IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: 4143/2000

10/5/2019

DELETE WHICHEVER IS NOT APPLICABLE		
(1)	REPORTABLE:	~~YES~~/NO
(2)	OF INTEREST TO OTHER JUDGES:	~~YES~~/NO
(3)	REVISED	
	DATE:	.....
	SIGNATURE:	.....

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES — Applicant

And

JOHANN GEORG NIEHAUS — Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] This is an application for the striking of the respondent's name from the roll of attorneys on the basis that the respondent's conduct fell foul of the conduct expected of a duly admitted and practising attorney.

PARTIES

[2] The applicant, the Law Society of the Northern Provinces ("the Law Society"), has been succeeded by the Legal Practitioners Council Gauteng, which council was established in terms of the provisions of the Legal Practice Act, 28 of 2014 ("the Act"). In terms of the provisions of section 116(2) of the Act, all proceedings instituted prior to the commencement of the Act, must be continued and concluded as if the Attorneys Act, 53 of 1979 has not been repealed by the Act.

[3] The respondent is Johann Georg Niehaus who was admitted as an attorney on 27 January 1976. At the time when the application was launched during February 2000, the respondent was practising as a director of the firm Slabbert, Visser and Schnetler Inc. The respondent was suspended from practice in terms of an order of this court on 25 May 2001. When this application was heard on 14 February 2019, the respondent had not been practising for a period of approximately 18 years.

INTRODUCTION

[4] The complaints *in casu* occurred as long ago as 1998 and 1999. The delay in the finalisation of the application was, in the main, caused by criminal charges of theft and fraud the respondent faced in the Regional Court of Gauteng. The charges related to the respondent's conduct in his practice as an attorney. On 14 September 2016, the respondent was found guilty on 15 counts of fraud and 13 counts of theft.

[5] The respondent, who was 68 years at the time, was sentenced to 15 years' imprisonment wholly suspended for five years on condition that the respondent was not found guilty of fraud and theft during the aforesaid period.

LEGAL FRAMEWORK

[6] First and foremost, this application is an inquiry into the respondent's fitness to hold office of an attorney. The inquiry is *sui generis* and distinct from criminal proceedings. The inquiry involves three stages, namely:

[6.1] a factual inquiry into the alleged conduct of the respondent;

[6.2] should the conduct be established beyond reasonable doubt, the court should determine whether the respondent is a fit and proper person to continue practising as an attorney;

[6.3] once it is found that the respondent is not fit and proper to continue practising as an attorney, the court must consider an appropriate

sanction to be imposed. [*Jasat v Natal Law Society* 2000 (3) SA 44 (SCA).]

[7] The conviction in the criminal proceedings is as a result, only a factor to be considered in the inquiry and not the basis of the inquiry.

Factual inquiry

[8] The facts underlying the alleged offensive conduct of the respondent are not in dispute. The respondent, however, denies that the facts amount to dishonourable conduct. In order to establish whether the common cause facts impact on the respondent's fitness to practice as an attorney, a short summary of the facts will suffice.

[9] The respondent formed a close bond with a certain Mr Agrela of Hersch International Consultants (Pty) Ltd. Mr Agrela became the largest client of the respondent's firm and shared offices with the firm. Mr Agrela was the mastermind of a fraudulent scheme in which large amounts of money were purportedly advanced to prospective lenders.

[10] The respondent's involvement in the scheme, pertained to monies paid into the respondent's trust account for purposes of costs associated with the obtaining of offshore finance and interim loans from Hersch, represented by Agrela. The monies never eventuated and upon cancellation of the loan

agreements by the prospective lenders, the respondent failed to return the monies he held in trust on behalf of the lenders.

[11] The following summary of complaints appear from the heads of argument filed by Mr Groome, on behalf of the Law Society:

"*(a) Marthinus Johannes Crous*

Mr Crous applied for a loan from Hersch on behalf of Unique Welding Alloys CC. Mr Agrela informed him that the loan was approved, but he had to pay an amount of R21 000 into the respondent's trust account to provide for administration fees, the drafting of the contract and stamp duties of R9 000. The loan never paid out and the respondent failed to return the amount of R21 000 to him.

The respondent says that he had prepared a loan agreement with bond documents, but does not annex an invoice and makes no mention of paying stamp duties. According to him, the deposit was received for the credit of Hersch and he advised Mr Crous to collect his money from Hersch if he had a claim thereto.

(b) Barend Jacobus Jordaan Burger:

Mr Burger paid an amount of R75 000 into the respondent's trust account on behalf of Pro-Soya (Pty) Ltd. Hersch informed the company that a loan of

US$21 million was approved, but an amount of R75 000 had to be paid in advance for administration fees, the drafting of the contract and stamp duties of R63 000. The loan never paid out and the respondent failed to return Mr Burger's funds to him.

The respondent's reply is similar to the matter of Crous. He says that a loan agreement and bond documents were prepared, but again annexes no invoice and makes no mention of paying stamp duties. According to him, the deposit was received for the credit of Hersch, and a company called Protein Extraction would attend to the repayment of the deposit to Mr Burger.

(c) *Leslie J Marx:*

Mr Marx paid an amount of R21 000 into the respondent's trust account on behalf of Randburg Executives CC. The corporation had applied for a loan from Hersch, but an amount of R6 000 had to be paid in advance for costs and R15 000 for stamp duties. The contract was never signed and when he decided to withdraw from negotiations, the respondent failed to return the amount of R21 000 to him.

The respondent's answer is similar to the other matters. The deposit was received for credit of Hersch, but there is no invoice annexed and it does not appear from the papers that stamp duties were actually paid.

(d) *Leon Toolpart:*

The respondent misrepresented to Mr Badenhorst, the managing director of a business called Leon Toolpart, that one of its debtors, Pro Industries (Pty) Ltd, had obtained a loan from Hersch in the amount of R600 000. As a result of the misrepresentation, Leon Toolpart continued to supply goods to the debtor on credit. The loan never paid out and the debtor was eventually liquidated.

The respondent admits that he signed a payment guarantee on behalf of Hersch, dated 24 July 1998, that was payable upon registration of a mortgage bond.

By October 1999, when IDSEO attached the respondent's files, the bond had still not been registered.

(e) *Riccardo Rosser Valente:*

Mr Valente applied for a loan from Hersch on behalf of his company, Erf 332 Chloorkop (Pty) Ltd. He paid two amounts of R303 361.67 and R45 000 into the respondent's trust account to provide for the costs associated with the loan. As with the other complaints, the loan never materialised and the respondent failed to repay the deposits from his trust account.

The payments were made on the basis of two pro forma invoices drawn up by the respondent.

The Law Society's inspector, Mr Swart, determined that there were no debits raised in the respondent's accounting records for fees or stamp duties. The amounts were simply credited to Hersch and paid out in seemingly unrelated transactions.

According to the respondent, the funds had already been paid to Hersch when the agreement was terminated, and he tried in vain to get a refund from Mr Agrela.

(f) *TK Blaise:*

Mr Blaise paid an amount of R105 000 into the respondent's trust account to provide for the costs associated with a loan from Hersch. The loan never paid out and the respondent failed to return the deposit.

According to the respondent, the deposit was received for credit of Hersch and was refunded by Hersch to a certain Mr Bezuidenhout, presumably after the respondent had paid the funds out to Hersch.

(g) *The Gilson Family Trust:*

The trust lost an amount of R30 000 that was paid into the respondent's trust account to provide for costs associated with a loan from Hersch.

The respondent says that the deposit was received for the credit of Hersch.

(h) *AT Moodley & Associates:*

AT Moodley & Associates lodged a complaint with the Law Society on behalf of their client, who lost an amount of R12 500 that was paid into the respondent's trust account to obtain a loan from Hersch.

(i) *Tim Du Toit & Kie Incorporated:*

Tim Du Toit Inc lodged a complaint with the Law Society on behalf of Duwill Properties CC, who lost an amount of R270 000 that was paid into the respondent's trust account to obtain a loan from Hersch.

It appears from annexures to the complaint that the respondent signed a 'Joint Venture Profit Sharing Agreement' as 'agent' and indemnified the investors against loss of the deposit if no bond is issued.

According to the respondent, a bond was indeed issued. However, he relies on hearsay evidence and does not attach a copy of the bond to his papers.

(j) *Klagsbrun De Vries Attorneys:*

Klagsbrun De Vries lodged a complaint with the Law Society on behalf of Mr JW Wallace, who paid two amounts of R270 000 and R155 000 into the respondent's trust account. When Mr Wallace withdrew from negotiations with Hersch, the respondent failed to return the funds.

Mr Wallace signed a written mandate that appointed the respondent to act as an attorney on his behalf.

The respondent admits that the amounts were paid, but says that he received the deposits for the credit of Hersch."

[12] The respondent's insistence that the monies he received in trust from lenders were for the credit of Hersch, is not borne out by the facts *supra*. The respondent did not provide one shred of evidence, be it an allegation of an oral or written mandate from the depositor/client, to support his version of events.

[13] It is trite that monies held on trust by an attorney on behalf of the depositor/client remains the money of the depositor/client. An attorney, in terms of the applicable rules and regulations pertaining to his/her profession,

must keep proper record of each and every amount so received and of each and every debit raised against the money held in trust.

[14] In the present instance, the monies were paid into the respondent's trust account by the lenders for a specific purpose, i.e. the drafting of loan agreements and the payment of stamp duties.

[15] Save for the rules and regulations pertaining to an attorney's trust account, the mere receipt of money in *"trust"* implies a fiduciary duty towards the depositor/client to properly, accurately and honestly deal with the money on instructions of the depositor. The respondent failed to account to the trust creditors in respect of each and every transaction debited against the monies he held in trust on their behalf. The respondent failed to return the depositor/client's money on request. This does not only amount to misappropriation of trust funds but also to theft.

[16] The respondent, who represented himself at the hearing of this application and upon a question from the court as to why the prospective lenders did not pay the amounts directly to Hersch, if the money was in actual fact due to Hersch, could not provide a coherent or satisfactory answer.

[17] Upon further questions raised by the court, the respondent intimated that in *"hindsight"* his conduct might not have been of the standard expected of an

attorney. The respondent, however, steadfastly denied that he intended to defraud the depositors.

[18] As alluded to *supra*, in these proceedings the respondent's intention is of little or no consequence. The respondent as an admitted attorney was at all relevant times bound by the rules and regulations pertaining to his profession. The respondent's conduct amounts to at least the misappropriation of trust monies, which, without a doubt, is one of the most serious transgressions an attorney could be found guilty of.

[19] A further complaint pertains to guarantees the respondent issued on behalf of ABSA, without being mandated to do so. The respondent acted on behalf of ABSA in property transactions and had a written mandate to issue guarantees on behalf of ABSA up to a certain amount.

[20] During February 1998, it came to ABSA's attention that the respondent had issued guarantees on behalf of ABSA without being mandated to do so. The guarantees were irregularly issued and suffered the following defects:

[20.1] there were no property transactions in terms of which the guarantees could be issued;

[20.2] the guarantees were issued for amounts substantial larger than the amounts authorised by ABSA;

[20.3] the guarantees did not have a bank account number and were undated;

[20.4] some of the guarantees were signed by Agrela.

[21] The irregular and unauthorised conduct of the respondent was discovered when one of the guarantees was presented at a Durban branch of NBS Bank for payment.

[22] According to the respondent, an ABSA employee was present during a meeting in his offices with Agrela. The bank official confirmed orally that the guarantees may be issued. This explanation emanating from an experienced attorney who had been issuing guarantees on behalf of ABSA for a substantial amount of time and had intimate knowledge of ABSA's business practice, defies all logic.

[23] Confronted with the aforesaid dilemma, the respondent stated that in *"hindsight"* he should not have trusted the mere say so of Agrela and the bank official. The fact of the matter is that the respondent acted outside the scope of his written mandate received from ABSA in circumstances that is unacceptable and unbecoming of an honest and diligent attorney.

[24] In the premises, I am satisfied that the facts in support of the complaints against the respondent have been established on a balance of probabilities.

Fit and proper

[25] The second stage of the inquiry involves a value judgment, which in turn involves the weighing up of the unprofessional and improper conduct of the respondent against the conduct expected of an attorney.

[26] The conduct expected of an attorney was succinctly summarised by Eksteen JA in *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at page 537F-G of the judgment:

"*In this regard it must be borne in mind that the profession of an attorney, as of any other officer of the Court, is an honourable profession which demands complete honesty, reliability and integrity from its members; and it is the duty of the respondent Society to ensure, as far as it is able, that its members measure up to the high standards demanded of them. A client who entrusts his affairs to an attorney must be able to rest assured that that attorney is an honourable man who can be trusted to manage his affairs meticulously and honestly. When money is entrusted to an attorney or when money comes to an attorney to be held in trust, the general public is entitled to expect that that money will not be used for any other purpose than that for which it is being held, and that it will be available to be paid to the persons on whose behalf it is held whenever it is required. Here once again the respondent Society has been created to ensure that the reputation of this honourable profession is upheld by all its members so that all members of the public may continue to have every confidence and trust in the profession as a whole.*"

[27] The respondent's conduct does not only fall dismally short of the high standard of conduct expected of an attorney, but also led to him being found guilty of fraud and theft. Both charges contain an element of dishonesty. An attorney who has been convicted of dishonest conduct in his dealings with his clients, could never be found to be a fit and proper person to continue in his practice.

[28] In the premises, I am satisfied that the conduct of the respondent renders him unfit to continue to practice as an attorney of this court.

Sanction

[29] The respondent pleaded with this court not to strike his name from the roll of attorneys. The respondent submitted that he had already suffered severely as a result of his conduct. He has lost his house, his family is in financial dire straits and he was subjected to a criminal trial that lasted almost eight years. He has nothing left.

[30] The main aim of imposing an appropriate sanction, is, however, not to penalise the attorney in question, but to protect the public from unscrupulous attorneys. The fact that the respondent will in all probability not practise as an attorney in future is cold comfort to the complainants who lost large sums of money due to respondent's conduct.

[31] As long as the respondent's name is reflected on the roll of attorneys, he remains a potential danger to the public at large. The court can simply not countenance the respondent's conduct by allowing him to remain in the honourable profession of an attorney. To do so, would make a mockery of the very essence of the profession, namely honesty and integrity.

[32] The court would be neglecting its duty towards the profession and the public, if the respondent is allowed to continue in his practice as an attorney.

ORDER

[33] In the premises, I propose the following order:

1. The name of **JOHANN GEORG NIEHAUS** (the Respondent) is hereby struck from the roll of attorneys of this Court.

2. Paragraphs 2 to 11 of the court order, dated 25 May 2001, remain in full force and effect.

3. The respondent is ordered to pay the costs of the application, including the costs previously reserved on 20 March 2006, 1 October 2007 and 17 April 2009, on the scale as between attorney and client.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

T.M. MAUMELA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD	14 February 2019
JUDGMENT DELIVERED	March 2019

APPEARANCES

Counsel for the Applicant:	Mr. L Groome
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Instructed by:	Rooth & Wessels Inc
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Appearance for the Respondent:	Mr J.G. Niehaus (In person)