money after due demand was given to him; and
- Rule 70.3 in that the Form of Assurance Report the Respondent caused to lodge with the Applicant was incorrect.

[5] The conduct of the respondent deviates to such an extent from what is expected of an attorney that there is no question that he is not a fit and proper person to continue to practise as an attorney.

[7] As far as the third enquiry is concerned the conduct established justifies the conclusion that the respondent's name must be removed from the roll of

attorneys². It is clear that he did not keep proper accounting records and that he has not dealt honestly with funds entrusted to him. The public must be protected against such a practitioner, and there is no suggestion that he will rehabilitate himself. He did not place facts before this court to show that he should not be struck off the roll.

[8] The contraventions by the respondent are of such a nature that he should be removed from the roll as a suspension would not suffice under the circumstances and I propose that we should exercise our discretion to that effect.

[9] Consequently an order is made in terms of the draft marked "X"



R G TOLMAY

JUDGE OF THE HIGH COU

I agree:



B R SOUTHWOOD

JUDGE OF THE HIGH COURT

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

24 FEBRUARY 2012
BEFORE JUDGE SETHWANE
BEFORE JUDGE TULHAY

Case No: 2188/2011

In the matter between:

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

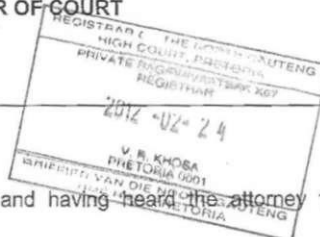
APPLICANT

and

CORNELIUS FREDRICUS JACOBUS SWANEPOEL

RESPONDENT

DRAFT ORDER OF COURT



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

IT IS ORDERED

[Signature]
24/2/12

1. That the name of **CORNELIUS FREDRICUS JACOBUS SWANEPOEL** (respondent) be struck from the roll of attorneys of this Honourable Court.
2. That the respondent hands and delivers his certificate of enrolment as an attorney to the Registrar of this Honourable Court.
3. That in the event of the respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate and to hand it to the Registrar of this Honourable Court.
4. That respondent be prohibited from handling or operating on his trust accounts as detailed in paragraph 5 hereof.
5. That Johan van Staden, the head: members affairs of applicant or any person nominated by him, be appointed as *curator bonis* (curator) to administer and control the trust accounts of respondent, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by respondent at a bank in the Republic of South Africa in terms of section 78(1) of Act No 53 of 1979 and/or any separate savings or interest-bearing accounts as contemplated by section 78(2) and/or section 78 (2A) of Act No. 53 of

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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);

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- 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

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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/she 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

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- 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 deliver his accounting records, records, files and documents containing particulars and information relating to:
- 6.1 any monies received, held or paid by respondent for or on account of any person while practising as an attorney;
- 6.2 any monies invested by respondent in terms of section 78(2) and/or section 78 (2A) of Act No 53 of 1979;
- 6.3 any interest on monies so invested which was paid over or credited to respondent;
- 6.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by respondent, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;
- 6.5 any insolvent estate administered by respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;

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- 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;
- 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/her (respondent) in respect of his/her former practice, and should he/she fail to do so, he/she shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he/she 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.

