REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO:

1460/2005

In the matter between:

THE LAW SOCIETY OF THE

Applicant

NORTHERN PROVINCES

(Incorporated as the Law Society of the Transvaal)

and

GABORONE MOTHOAGAE First

Respondent

THE LAW SOCIETY OF Second
Respondent
BOPHUTHATSWANA

CIVIL MATTER

DATE OF HEARING : 24 NOVEMBER 2005

DATE OF JUDGMENT: 12 JANUARY 2006

COUNSEL FOR THE APPLICANT : ADV L LEVER

COUNSEL FOR THE
FIRST RESPONDENT : MR H.E.T.H. MABASO

JUDGMENT

HENDRICKS J:

A. Introduction:

[1] The Applicant, the Law Society of the Northern Provinces, apply on an urgent basis, as interim relief, that:-

[i] the First Respondent be suspended from practising as an Attorney;

[ii] the First Respondent be interdicted from operating his trust accounts; and

[iii] that a curator be appointed with certain powers to perform certain functions and duties with regard to the practice of the First Respondent.

[2] This application was opposed and was argued before me on the 24th November 2005. After listening to the submissions of both Mr Lever on behalf of the Applicant and Mr Mabaso on behalf of the First Respondent, and having perused the affidavits and documents filed, I granted an order, the contents whereof is repeated at the end of this judgment. I also ordered that the reasons for the granting of the order will follow. Here follows the reasons:-

B. The Parties:

[a] **<u>The Applicant</u>**:

[3] The Applicant is the Law Society of the Northern Provinces incorporated as the Law Society of the Transvaal. It is a society as contemplated in Chapter 3 of the Attorneys' Act, Act 53 of 1979. The Law Society of the Transvaal is described as a juristic person in terms of Section 56(c). Upon the disappearance of the former Transvaal Province the Law Society of the Transvaal has renamed itself as the Law Society of the Northern Provinces.

[b] **<u>The First Respondent</u>**:

[4] The First Respondent is Goborone Mathoagae, an attorney of this court, who was admitted as such on 26 October 1993, and who is practising under the name and style of
G Mothoagae Attorneys at Mafojane Shopping Complex, Zone 1, Ga-Rankuwa.

[c] **<u>The Second Respondent</u>**:

[5] The Second Respondent is the Law Society of Bophuthatswana, a statutory body established by Section 50 of the Attorneys, Notaries and Conveyancers Act, No 29 of 1984 (the Bop Attorneys Act), with its offices situated at 5049 Zone 4, Molatlhwa Street, Ga-Rankuwa. No relief is sought against the Second Respondent.

C. Points-*in-limine*:

[6] On the day that this matter was argued, Mr Mabaso handed in a document which is titled "Notice of Motion in the Counter-Application by the 1st Respondent". This document was issued and handed over to Mr Lever, who appeared on behalf of the Applicant, on the same day that it was handed into court. Upon scrutiny of this document, it appears to me that what is termed a "counter-application" is nothing else than points-***in-limine*** raised.

[7] Before dealing with the merits, I will deal with the following points-***in-limine*** raised:-

[i] lack of ***locus standi***;

[ii] the unconstitutionality of Section 84 A of the Attorneys Act;

[iii] that the Bophuthatswana Law Society has exclusive jurisdiction over the First Respondent.

[i] Lack of *locus standi*:

[8] The first issue raised ***in limine*** in this Court by Mr Mabaso for the First Respondent, concerns the Applicant's ***locus standi***. It is argued that the Applicant is not a statutorily recognised body whose continued existence is ensured or recognised by Section 56 of the Act. The Law Society,

which has powers to regulate the exercise of the Attorneys' profession in the area of jurisdiction of the Transvaal Provincial Division, is the Transvaal Law Society and is thus the only entity, so it was argued, which could and should have launched this application. The Law Society of the Northern Provinces (the Applicant) therefore lacks the necessary ***locus standi*** to bring this application.

[9] The Applicant describes itself in the founding affidavit as the Law Society of the Northern Provinces, incorporated as the Law Society of the Transvaal, which came into existence "by Volksraadbesluit 1307 dated 10 October 1892" and which continued in existence "by virtue of the Constitution of the Incorporated Law Society of the Transvaal Ordinance No 1(Private) of 1905" and continued further in existence by virtue of the Attorneys Act.

[10] It is true that the name of the Applicant does not appear amongst the Law Societies mentioned in Section 56 of the Attorneys Act, but, on its letterhead, attached as annexure "1", below the name of the Applicant appears the words:-

> "Incorporated as the Law Society of the Transvaal."

and also:-

> "Serving Gauteng, Mpumalanga, Limpopo (now the Northern Province) and the North West Provinces."

[11] It can hardly be disputed that the old Transvaal no longer exists, this since the advent of our constitutional dispensation. In my view, judicial notice can be taken of the fact that the areas served by the Applicant as indicated on his letterhead now makes up the biggest portion, if not all, of what used to be known as "Transvaal".

[12] In my view, the fact that the Applicants' name does not appear in Section 56 of the Attorneys Act does not mean that it cannot and should not be recognised. It is clear that the Applicant has incorporated the Law Society of the Transvaal, which was statutory recognised. Thus, I find that this point, which was raised ***in limine*** by Mr Mabaso, to be without merit.

See:- **Mabaso v Law Society, Northern Provinces** 2004 (3) SA 453 (SCA).

[ii] The Unconstitutionality of Section 84 A of the Attorneys Act, Act 53 of 1979:-

[13] As the second point ***in limine*** raised by Mr Mabaso, it is stated:-

> "that Section 84 A of the Attorneys Act, Act 53 of 1979, as amended (should) be declared unconstitutional and invalid by virtue of the fact that it unfairly discriminates between Attorneys practising in the area of the erstwhile Bophuthatswana, and treats them unequally from those who practice in the area of the erstwhile 'Republic of South-Africa', and infringes

upon their right to equality and equal treatment in and before the law and seeks to unlawfully subject the Attorneys practising in the area of the erstwhile Republic of Bophuthatswana to control and regulation by two bodies, called statutory law societies, whereas it does not so require the same in the case of Attorneys practising in the erstwhile area that was the Republic of South-Africa, thus subjecting the said Attorneys to more burdens and hardships as opposed to those brought to bear on their colleagues (those practising in the area erstwhile known as the Republic of South-Africa) because they practice from the social area located in the erstwhile homelands, thereby infringing the said Attorneys' right to equality (Section 9) and equal treatment in and before the law, Rule of Law (Section 1 (C), Just Administrative Action, freedom of association, and other rights, in terms of the Act, number 108 of 1996, as amended, as well as summarily bring litigation against them before hearing their side as happens in the case of Attorneys in the erstwhile Republic of South-Africa, thereby contravening Section 3 of Act 3 of 2003, contrary to Section 8 (1) of Act 108 of 1996, amongst others,"

Section 84 A of the Attorneys Act reads as follows:-

"Law Society of Transvaal may exercise certain powers in respect of practitioners practicing in areas of former Republics of Bophuthatswana and Venda.

Notwithstanding any other law, the Law Society of the Transvaal and its council, president and secretary,

> may in respect of practitioners practicing in the areas of the former Republics of Bophuthatswana and Venda, perform any function which is similar to a function assigned to that Law Society, council, president or secretary, as the case may be, by section 22 (1) (*d*) or (*e*), (2), 67 (2), 69 (*a*), (*e*) or (*m*), 70, 71, 72, 73, 74 (1) (*a*), (*e*) and (*f*), 78, 81 (1) (*e*) and (*f*), (2) (*a*), (*d*), (*e*), (*i*) or (*j*), (5) or 83 (9), (13) or (15)."

[14] In essence Section 84 A provides that notwithstanding any other law, the Law Society of the Northern Provinces may, in respect of practitioners practising in the area of the former Republic of Bophuthatswana perform any functions "which is similar to a function assigned to that Law Society" by various Sections of the Attorneys Act, which are referred to in Section 84 A.

[15] The purpose of Section 84 A is to:-

[a] extent the cover of the Attorneys fidelity fund to the former territory of Bophuthatswana;

[b] make certain provisions of the Attorneys Act applicable to Attorneys practising in Bophuthatswana for the purpose of this Section;

[c] provide the Law Society of the Northern Provinces with the power and authority

- to ensure that Attorneys practising in Bophuthatswana comply with those provisions of the Attorneys, Notaries and Conveyancers Act, No 29 of 1984 (Bop Attorneys Act) of the former Bophuthatswana which are similar to the corresponding provisions of the Attorneys Act, such as:-

  [i] the keeping of a proper trust account;

  [ii] the keeping of proper accounting records; and

  [iii] the compliance with the appropriate rules.

- to enable the Law Society of the Northern Provinces to inspect the accounting records of such practitioners;

- to initiate disciplinary procedures against those practitioners who contravene the appropriate Sections of the Bop Attorneys Act and the Rules; and

- to initiate proceedings in the appropriate court to suspend or strike off Attorneys who, because of unprofessional, dishonourable and unworthy conduct, are deemed no longer fit and proper to remain on the roll of Attorneys in the appropriate circumstances.

[16] Prior to the enactment of the Attorneys and Matters relating to Rules of Court Amendment Act, Act 115 of 1998, which

came into operation on the 15th January 1999, an Attorney who practised in the erstwhile Republic of Bophuthatswana, belonged to the Bophuthatswana Law Society, by virtue of the Attorneys, Notaries and Conveyancers Act, No 29 of 1984 (Bop Attorneys Act).

[17] In Bophuthatswana there was no fidelity fund which was operational by then but only a benevolent fund. Although there was provision made for public protection, it was never implemented in Bophuthatswana. In the Schedule to the Attorneys Amendment Act, Act 115 of 1998 it is indicated which acts are repealed. Chapter 2 of the Bop Attorneys Act, No 29 of 1984 is amongst others repealed. Chapter 2 in essence dealt with fidelity fund matters.

[18] The situation of the absence of a fidelity fund is cured by the insertion of Section 84 A. However, Section 84 A does not deal exclusively with fidelity fund matters. Section 84 A confer on the Law Society of the Northern Provinces concurrent jurisdiction with the Bophuthatswana Law Society over members of the Bophuthatswana Law Society.

[19] There can be no doubt that the concurrent jurisdiction of the Law Society of the Northern Provinces and that of the Bophuthatswana Law Society is not confined to fidelity fund issues. For example:-

Section 22 deals with the obligation of the Law Society to apply for the removal of an Attorney from the roll;

Section 70 provides for the inspection of records;

Section 71 deals with unprofessional or dishonourable or unworthy conduct.

Section 78 deals with trust banking accounts.

[20] The position at present seems to be the following:

[a] An Attorney practising in the former Bophuthatswana is obliged to belong to the Bophuthathswana Law Society;

[b] that Attorney is also regarded for the purpose of Chapter 2 of the Attorneys Act, Act 53 of 1979 to be a member of the Law Society of the Northern Provinces and the provisions of Chapter 2 of this Act apply thus to Attorneys practising in the area of the former Bophuthatswana;

[c] the Bophuthatswana Law Society does not exercise jurisdiction over fidelity fund matters;

[d] the Bophuthatswana Law Society and the Law Society of the Northern Provinces exercise concurrent

jurisdiction over an Attorney practising in the territory of the former Bophuthatswana as regards the matters listed in Section 84 A of the Attorneys Act 53 of 1979;

[e] some of the Attorneys would be on the roll of another Law Society so that the provisions of Section 71 would apply to them.

See: **Law Society, Northern Provinces v Maseka and Another**2005 (6) SA 372 BHC.

[21] It is contended on behalf of the First Respondent that Section 84 A is unconstitutional and invalid because it unfairly discriminates against Attorneys belonging to the Bophuthatswana Law Society in that, they are subjected to the control and regulation of two Law Societies, quite different from their counterparts who belongs to Law Societies of the then Republic of South-Africa, which did not fall under the former homelands.

[22] Although it is true that an Attorney who belongs to the Bophuthatswana Law Society are also regarded as being a member of the Law Society of the Northern Provinces, as stipulated before, I am unconvinced that the dual membership amounts to unfair discrimination.

[23] The fact that two Law Societies have concurrent jurisdiction over an Attorney and exercise control over such Attorney is in my view not discriminatory. Either of the two Law Societies may take action or

appropriate steps against a member. Nothing prevents the two Law Societies together in their effort, to take action or steps against an Attorney at the same time. If however, these Law Societies take separate action against an Attorney, for the same misconduct, such an Attorney will have the appropriate remedies or defences at his or her disposal.

[24] Although the "more burdens and hardship" experienced by such an Attorney was not clearly explained by Mr Mabaso, it seems to me that the point he wanted to make is that the fact that an Attorney of the Bophuthatswana Law Society is accountable to two bodies (Law Societies) for his actions, creates practical problems for such an Attorney. Mr Mabaso however did not point out any prejudice which such an Attorney suffers or is likely to suffer in future.

[25] Without any stretch of the imagination, I cannot think of any situation that can arise in practice where such an Attorney cannot inform either of the Law Societies that the other Law Society dealt with or is dealing with the same matter. I also cannot understand why it will be so difficult for the two Law Societies not to communicate with one another. Their purpose is the same, and that is to regulate the Attorneys' profession. They are not rivalries.

[26] Law Societies are empowered by the Act to play an

important role in ensuring that legal practitioners conduct themselves with integrity. They do so in the public interest.

[27] It was also contended that Section 84 A has the effect that an Attorney of the Bophuthatswana Law Society can be subjected to litigation before an enquiry is held or to give such an Attorney the opportunity to present his case at a disciplinary hearing as it happens with their counterparts in the Republic of South Africa.

[28] Van Dijkhorst J in **Prokureursorde van Transvaal v Kleynhans** 1995 (1) SA 839 (T) at 851 G states that:-

> **"**Hierdie hof het die bevoegdheid om sy eie prosedure te reël.
>
> Dit is per slot van rekening 'n dissiplinêre ondersoek, nie 'n siviele geding nie.
>
> Die vraag of die jurisdiksie wat die Applikant aan a. 22 van die Wet op Prokureurs ontleen geldig is, is dus nie wesenlik nie. Die geskilpunte draai om die geskiktheid van die Respondent om as prokureur te praktiseer, nie om die Applikant se ***locus standi*** nie."

[29] Bertelsman J in the matter of **The Law Society of the Northern Provinces v Peter Clive Soller** (unreported case

No 992/2001 TPD) states the following:

> **"**It follows that the respondent has no right to insist upon a disciplinary enquiry being held prior to steps being taken for his removal from the roll. In fact, this Court could ***mero motu*** initiate steps to strike the respondent's name off the roll of Attorneys, and could do so, albeit notionally, without reliance upon the applicants' co-operation or, indeed, against the applicants' wish."

[30] I am in full agreement with Bertelsman J. This court can determine whether an Attorney, as an officer of this court, is a fit and proper person to practice, or continue to practice as such. This is done in the interest of and for the protection of the public for which the Attorney renders a service.

[31] As pointed out by Van Dijkhorst J in the case of Prokureursorde van Transvaal v Kleynhans, ***supra*****,** that an application to either suspend or strike an Attorney from the roll of Attorneys is indeed a disciplinary hearing and not a civil action.

[32] Although this application consists of two parts namely, at first it is an application for the suspension of the First Respondent and secondly it is an application to strike the First Respondent from the roll of Attorneys, what is now before me is the first part. However, in both

instances, the First Respondent is called upon to reply to the allegations and thereby given a chance to present his case and to defend himself.

[33] Therefore, I am of the view that the complaint raised by First Applicant that Attorneys like himself, who practices under the Bophuthatswana Law Society is at a disadvantage compared to their counterparts in the areas that did not fall under the erstwhile homelands, is without merit.

[34] As alternative to this point ***in limine***, it is submitted that the following words should be inserted at the end of Section 84 A, namely:-

"regarding matters not dealt with by either the Law Society of Bophuthatswana, or the Law Society of Venda ."

[35] The aim of the proposed insertion of these words is to prevent or do away with the situation that the Law Society of the Northern Provinces and the Law Society of Bophuthatswana for example, has concurrent jurisdiction over certain matters pertaining to Attorneys practicing under the Law Society of Bophuthatswana.

[36] Although it might be said that the regulation of an Attorney who practices in the territory of the former Republic of Bophuthatswana is a little complicated and

not altogether satisfactory, because of the concurrent jurisdiction over such an Attorney also by the Law Society of the Northern Provinces, I am of the view that it is not unconstitutional. I also do not agree with the contention that such an Attorney is at a disadvantage, as compared to his/her counterparts in the areas of the Republic of South Africa which did not fall under the erstwhile homeland areas.

[37] Seen from the perspective of the interest of society, the fact that two Law Societies has concurrent jurisdiction over an Attorney does have its advantages.

[iii] **<u>The Bophuthatswana Law Society and the Law Society of Venda to have exclusive jurisdiction over the areas for which they have been established</u>**:

[38] As the third point ***in limine***, it was argued that this court should direct that the Law Society of Bophuthatswana and the Law Society of Venda shall retain its exclusive jurisdiction over the areas for which they have been established by statute.

[39] I am of the view that this court is not empowered to order the exclusive jurisdiction of the Law Society of Venda over the areas for which it has been established simply because this court does not have jurisdiction over that areas or over the Law Society of Venda.

[40] As far as the Law Society of Bophuthatswana's position is concerned, I am of the view that although the golden thread that runs through several sections of the Attorneys Act indicates that the legislature intended that the jurisdiction in respect of any practising Attorney lies with the Law Society of the Province where that Attorney is practising, there is nothing that prevents the legislature to confer extra territorial jurisdiction on that Law Society. For example, in terms of Section 71, if an Attorney is on the roll of Attorneys in one Province, but practices in another Province, then it means that the Law Society of the Province where he practices will have exclusive jurisdiction over him to the exclusion of the Law Society of the Province where he is enrolled.

[41] In my view, there will be nothing wrong if the Law Society where such an Attorney is enrolled seeks to investigate unprofessional conduct against him. Similarly, the Law Society in whose area of jurisdiction that Attorney practises can also investigate for example the unprofessional conduct of such an Attorney. Either of the two law societies can do it alone or in conjunction with one another.

[42] I am of the view that the situation of an Attorney who is enrolled in Bophuthatswana is similar to the scenario described above. Such an Attorney can be investigated for unprofessional conduct by either, the

Bophuthatswana Law Society, where he is enrolled, or the Law Society of the Northern Provinces who has concurrent jurisdiction over such an Attorney.

[43] I am unconvinced that this court is entitled to direct that the Bophuthatswana Law Society has exclusive jurisdiction over the areas for which it has been established by statute.

[44] It is for the abovementioned reasons, that the points ***in limine*** were dismissed.

D. <u>Merits</u>:

[45] <u>Mr Mabaso</u> submitted that the proceedings in terms of Section 41 of the Attorneys Act, is premature. The First Respondent in his "Founding Affidavit for the Conditional Counter-Application" states:-

> **"**In essence, I respectfully submit that:-
>
> **7.1** As stated in the affidavit of 1st Respondent [Applicant], I communicated with it on several occasions and ended with an arrangement that when I shall have reply from my auditors I shall communicate with Respondent [Applicant], this was accepted by the

> Respondent [Applicant], myself and its agent, Swart."

[46] This is a "counter application", and the First Respondent in reconvention does not name the parties as in convention. This may create some confusion. I will endeavour to explain the position in this judgment with reference to the parties as in convention.

[47] This contention by the First Respondent was stated in response to the allegation which is contained in paragraph 5.2 of the report of Mr Swart, the contents thereof reads as follows:-

> **"**I requested Mr Mothoagae to contact the firm's auditors to conduct their audits for the years ended 29 February 2004 and 28 February 2005, which he agreed to do. I again reminded him to do this on 23 May 2005 and on 4 August 2005, when he promised that he would report back to me by 12 August 2005. I did not receive any further calls from the firm."

[48] It is highly unlikely that the auditor, assigned by the Applicant, Mr Swart, would have entered into this arrangement with the First Respondent. At first it defies all logic that the Applicant will go through the trouble of appointing an auditor to inspect the books of the First Respondent, only to enter into an agreement that the First Respondent can submit his books at some undetermined future date.

[49] The First Respondent also indicates that he is in possession of a fee book and that Mr Swart informed him that “there is nothing wrong” with his books.

[50] This is in sharp contrast to what is contained in the report of Mr Swart. In his report Mr Swart categorically states that the First Respondent’s firm’s accountant report for the year ended 29 February 2004 which was due on or before 31 August 2004, was not submitted to the Law Society as at the date of his report, being the 25th August 2005.

[51] Furthermore, the report states that First Respondent is also practising without a fidelity fund certificate from 01 January 2002. In terms of Section 41(3)(b) a fidelity fund certificate is valid only until 31 December of the year in which it is issued.

It means therefore that the last valid fidelity fund certificate that was issued to First Respondent prescribed at the end of the year 2001.

[52] For the years 2002, 2003, 2004 and also 2005, First Respondent was practising as an Attorney without being in possession of a valid fidelity fund certificate. This is in contravention of Sections 41(1) and 41(2) of the Attorneys Act and also Section 36(1) and 36(2) of the Bophuthatswana Act.

[53] The allegation by First Respondent that Mr Swart told him that “there is nothing wrong” with his books, cannot be believed.

[54] It is clear that the First Respondent practised as an Attorney for four (4) years without being in possession of a valid fidelity fund certificate. This is in contravention with the peremptory provision of Section 41(1) of the Attorneys Act which states that a practitioner shall not practice or act as a practitioner on his own account or in partnership unless he is in possession of a fidelity fund certificate.

[55] In my view, the contention that the proceedings in terms of Section 41 is premature, is without merit.

E. **Complaints against First Respondent**:

[56] There are also two complaints registered with the Applicant against the First Respondent.

[57] The first complaint is from the firm of Attorneys Gildenhuys van der Merwe Incorporated who acts on behalf of the Road Accident Fund (RAF). The RAF alleges that First Respondent acted on behalf of a

certain Mr O.J. Mothoagae against it. A claim for injuries sustained as a result of a motor vehicle accident was instituted by First Respondent on behalf of Mr O.J. Mothoagae. On the 26 January 2001 settlement between the First Respondent's firm and the RAF was reached and an amount of R70 312-50 was paid on 29 January 2001 into the trust banking account of the First Respondent.

[58] Mr O.J. Mothoagae (the client) however died on 07 November 2000 of causes unrelated to the motor vehicle accident. The RAF thereafter claimed the repayment of the settlement amount and has obtained a civil judgment against First Respondent for the amount of R70 312-50 plus interest thereon.

[59] When Mr Swart visited the firm of First Respondent, he requested the firm's accounting records in which these transactions would be recorded. First Respondent could not produce the accounting records or the client's file. The trust banking account of First Respondent's firm indicated a trust surplus of R154-69 as on the date of the report (25 August 2005).

[60] According to the report by Mr Swart, there is a strong suspicion that the firm of the First Respondent received the benefit and hence the failure to account for the money creates a trust shortage in the practice. The total amount of money in the firm's trust banking

account is less than the total amount of the credit balances of the firm's trust creditors.

[61] The second complaint is from Mr M.W. Taukobong, who instructed First Respondent's firm during 1999 to handle the administration of the estate of his deceased mother.

[62] The First Respondent did not execute the instruction properly. The assets in the estate amounted to R54 000-00. First Respondent only paid an amount of R8 000-00 to Mr Taukobong and failed to account in respect of the balance.

[63] Upon receipt of this complaint, the Applicant referred it to the First Respondent on 01 June 2005 and requested him to comment thereon. No response was forthcoming. According to the Applicant, the First Respondent most probably misappropriated the estate's funds.

[64] This is an application for interim relief and not for final relief. I am of the view that, ***prima facie***, a case has been made out by Applicant for the interim relief. These complaints necessitate the granting of the interim relief as prayed for by the Applicant.

F. **<u>Urgency</u>**:

Mr Mabaso submitted that his matter is not urgent. I cannot agree with this submission. It is clear to me that the First Respondent is not in possession of a fidelity fund certificate and that he is not keeping proper books of accounts. The public need to be protected and this must be done as soon as it is practical possible to do so.

> The trust creditors are at risk to loose their money, and so too is the Attorneys fidelity fund at risk to suffer losses. I am of the view that in the interest of the safety of the public, Applicant was entitled to approach this Court and to take the required action without delay, even on such an urgent basis.

It is for the abovementioned reasons that I granted the following order:-

[1.1] **THAT** the forms and service provided for in the Uniform Rules is dispensed with and that the matter is treated as an urgent application;

[1.2] **THAT** Goborone Mothoagae (hereinafter referred to as the First Respondent) be suspended from practising as an Attorney of the above honourable court, pending the final determination of this application;

[1.3] **THAT** the First Respondent surrenders and delivers to the registrar of this honourable court his certificate of enrolment as Attorney of this honourable court;

[1.4] **THAT** should the First Respondent fail to comply with the provisions of the preceding paragraph of this order on date of service of this order upon him, the sheriff for the district in which such certificate of enrolment is, is empowered and directed to take possession thereof and deliver it to the registrar of this honourable court;

[1.5] **THAT** the First Respondent be interdicted and prohibited from operating on his trust accounts as defined in paragraph 1.6 hereof;

[1.6] **THAT** Johan van Staden, the Head: Members' Affairs of Applicant, be appointed as a curator to administer and control the trust account of First Respondent, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with the First Respondent's practice as Attorney and including, also, the separate banking accounts opened and kept by First 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;

[1.6.1] immediately to take possession of the First Respondents' accounting records, records, files and documents as referred to in paragraph 1.7;

[1.6.2] 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 First Respondent was acting at the date of this order;

[1.6.3] subject to the approval and control of the board of control of the fund, to recover and received and, if necessary in the interest of persons having lawful claims upon the trust account(s) and/or against First Respondent in respect of monies held, received and/or invested by First 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 First Respondent was and may still have been concerned and which may have been wrongfully and unlawfully

paid from the trust account(s) of First Respondent, and to receive such monies and to pay same to the credit of the trust account(s);

[1.6.4] to ascertain from First Respondent's accounting records the names of all persons on whose account First Respondent appears to hold or to have received trust monies (hereinafter referred to as trust creditors) and to call upon First Respondent to furnish him, within thirty (30) 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;

[1.6.5] 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 First Respondent and, if so, the amount of such claim;

[1.6.6] to admit or reject, in whole or 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 creditors' right of access to the civil courts;

[1.6.7] having determined the accounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject to the approval of the board of control of the fund;

[1.6.8] in the event of there being any surplus in the trust account(s) of First 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 First Respondent, the costs, fees and expenses referred to in Section B, paragraph 1.3 of this order, or such portion thereof as has not already been separately paid by First 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 First Respondent, if they are solvent, or, if First Respondent are insolvent, to the trustee(s) of First Respondent's insolvent estate;

[1.6.9] in the event of there being insufficient trust monies in the trust banking account(s) of First

Respondent to pay in full the claims of trust creditors, to distribute the credit balance(s) in the trust banking account(s) pro rata amongst the trust creditors whose claims have been proved or admitted;

[1.6.10] 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

[1.6.11] to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of First Respondent has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated;

[1.7] **THAT** First Respondent immediately deliver his accounting records, records, files and documents containing particulars and information relating to:

[1.7.1] any monies received, held or paid by First Respondent for or on account of any person while practising as an Attorney;

[1.7.2] any monies invested by First Respondent in terms of Section 78(2) and/or Section 78(2A) of Act No 53 of 1979;

[1.7.3] any interest on monies so invested which was paid over or credited to First Respondent;

[1.7.4] any estate of a deceased person, or any insolvent estate, or any estate placed under curatorship of which First Respondent is the executor, trustee or curator or which First Respondent is administering on behalf of the executor, trustee or curator of such estate; and

[1.7.5] First Respondent's practice as Attorney of this honourable court, to the curator appointed in terms of paragraph 1.6 hereof, provided as far as such accounting records, records, files and documents are concerned, First Respondent shall be entitled to have access to them but always subject to the supervision of such curator or his nominee;

[1.8] **THAT** should First 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 First 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 where ever they may be and to deliver them to such curator;

[1.9] **THAT** the curator shall be entitled to:

[1.9.1] hand over to the persons thereto all such records, files and documents as soon as he has satisfied himself that the fees and disbursements in connection therewith have been paid or satisfactorily secured or that same are no longer required, provided that a written and signed undertaking by a trust creditor or pay such amount as may be due to First Respondent, either on taxation or by agreement, shall be deemed to be satisfactory security for the purposes of the preceding paragraph hereof; provided that such written and signed undertaking incorporates a ***domicilium citandi et executandi*** of such trust creditor;

[1.9.2] require that any such file, the contents of which he may consider to be relevant to a claim, or possible or anticipated claim, against him and/or First Respondent and/or First Respondent's clients and/or fund in respect of money and/or other property entrusted to First Respondent be re-delivered to him (the curator): provided that any person entitled thereto shall be granted

reasonable access thereto and shall be permitted to make copies thereof;

[1.10] **THAT** First Respondent, within one (1) year of they 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 (First 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;

[1.11] **THAT** a certificate to be signed by the curator specifying the number of hours spent by him, shall constitute ***prima facie*** proof of the number of hours spent by him on this matter.

R D HENDRICKS
JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPLICANT: ROOTH & WESSELS INC. c/o MINCHIN & KELLY INC.