IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN

Case No: 4791/10

In the matter between:

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE **Appellant**

and

DANIEL JACOBUS SIEBRITS **Respondent**

JUDGMENT DELIVERED: TUESDAY 28 SEPTEMBER 2010

SALDANHA, J

[1.] This is an application for an order removing the name of the respondent from the role of attorneys, notaries and conveyancers. The respondent opposes the application principally on the ground that an order of striking-off is not the only appropriate sanction in the circumstances.

[2.] On the 13th of May 2004 an interdict was granted by Acting Judge Franks against the respondent that, pending his obtaining a Fidelity Fund certificate for the period 1st January 2004 to 31 December 2004 as prescribed in terms of section 41 (1) of the Attorneys Act 1979, he was prohibited from practising as an attorney, notary and conveyancer. Various ancillary relief was also granted, similar to that which is sought in this application.

[3.] This application was initially unopposed until it first came before this court on the 4th of June 2010. It was postponed at the request of the respondent who sought an opportunity of filing opposing papers for as he termed it *"to place the correct facts and circumstances before the court"*.

[4.] The respondent is a 66 year old attorney, notary and conveyancer who prior to being interdicted had practised under the name and style of Siebrits and De Braal in Bellville. He was initially admitted as an attorney of the Transvaal Provincial Division (as it was then known) on the 9th September 1974 and was admitted as a conveyancer in that division on the 12th of July 1977. He was enrolled as an attorney and conveyancer of this Court on the 3rd November 1978 and was admitted as a notary on the 19 November 1980. He thereafter practised as a professional assistant with the firm Cloete & Partners in Cape Town until the 22nd April 1979 whereafter he practised as a professional assistant with the firm Cohen & Co. in Bellville until the 29th of February 1980. On the 1st of March 1980 he began practising as a partner at the firm DJ Smit & Siebrits in Bellville until the 28 February 1985 whereafter he commenced practice for his own account under the name and style DJ Siebrits Attorneys also in Bellville until the 6th December 1987. He thereafter practised as a partner in the firm Kantor Fialkov & Siebrits in Bellville until the 28th of February 1989, whereafter he practised for his own account under the name and style Danie Siebrits Attorneys in Bellville from the 1st of March 1989. On the 1st of January 1991 he became a partner in the firm Siebrits & Vernooy until the 1st of March 1992 and from the 1st June 1996 he practised as a partner in the firm Siebrits & de Braal. He also practised as a professional assistant at Venter van Eeden Incorporated in Bellville from the 1st of October 1998.

[5.] In 2001 the respondent was the subject of a resolution of the council of the applicant to bring an application to interdict him from practising as an attorney, as a result of his failure to timeously submit his annual audit report. The report which had been due by the 31st August 2000 was only received by the applicant on the 19th of April 2001. The application was thereafter withdrawn by the applicant.

[6.] In 2003 the respondent was again the subject of a resolution to interdict him from practice as a result of his failure to submit an annual audit report by the 31st August 2002.

[7.] In 2004 the respondent was yet again the subject of a resolution to interdict him from practising as an attorney and as a result of his failure to submit his annual audit report by the 31st of August 2003 he was interdicted from practice on the 13th May 2004.

[8.] In this application the applicant has brought to the attention of the court various allegations of serious misconduct on the part of the respondent relating to the misappropriation of trust funds. The applicant has expressed a view that the most appropriate sanction is that of the removal of the respondent's name from the roll of attorneys, notaries and conveyancers. The applicant contends that the grounds for the consideration for the for the removal of the respondent's name from the roll are *inter alia,* (i) that the respondent misappropriated trust funds and in the process made himself guilty of theft (ii) the respondent administered his trust accounts in a reckless and cavalier manner and without any regard to his duties as an attorney. (iii) the respondent manifested a character defect and a lack of integrity (iv) the respondent is guilty of unprofessional, dishonorable and unworthy conduct and that (iv) the respondent has brought the attorneys profession into disrepute.

[9.] The applicant claims that, in addition to the complaint of misconduct which was the basis of the interdict application, the application is also based on claims that had been submitted to the Attorneys Fidelity Fund (the Fund) by some of the respondent's former clients. In this regard the applicant attached a summary of claims submitted to the Fund by Graham Howard Price and Rory Trevor Flanagan trading as PR Profiles CC in the amount R300 000.00; Jacobus Christiaan De Wet Du Plessis trading as De Wet Du Plessis Inc. in the amount of R13 650.75; A P Theron on behalf of JR and PG McEvilly in the amount of R200 000.00, Gilloway (E/L WH Rivers), and Jonathan David in the amount of R20 000.00 and Meynhardt (Meynhardt & Kie) in the amount of R400 000.00. The total amount of the claims as at the 4th of August 2009 was R933 650.75. Save for the amount of R20 000.00 in respect of the Gilloway (Estate Late WH Rivers) claim which the respondent claimed he had settled directly, the remaining four claims totaling R913 650.75 was paid by the Fund from monies which were paid in by the respondent.

[10.] The details of each of these claims are briefly;

(i) <u>The Graham Price Claim</u>

This claim arose out of deposits totaling an amount of R1 071 580.74 which had been paid into the trust account of Siebrits and de Braal. The deposits were to be held in trust and were to be paid to contractors for the construction of a factory for the Close Corporation. The claimant submitted that of the total amount deposited into the respondent's trust account only an amount of R160 770.00 was paid out and a balance of R910 810.74 had remained with the respondent.

(ii) The Jacobus Christiaan de Wet Du Plessis claim.

[11.] The claimant, a partner in the firm of attorneys Bill Tolken Hendrikse Inc. in Bellville claimed that an amount of R13 650.75 was owed to him for work done on behalf of the respondent's firm. De Wet Du Plessis claimed that the clients which he had assisted had paid over various amounts to the respondent to cover the fees but that the respondent had failed to pay over the amounts to him.

(iii) The Anthony Paul Theron claim.

[12.] This claim arose out of instructions received by the respondent from a Mr. McEvilly to attend to a property transaction. Several amounts were paid by McEvilly into the respondent's trust account. Upon registration of transfer of the property on the 5th of March 2004 an amount of R247 189.80 became due to McEvilly and which was not paid over to him. The claim was lodged by Mr. Anthony Paul Theron an attorney with the firm Louw & Du Plessis in Somerset West on behalf of McEvilly.

(iv) The Meynhardt & Co. claim

[13.] Ms Christiana Meynhardt an attorney who practised for her own account under the name and style of Meynhardt & Co. in Tygervalley, claimed that she had from November 1992 been employed as a professional assistant at the respondent's firm Danie Siebrits Attorneys which thereafter became Siebrits and de Braal. She mainly ran the collections practice of the firm and in May 2002 opened up her own practice. Several clients of the respondent's firm migrated to her new practice but many of them continued to deposit money into the account of Siebrits & de Braal. Such monies were meant to be transferred into the account of Meynhardt & Co. Meynhardt claimed that as at the date of the interdict against the respondent an amount of R456 744.29 was meant to have been transferred into her firm's account.

[14.] In his opposing papers the respondent for his part admitted that he had misappropriated the funds from his trust account. He claimed though that he had paid a total amount of R932 906.88 into the Fund to cover the claims. The amount had come from various sources such as R96 688.07 from the trust account of his erstwhile practice, plus an amount R796 218.81 which he had raised from the sale of his and his wife's house plus a further amount of R40 000.00 from his wife.

[15.] The respondent claimed that as a result of negotiations which had been held between the legal representative of the trust creditors and his legal representative, a final settlement of the claims was reached in September 2007 and a written agreement was entered into between the parties. The details of the agreement were covered by a confidentiality clause. It appears that the amounts initially claimed by the claimants were compromised and settled in the total amount of R913 650.75.

[16.] The applicant claimed that the respondent had failed to properly account for the amounts claimed by the claimants. In response, the respondent claimed that as a result of the confidentiality clause in the settlement agreement he was not at liberty to disclose the content of the settlement other than that the amounts settled were agreed between the parties and were paid from the amount which he had paid into the Fund. The respondent also claimed that the agreement carried the *'imprimatur'* of the Fund and the applicant in so far as the claims were paid from the amounts he had paid into the Fund.

[17.] The claimants, Graham Price and attorney Jacobus Du Plessis, had also indicated that their claims had been referred to the South African Police Services for investigation against the respondent.

[18.] The respondent explained that during the course of the subsequent criminal proceedings there were successful negotiations with the offices of the Deputy Director of Public Prosecutions (Specialized Commercial Crime Unit-Western Cape) for the criminal charges not to be proceeded with, but that the respondent was rather to participate in a diversion program in which he undertook to do seven hundred (700) hours of community service at the offices of the Black Sash (Cape Town.) It appears that central to this agreement with the Deputy Director of Public Prosecutions was the respondent's stated intention to emigrate to Portugal together with his wife as soon as his community service obligations had been completed. His daughter and her husband, a Portuguese citizen, who lived in Manchester, England, had offered to support him and his wife and they had offered them the permanent use of a portion of their house in

Porta, Portugal. In addition the respondent had accepted an offer of employment as a farm manager near Porto with effect from September 2012. The respondent claimed that he would initially seek to obtain permanent residence whereafter he would seek Portuguese citizenship. In his negotiations with the Directorate of Prosecutions he claimed that it was very likely that his application for permanent residence and citizenship in Portugal would be prejudiced in the event of him been convicted of theft. The respondent had also submitted to the DDPP a report by a clinical psychologist Mr. Bernard Altman dated 30 October 2008 in support of his representations that the criminal charges not be proceeded with. Altman had recommended that the respondent participate in the diversion program and claimed, amongst others, that the respondent had acknowledged his wrongdoings, that he was openly contrite, that he was ashamed of his actions and that he had experienced deep regret and self reproach as a result of his conduct.

[19.] The respondent in his opposing affidavit further set out the circumstances in which the misappropriation had occurred and claimed that he was not motivated by self enrichment but rather to have extricated himself from bad financial decisions that he had made in respect of the conduct of his legal practice. He claimed that he had also been under severe financial pressure to continue with his practice as a result of his wife having been diagnosed with cancer and his son's condition of schizophrenia.

[20.] He claimed that the amounts which he had misappropriated from his trust account were used to pay for the monthly overheads of his firm which included the salaries of twelve staff members. In this regard he explained that in 1994 he had employed Ms Meynhardt as a professional assistant and that she had developed a debt collection practice. As it grew they decided to move to larger premises on the understanding that he would be responsible for the overheads of the practice as a whole and in return he would receive a share of the fees derived from the collections. He claimed that his personal and business resources had increasingly been placed under strain as the monthly expenses of the practice had increased without a commensurate increase in income from the collections practice. He claimed that instead of extricating himself from the precipitous financial disaster by closing the firm and cancelling the leases he did not have *"the strength of character"* to do so but rather used the trust funds to subsidize the considerable monthly overheads.

[21.] While admitting that his actions were reprehensible he claimed that he was under extreme personal and financial pressure at the time that he committed the offences.

[22.] He claimed that as a result of the interdict proceedings he had fully co-operated with the applicant and surrendered his certificates of enrolment as an attorney, notary and conveyancer and that he had co-operated with the curator who had been appointed in terms of the court order in 2004. He claimed that there was nothing that remained of his practice and that he presently worked as a consultant and as a paralegal to various firms of attorneys and conveyancers in the Western Cape for which he is paid a fee. He has the use of office facilities and a separate office which is situated in close proximity to the Deeds and

Masters Offices from which he collects documents on a daily basis. He claims that he has adhered to the terms of the interdict and that he does not intend applying for a Fidelity Fund certificate in the future.

[23.] He also claimed that as a result of his diminished earning capacity and parlous financial circumstances he has had to sell whatever assets remained to cover his living and legal expenses. He struggles each month to make ends meet and is in arrears with several of his creditors. Both he and his wife's lifestyle have been drastically affected over the past six years and they have had to curtail all but their necessary expenses. As a result of their financial position they are obliged to take up the offer to live in Portugal where he claims their expenses would be more affordable.

[24.] The respondent also claimed that on 22 May 2009 he commenced with the community service at the regional office of the Black Sash in Cape Town and that he had since served 285 hours. He also claimed that prior thereto he had spent 157 hours on a voluntary basis assisting at the Black Sash. He attached a letter from the regional director of the Black Sash, Ms Leonie Caroline, in which she confirmed that the respondent was participating in the diversion program which was monitored by Nicro. She stated that the respondent had worked mostly on the drafting of publications, has assisted with research and collating of information with regard to the national education system, refugee rights, child and social grants and pension law as well as consumer protection issues. Part of the respondent's work included the analysis of key judgments of the courts relating to these matters. His research is used in the publications of the Black Sash and also in learner guides and pamphlets for distribution. She claimed that the respondent has performed his work in a highly satisfactory manner and that he has been an asset to the office. She was impressed with his conscientiousness in the tasks allocated to him and his integrity. She also claimed that the respondent was held in high esteem by members of the staff and their foreign interns.

[25.] The respondent claimed that his experience of working at the Black Sash had provided him with an opportunity to gain involvement in the wider community and it has afforded him the opportunity of gaining insight into his failings and the opportunity of rehabilitating himself. In support of his rehabilitation he also annexed letters from a colleague Mr. Ben-Zion Surdut a practising attorney and conveyancer in Cape Town. Surdut claimed that he was aware of the remorse that the respondent had suffered since being precluded from practising as an attorney and conveyancer. He claimed that the events which led to the respondent being interdicted from practice were in his opinion contrary to the nature and make-up of the respondent. In another letter, a Mr. E W Pienaar claimed that he had known the respondent since 1982 in his professional capacity and that the respondent has been an inspiration to him and had assisted him with his conveyancing work. Pienaar also claimed that he was aware of the respondent's remorse and expressed the hope that the respondent would not be struck from the roll.

[26.] The respondent also claimed that it was "highly likely" that he would be prejudiced in an application for permanent residence or citizenship in Portugal in the event of him being struck off the roll. He also claimed that an order of striking off would be unduly harsh and that since the initial application there had been a substantial passage of time in which he has reformed himself and in which he has attempted to make amends for his transgressions. He also claimed that a striking off would have a highly prejudicial effect on his future. The Fund, he claimed, had not sustained any financial loss as a result of his actions and that no other creditor has pursued him. He also claimed that the difficult financial circumstances which he has had to endure over the past several years will continue and should also be taken into account. He requested that the application be postponed *sine die* and that the interests of the applicant and the public would be adequately protected by the interdict that prevented him from practising as an attorney. He therefore consented to an order whereby he would not apply for a Fidelity Fund certificate pending his departure to reside permanently in Portugal.

<u>The applicable legal principles and the application thereof.</u>

[27.] This application has been brought in terms of section 22(1)(d) of the Attorneys Act 53 of 1979 which provides that ;

> *"22 Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the role or suspended from practice by the court….*
>
> *(d) If he, in the discretion of the court, is not fit and proper person to continue to practice as an attorney."*

The inquiry which is threefold was instructively set out in **Jasat v Natal Law Society 2000 (3) SA 44 (SCA); 2000 (2) All SA 310 at para 10;**

"First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry.
Second, it must consider whether the person concerned 'in the discretion of the court' is not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment.
And third, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice."

[28.] In respect of the first stage the court in effect conducts a factual enquiry while in the second and third the court in exercising a judicial discretion does so by making a value judgment on the conduct of the attorney concerned and also in respect of an appropriate sanction.

[29.] In the decision of **Malan & Another v Law Society, Northern Provinces 2009 (1) SA 216 at 219 para 6**, Harms ADP (as he then was) pointedly remarked as follows;

"As pointed out in Jasat, the third leg is also a matter for the discretion of the court of first instance, and whether a court will adopt the one course or the other depends upon such factors as the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession, the likelihood or otherwise of a repetition of such conduct and

the need to protect the public. Ultimately it is a question of degree. It is here where there appears to be some misunderstanding."

[30.] In considering the misunderstanding referred to, Harms ADP refers to three aspects. Firstly; he emphasizes that whatever course the court follows it is not 'first and foremost' the imposition of a penalty but that;

"The main consideration is the protection of the public." [para 7]

[31.] Secondly Harms ADP reasoned that if it the court found that someone was not a fit and proper person to continue to practice as an attorney that person must be removed from the roll. However he continues at para 8;

> *"......... the Act contemplates a suspension. This means that removal does not follow as a matter of course. If the court has grounds to assume that after the period of suspension the person will be fit to practise as an attorney in the ordinary course of events it would not remove him from the roll but order an appropriate suspension. In this regard the following must be borne in mind:*
>
> > *The implications of an unconditional order removing an attorney from the roll for misconduct are serious and far-reaching. Prima facie , the Court which makes such an order visualises that the offender will never again be permitted to practise his profession because ordinarily such an order is not made unless the Court is of the opinion that the misconduct in question is of so serious a nature that it manifests character defects and lack of integrity rendering the person unfit to be on the roll. If such a person should in later years*

apply for re-admission, he will be required to satisfy the Court that he is 'a completely reformed character' (Ex parte Wilcocks 1920 TPD 243 at 245) and that his 'reformation or rehabilitation is, in all the known circumstances, of a permanent nature' (Ex parte Knox 1962 (1) SA 778 (N) at 784). The very stringency of the test for re-admission is an index to the degree of gravity of the misconduct which gave rise to disbarment."

[32.] The third area of misunderstanding is that in the exercise of its discretion the court *"is not bound by rules, and precedents consequently have a limited value. All they do is to indicate how other courts have exercised their discretion in the circumstances of a particular case."* [para 9]

[33.] In **Malan** (above) the appellant had relied on the decision in **Summerley v Law Society, Northern Provinces 2006 (5) SA 613 (SCA),** which decision was also relied on by counsel for the respondent Mr. Le Breton in submitting that the court should not order the removal of the respondent from the roll. However in **Summerley** (above) no dishonesty on the part of the attorney was found and for that reason, *inter alia,* the court considered the alternate option of a suspension from practice. Harms ADP in **Malan** (above) noted further at para 10 D;

> *"Obviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal. (Exceptional circumstances were found in Summerley and in Law Society, Cape of Good Hope v Peter [2006] ZASCA 37 and the court was able in the formulation of its order in those cases to cater for the problem by ….."*

[34.] At paragraph 11, he continues,

'[11] As mentioned in Summerley (at para 15), the fact that a court finds that an attorney is unable to administer and conduct a trust account does not mean that striking-off should follow as a matter of course. The converse is, however, also correct: it does not follow that striking-off is not an appropriate order (compare Prokureursorde van Transvaal v G Landsaat 1993 (4) SA 807 (T) ; Law Society of the Transvaal v Tloubatla [1999] 4 All SA 59 (T)). To the extent that the judgment in Law Society of the Cape of Good Hope v King 1995 (2) SA 887 (C) at 892G - 894C propagates an 'enlightened approach', requiring courts to deal with misconduct which does not involve dishonesty with (in my words) kid gloves, I disagree. In order to stem an erosion of professional ethical values a 'conservative approach' is more appropriate (Incorporated Law Society, Transvaal v Goldberg 1964 (4) SA 301 (T) at 304A - F)".

[35.] The respondent in this matter has admitted to the offending conduct, namely the misappropriation of trust monies and therefore the first leg of the inquiry has been established.

[36] Much of the facts and circumstances pertaining to the remaining legs of the inquiry were to a large extent common cause and **Mr. Le Breton** submitted it was merely a question of the inferences to be drawn therefrom that were in dispute. During the course of argument the court raised with Mr. Le Breton the concern about respondent's failure to have made a full accounting of the claims

that he had settled with three of the trust creditors. Mr. Le Breton submitted that the respondent was bound by the confidentiality clause in the agreement with the trust creditors which precluded any disclosure. It appears that the actual claim made by all of the trust creditors was in excess of R1,5 00 000.00 was reduced in the settlement negotiations by approximately R600 000.00. Notwithstanding the respondent's claim that he had fully disclosed to the Fund the contents of negotiations and the settlement agreement, it remained incumbent on the respondent to have properly disclosed to the court the basis of the settlement given the large amounts involved. Moreover it would have also been a clear demonstration of his taking the court into his confidence in respect of the compromise and the basis of some of the claimants abandoning their right to have pursued criminal proceedings against him.

[37.] Mr. Le Breton submitted that while the defendant sought as a first prize an indefinite postponement of these proceedings, he urged the court in the alternative to consider a lengthy suspension of the respondent's right to practise as a attorney, notary and conveyancer together with an order that he not be allowed to practise for his own account in future. In effect, Mr. Le Breton submitted that while the respondent was not seeking to practise as an attorney for his own account in future, he may in the event of his application for permanent residence in Portugal been unsuccessful, contemplate practising again as an attorney in South Africa. Mr. Le Breton submitted that there existed exceptional circumstances in favour of the respondent that did not warrant his striking off, such as the difficult financial circumstances he faced when he misappropriated the trust funds and his apparent reformation or rehabilitation. The court, Mr. Le

Breton argued, should consider the factors appropriate for the re-admission of an attorney after having been struck off the roll. In this regard he submitted that the expressions of contrition and repentance were usually sound indicators of such reformation and rehabilitation **(Swartberg v Law Society Northern Provinces (2008) (5) SA 322 (SCA).** He also relied on the testimonials by Surdat and Pienaar with regard to the remorse of the respondent and the letter of Ms Leonie Caroline with regard to the work that the respondent did at the Black Sash, in respect of his reliability and integrity. Mr. Le Breton submitted that the respondent had indeed rehabilitated himself. He acknowledged though that there was no evidence before the court that indicated that during the last 6 years the respondent had handled money without supervision, or that he was subject to any risk of a repetition of his prior misconduct.

[38.] It is apparent from the respondent's misconduct on the facts and circumstances which have been set out with some detail, that he is not a fit and proper person to continue the practice of an attorney. The question before the court in the exercise of its discretion is whether the respondent should be removed from the roll of attorneys or whether he should merely be penalised with an order of suspension from practice.

[39.] In the first instance the court is faced with a respondent who has admitted guilt of a serious misconduct such as the misappropriation of a large amount of trust money and which is compounded by his failure to have complied with his obligations under the Attorneys Act. The situation is therefore distinguishable from that of both **Summerley** (above) and that of **Law Society of Cape v Peter**

2009 (2) SA 18 SCA in which there was no element of dishonesty by the respondents and where the court made appropriate orders of suspension from practice on various conditions.

[40.] The court is under an obligation to protect the interests of the public when dealing not just with errant attorneys but those who have displayed dishonesty and who are in breach of the fundamental tenants of integrity in dealing with the affairs of their clients. The misconduct which the respondent is guilty of took place over a period of time and involved large amounts of money. While the court is mindful of the precarious financial circumstances the respondent had placed himself in, he was a senior and well experienced legal practitioner who adopted the course of extricating himself from his predicament by dishonestly using the trust funds of his clients. There is no indication by him that he sought any other measures to ameliorate the circumstances or that such efforts were unsuccessful before he resorted to the use of his clients' money. On his own admission he simply lacked the 'strength of character' to do so. It appears that he committed the acts of misappropriation both consciously and systematically. Moreover he failed to disclose it to the applicant on his own despite the recurring problems in complying with the annual audit over successive years.

[41.] The respondent has also enjoyed the benefit of not being criminally prosecuted for the offences which he had committed. He was able to successfully negotiate a diversion of the criminal charges to that of community service and appears to have persuaded the Deputy Director of Public Prosecutions to do so on the basis that he was to emigrate to Portugal and with the favourable motivation of his clinical psychologist Mr. Altman who explained the remorse and the personal pain that the respondent experienced. The community service that the respondent performs, albeit a large number of hours and which is of great benefit to the poor does not appear at all to be an onerous or an exacting burden.

[42.] The respondent has suffered severe personal and family hardship in that his standard of living has obviously been affected by his inability to practise as an attorney. However he still enjoys the confidence and support of his colleagues who give him consultancy work on a regular basis. The respondent has claimed that a striking off will impact on his ability to successfully apply for permanent residence or citizenship in Portugal. While that consideration may have been pertinent when the DDPP considered his representations and although it initially appeared to have been one of the more important reasons for his plea to the court not to strike him off, Mr. Le Breton correctly conceded that it was no more than merely one of several factors that the court has to take into account when exercising its discretion.

[43.] It is also apparent that the respondent has displayed some insight into his wrongdoing and as Mr. Le Breton has pointed out the respondent appears to be on the road to rehabilitation. However that is also but only part of the considerations that this court has to take into account. More importantly and significantly is that of the interests and protection of the public as was emphasised by Harms ADP in the **Malan** judgment (above). This court would be failing in its duty to the public if it did not use the protection of the public as the appropriate beacon in the exercise of its discretion under the Act. This is not an instance in which a suspension from practice will suffice as an appropriate measure in protecting the public, coupled with an order that the respondent not practise for his own account. There is nothing exceptional in the circumstances that the respondent has placed before this court that would enable it not to exercise its discretion in favour of the applicant's recommendation. The misappropriation and theft of trust funds remains one of the most serious offences an attorney is able to commit against his/her client and it does not only offend against the client and the public but undermines the integrity of the attorneys profession and the very oath of office that attorneys pledge on admission to practice.

[44.] In the result, having considered all the circumstances of the respondent and not without a measure of regret, I would order the removal of the respondent's name from the roll of attorneys, notaries and conveyancers. The ancillary orders prayed for by the applicant are no longer necessary as his practice has already been wound up by the curator and whatever remained in his trust account has been paid over to him. The respondent is also liable for the costs as prayed for by the applicant.

I propose the following order:

(1) The respondent's name is removed from the roll of attorneys, notaries and conveyancers of this court.

(2.) The respondent is to pay the costs of and incidental to this application on the scale as between attorney and client.

SALDANHA, J

I agree and it is so ordered.

FOURIE, J