



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **8296/2022P**

In the matter between:

**LEGAL PRACTICE COUNCIL
(KWAZULU-NATAL PROVINCIAL OFFICE)**

APPLICANT

and

**ADVOCATE ENOCK FELANI MANANA
STANDARD BANK OF SOUTH AFRICA**

**FIRST RESPONDENT
SECOND RESPONDENT**

Coram: Mossop J (Shoba AJ concurring)

Heard: 17 April 2023

Delivered: 28 April 2023

ORDER

The following order is granted:

1. The first respondent's application for an adjournment is dismissed with costs.
2. The rule *nisi* granted on 15 September 2022 is confirmed.

JUDGMENT

Mossop J (Shoba AJ concurring):

[1] The first respondent is an advocate by profession and, to be more precise, he is a 'trust account advocate'.¹ It is this trust account, and the manner in which the first respondent has dealt with it, that has precipitated the bringing of this application.

[2] On 15 September 2022, the applicant sought and obtained a rule *nisi* against the first respondent, with interim relief, which, in essence, suspended the first respondent from his practice as an advocate and installed a curator to administer his practice. The order granted is lengthy, covering ten pages, and is not restated for that reason. Suffice it to say that it is in the usual form and contains the usual orders and powers. The applicant now seeks the confirmation of the rule, which will, inter alia, result in the name of the first respondent being finally removed from the roll of advocates. The basis for this order is that the applicant alleges that the first respondent is not a fit and proper person to continue acting as an advocate. In a nutshell, the applicant's allegations are that the first respondent has failed to account to a client of his and has unlawfully misappropriated money from his trust account that rightfully belongs to that client. Despite several promises to pay his client, the first respondent has failed to do so. The first respondent advances explanations that, so he claims, explains and justifies his conduct.

[3] The applicant is the KwaZulu-Natal provincial office of the Legal Practice Council (the Legal Practice Council). The Legal Practice Council is the regulatory body for the legal profession in this country. It was established in terms of section 4 of the Legal Practice Act 28 of 2014 (the Act) and its affairs are conducted by its Council, which has certain powers and duties conferred upon it in terms of the Act. It is generally required to regulate the legal profession and to do so it is endowed with certain powers and duties. One of its essential functions is to ensure that appropriate standards of conduct are maintained by its members. The legal profession is an ancient and honourable profession that prides itself on its members' integrity, honesty

¹ Rule 1.34 of the Rules applicable to the Legal Practice Act 28 of 2014 defines a 'trust account advocate' as 'an advocate referred to in section 34(2)(b) of the Act who is, in terms of the Act, required to hold a Fidelity Fund certificate' (The South African Legal Practice Council Rules, GN 401, GG 41781, 20 July 2018).

and trustworthiness and demands the highest ethical standards from those permitted to practise it.² The maintenance of these high ethical standards of conduct is vital for the effectiveness of the profession and for its continued sustainability. Where the applicant discerns that a practitioner has potentially conducted him or herself in breach of the accepted standards of conduct, it is required to investigate, prosecute and, if necessary, discipline that errant member. One of its powers is the entitlement to approach the high court for an order that the name of a member be removed from the applicable roll of legal practitioners. When the applicant does so, it acts both for the benefit of members of the public and members of the profession. In *Law Society v Du Toit*,³ the court indicated that:

‘The proceedings are instituted by the Law Society for the definite purpose of maintaining the integrity, dignity and respect the public must have for officers of this Court. The proceedings are of a purely disciplinary nature; they are not intended to act as a punishment of the respondent . . . The public are entitled to demand that a Court should see to it that officers of the Court do their work in a manner above suspicion. If we were to overlook misconduct on the part of officers of the Court, if we were to allow our desire to be merciful to overrule our sense of duty to the public and our sense of the importance attaching to the integrity of the profession, we should soon get into a position where the profession would be prejudiced and brought into discredit.’

These words, whilst committed to paper over 80 years ago, remain true and relevant today.

[4] The first respondent was admitted as an advocate in the North Gauteng Division of the High Court in 2014 and presently practises as an independent advocate in Newcastle, KwaZulu-Natal. The second respondent is the commercial bank at which the first respondent maintains his trust banking account. It has correctly played no part in this matter.

[5] Ms T C Nxumalo is the first respondent’s erstwhile client (the complainant). During 2019, she had mandated the first respondent to recover an amount of R120 000 (the funds) for her from a firm of attorneys in Newcastle. The firm of attorneys possessed the funds pursuant to the complainant entering into a

² *Eastern Cape Provincial Council of the South African Legal Practice Council v Mfundisi* [2022] ZAECKMHC 87; [2023] 1 All SA 90 (ECG) para 1.

³ *Law Society v Du Toit* 1938 OPD 103 at 104.

transaction to purchase certain immovable property, which transaction ultimately failed and did not proceed. The complainant was consequently entitled to a refund of the funds. The attorneys holding the funds, however, did not return them to her and she thus mandated the first respondent to secure their return to her. The first respondent took steps to execute his mandate and on 24 August 2020, he received payment of the full amount of R120 000. According to the first respondent, the funds were electronically paid directly into his trust banking account by the firm of attorneys that previously held those funds.

[6] On 8 October 2020, being some 45 days after he received the funds, the first respondent paid the complainant the amount of R45 000. The balance of the R120 000, in the amount of R75 000 (the balance of the funds), was retained by the first respondent and has never been paid to the complainant.⁴

[7] When the first respondent failed to pay the balance of the funds to her within a reasonable time, the complainant lodged a written complaint with the applicant. Having received the complainant's account of events, the applicant wrote to the first respondent seeking his version of events. The first respondent replied to this letter on 16 October 2020 (the 16 October 2020 letter) and stated that he agreed that there had been a 'misunderstanding' and that he would pay the complainant the balance of the funds by 1 November 2020. That date came and went and the balance of the funds was not paid to the complainant.

[8] When the first respondent failed to make payment as promised on 1 November 2020, the applicant appointed an investigating committee to look into the matter. The investigating committee ultimately concluded that on the information available to it, it appeared that the first respondent had conducted himself in an unprofessional manner. It recommended that the matter be escalated and referred to a disciplinary committee of the applicant.

[9] The applicant agreed with that recommendation and a disciplinary committee was duly constituted by it and a hearing date was fixed for 21 September 2021. On 3

⁴ This notwithstanding that as recently as 14 November 2022, being the date when this matter was last before this court, an adjournment was taken by consent in which it was recorded that the first respondent had undertaken to pay to the first respondent the balance of the funds within 10 days of 14 November 2022. The payment was not made.

September 2021, an administrator employed by the applicant, Mr Halalisani Nkwanyana (Mr Nkwanyana) informed the first respondent by email of the date of the hearing. The first respondent was advised that he would face three charges, namely that he was guilty of contravening paragraph 21.1 and 21.2 of the applicant's Code of Conduct⁵ and/or rule 57.1 of the applicant's rules in that he allegedly:

- (a) Breached rule 54.13 of the applicant's rules in that he failed to pay the complainant the amount of R75 000;
- (b) Breached paragraph 3.4 of the applicant's code of conduct in that he failed to honour his undertakings to pay the complainant the amount of R75 000; and
- (c) Breached paragraph 3.1 of the code of conduct in that he failed to maintain conduct of the highest standard of honesty and integrity in that he attempted to mislead the complainant into believing that she owed him the amount of R12 000.

[10] On 21 September 2021, the first respondent did not present himself at the hearing at the appointed hour. The disciplinary committee decided to proceed in his absence, having been satisfied through evidence that he had been given proper notice of the proceedings. That evidence was given by Mr Nkwanyana. He explained that the email address that he had used to give the first respondent notice of the hearing was the email address ordinarily used by the first respondent.⁶ He also explained that he had personally contacted the first respondent telephonically on three separate occasions about the hearing. On the first occasion, the first respondent denied that he had received the notification. The following interaction on this point is instructive:

'And did he give you any explanation as to why he did not receive the email dated 3 September 2021? --- The only reason that he gave to me, he said he did not check his emails.'

The last of those occasions on which Mr Nkwanyana had spoken to the first respondent had been on the day before the hearing, namely 20 September 2021.

[11] The complainant was called to testify at the hearing. Her evidence was consistent with the complaint that she had lodged with the applicant. The following

⁵ Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities, GN 168, GG 42337, 29 March 2019.

⁶ Indeed, the first respondent used the same email address to transmit the 16 October 2020 letter.

portion of her evidence, was significant given what the first respondent would later allege:

‘He was confused where he would find me and he said I must send my bank details to his WhatsApp and I did as he said.’

The person be referred to as ‘he’, is the first respondent.

[12] At around 13h30 that day, the hearing stood down. It was then realised that at 10h54 that day, the first respondent had sent an email to the applicant in which he stated that he had not been given proper notice of the hearing and that he was unable to attend the hearing due to prior work commitments. He explained further that he was not available the next month, October 2021 at all, and requested that the hearing be adjourned to either the first or second week in November 2021.

[13] The first respondent’s email came from the very same email address that the applicant had employed to inform him of the date of the disciplinary hearing. Given the evidence of Mr Nkwanyana, the request for an adjournment was not acceded to by the disciplinary committee and the hearing continued.

[14] On 23 March 2022, the disciplinary committee delivered its written report. It concluded that the first respondent was guilty of unprofessional conduct and that he was not a fit and proper person to continue practising as an advocate and recommended that an application be brought for the removal of his name from the roll of advocates. This application is the consequence.

[15] Much of what the complainant states regarding the conduct of the first respondent is common cause. The first respondent admits receipt of the full amount of R120 000 that he was instructed by the complainant to recover and admits further that he has only ever paid R45 000 thereof to the complainant. He accordingly admits that there is a balance of R75 000 due to her. He admits, further, that he has made at least two written promises to pay the complainant that he has not honoured.

[16] That the fact of non-payment is truly not in issue was revealed by events that occurred when this matter was called. The first respondent, who appeared for himself at the hearing, in my view a most undesirable state of affairs,⁷ moved an oral

application for an adjournment of the matter from the bar. The basis for the application, so the first respondent advised, was that his house had recently been sold and that he anticipated that transfer would occur shortly and he would then be able to pay the balance of the funds to the complainant from the proceeds of that sale. That application was opposed by Mr Chetty, who appeared for the applicant, who stated that whether the balance was paid to the complainant was an important consideration but was not the true issue: the true issue, insofar as the applicant is concerned, is the alleged dishonesty of the first respondent. After brief consideration, the application for postponement was refused, with costs.

[17] By virtue of those facts which are not in dispute, the first respondent's explanation for why he admittedly has not paid the balance of funds to the complainant assumes some significance. On the face of it, he concedes to conduct that is, at the very least, unprofessional in its nature and which, at the other end of the spectrum, is criminal and could amount to theft of the money due to the complainant. It goes without saying that a very good explanation would have to be advanced by him to explain why, more than two and a half years after receiving payment on behalf of the complainant, he still has not paid the balance of the funds over to her.

[18] In considering this matter, I intend following the approach proposed in *Jasat v Natal Law Society*,⁸ namely that the inquiry that is now to follow must negotiate three distinct phases, namely:

- (a) The court must decide whether the alleged offending conduct identified by the applicant has been established on a preponderance of probabilities. This, obviously, is a factual inquiry;
- (b) The court must then consider whether the first respondent, in the exercise of the discretion of the court, is not a fit and proper person to continue to practise as an advocate. This involves weighing up the conduct complained of by the applicant

⁷ 'Before you act, it's Prudence soberly to consider; for after Action you cannot recede without dishonour: Take the Advice of some Prudent Friend; for he who will be his own Counsellour, shall be sure to have a Fool for his Client', by W De Britaine *Humane Prudence, or, The Art by which a Man May Raise Himself and Fortune to Grandeur* (1682) at 57.

⁸ *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA), [2000] 2 All SA 310 (SCA) para 10.

against the conduct expected of an advocate and, is to a large extent, a value judgment; and

(c) Finally, the court must consider whether in all the circumstances of the matter, the first respondent is to be removed from the roll of advocates or whether an order of suspension from practice or some other lesser form of sanction would suffice.

[19] In considering whether the conduct of which complaint is made has been established, I do not lose sight of the fact that as a general proposition motion proceedings are not designed to resolve disputes of fact that arise on the papers nor are they designed to determine the likelihood of certain probabilities having occurred. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,⁹ the well-known approach was formulated that has been religiously followed in motion proceedings, that when disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. However, the *Plascon-Evans* approach is not the approach to be followed in striking off matters. In *Van der Berg v General Council of the Bar of South Africa*,¹⁰ Nugent JA explained why this is the case:

'Proceedings to discipline a practitioner are generally commenced on notice of motion but the ordinary approach as outlined in *Plascon-Evans* is not appropriate to applications of that kind. The applicant's role in bringing such proceedings is not that of an ordinary adversarial litigant but is rather to bring evidence of a practitioner's misconduct to the attention of the court, in the interests of the court, the profession and the public at large, to enable a court to exercise its disciplinary powers. It will not always be possible for a court to properly fulfil its disciplinary function if it confines its enquiry to admitted facts as it would ordinarily do in motion proceedings and it will often find it necessary to properly establish the facts. Bearing in mind that it is always undesirable to attempt to resolve factual disputes on the affidavits alone (unless the relevant assertions are so far-fetched or untenable as to be capable of being disposed of summarily) that might make it necessary for the court itself to call for oral evidence or for the cross-examination of deponents (including the practitioner) in appropriate cases. In the present case that might well have been prudent and desirable so as to resolve the many questions that are raised by the evidence, but that notwithstanding, the appeal can

⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

¹⁰ *Van der Berg v General Council of the Bar of South Africa* [2007] ZASCA 16; [2007] 2 All SA 499 (SCA) para 2.

in any event be properly disposed of on the undisputed facts. (For that reason it is also not necessary to revisit what degree of persuasion evidence must carry before facts can be taken to have been established in cases of this kind.).' (Footnotes omitted.)

[20] A consideration of the papers and the admissions made by the first respondent reveals that there are, in fact, no material disputes of fact in this matter and the difficulty contemplated in the extract above consequently does not arise. The facts are established and are admitted. All that falls to be assessed is the explanation offered by the first respondent for his conduct.

[21] As previously pointed out, the first respondent appears, at least initially, to have adopted and embraced the suggestion that there had been a 'misunderstanding'. It, however, does not appear that he regards himself as being the party who had misunderstood anything, because he stated in the 16 October 2020 letter that:

'I acknowledge receipt of the complaint against me. I agree that there was a misunderstanding that the client believed that the money was given to me by the legal counsel on her behalf. She believed that I played no part in assisting her to recover the money.'

What this alludes to, I think, is an oblique reference to the fact that the first respondent wished to be paid for his services in securing the repayment of the funds, something that the complainant was not prepared to countenance. The fees that the first respondent wanted to charge had apparently not previously been agreed upon between him and the complainant and the first respondent belatedly wanted to charge the complainant ten percent collection commission, which the complainant was not prepared to countenance.

[22] Whilst this disagreement may have been caused by a misunderstanding, there was no mistaking the undertaking then proposed by the first respondent in his letter of 16 October 2020:

'I will then make further payments on the 1 November 2020 for the balance of R75,000.00 when the payment limit allows me to do.'

Thus, on the first respondent's own version, the 'misunderstanding', whatever it was and whoever had misunderstood, ceased to play a part in the matter: the first respondent would now pay the complainant the balance of the funds.

[23] Why did this not occur then? The difficulty, according to the first respondent, was that the second respondent had a policy that prevented him from making electronic payments directly from his trust banking account to a client. Where he wished to make such a payment, he was first obliged to transfer the money into his business banking account from his trust banking account and then make an electronic payment to the client from his business banking account. Complicating matters further was the fact that there was a transactional limit on his business banking account of R50 000 per day.

[24] On 8 October 2020 he made payment of the amount of R45 000 to the complainant.¹¹ Having made that payment, the first respondent claimed that he was reluctant to make a second payment without the complainant first having acknowledged that she had received the first payment. He claimed to be worried that he might have paid the first payment into an incorrect banking account. According to the first respondent, the complainant allegedly never confirmed receipt of the amount of R45 000 and thus he made no further payments to her. Indeed, so the first respondent contended, not only did the complainant not acknowledge receipt of the payment of the R45 000, she actively avoided taking his calls, blocked his telephone number and ceased communicating with him.

[25] The first respondent's first answering affidavit is not a model of clarity and is sparsely populated with facts or dates. He also delivered a second answering affidavit. The second answering affidavit is no improvement in this regard. The following facts are not contained in either of those affidavits but were advanced by the first respondent in argument, when he was not under oath. He advised that upon receipt of the payment of the funds, he had immediately transferred the whole amount from his trust banking account into his business banking account. The payment of the R45 000 to the complainant came from the total amount in his

¹¹ The maximum of R50 000 was not paid to the complainant because, according to the first respondent, he had already paid out R5 000 to another client or clients that day.

business account. In anticipation that the complainant would at some stage acknowledge his calls and call for payment of the balance of the funds, the first respondent stated that he resolved to keep the balance of the funds in his business banking account and not in his trust banking account so that he could immediately pay her.

[26] According to the first respondent, the balance of the funds then remained in his business banking account. While this is irregular, as shall shortly be established, that should then have been the end of the matter. If his version was that he was unsure that the complainant had received the payment that he made to her, that uncertainty was erased when he was contacted by the applicant. The balance of the funds was demanded from him and that could only mean that the complainant acknowledged receipt of the R45 000. Why then did he not simply pay her from his business banking account as he had planned to do? What would appear to be a simple and obvious resolution of the matter is, in fact, not that simple according to the first respondent.

[27] The first respondent explains in his second answering affidavit, delivered without the leave of the court, that on an undisclosed day in November 2021, he was summoned from the magistrates' court to his offices to conduct a consultation with four new clients. Eager for the new work, he rushed from the court to his office. Those clients then held him up at gunpoint, stole his computer and demanded his banking password from him. Using his cellular telephone, which they had taken from him, they then transferred all the money in his business banking account to their banking account. By his estimation, this amounted to over R80 000. He was thus left impoverished and unable to refund the complainant. His carefully crafted plan to effect swift payment to the complainant came to naught. The first respondent asserts that he reported this unfortunate and unpleasant experience to the South African Police Service (SAPS), but was not given a CR number to prove that he had done so.

[28] It is notionally possible that there was some form of misunderstanding between the complainant and the first respondent when he first accepted her mandate. She apparently made a payment to him of R1 000 for the opening of a file in his practice and it is possible that she believed that this was the only payment that

she would be obliged to make to him. On the first respondent's own version, he did not, in accepting the complainant's mandate, discuss other fees or the levying of collection commission on what he recovered with her. But whatever impediment that constituted was, on the first respondent's own version, made redundant because he ultimately agreed to pay her in full.

[29] It is, again, not impossible that funds that needed to be paid electronically from the first respondent's trust banking account had to first be transferred into his business banking account so that they could be electronically disbursed to the client entitled to such payment. If this is accepted, then accepting that there may be a transactional limit is equally possible. Thus it is plausible that the full amount due to the complainant could not be paid to her in a single transaction. In allowing for this, I must acknowledge that there was no evidence from the second respondent that this was how the first respondent was required to operate his accounts with it. But it appears to me, from ordinary human experience, that what the first respondent submits is possible.

[30] But that is where my understanding of the first respondent's version comes to a grinding halt. There are a number of areas of his explanation that I have difficulty with. I shall come to the lesser problems in due course. But an overall conspectus of the primary reason advanced by the first respondent is that he ultimately could not pay the complainant because of the consequences of the robbery. He wanted to pay, knew he must pay, but he physically lacked the means to make such payment because all the previously available funds were no longer available.

[31] The first respondent's first answering affidavit was delivered on 24 August 2022 and the second was delivered on 1 November 2022. The remarkable thing is that the first answering affidavit contained no reference whatsoever to the occurrence of the robbery. It was completely silent on that aspect. As if it had not occurred.

[32] But, of course, according to the first respondent it had occurred. Why was it not mentioned then at the earliest opportunity and when precisely did it occur? No date other than the month and the year is mentioned in the second answering affidavit. It is difficult to accept that the first respondent cannot be more accurate

about this. He could not have been held up in his chambers at gunpoint on too many occasions in his life. One would think that the date of that frightful occurrence would be scorched into his memory and that it would be impossible for the first respondent not to remember it. In the first respondent's second answering affidavit, the best that he can do is to state that the robbery allegedly occurred sometime in November 2021. However, when he argued the matter, the first respondent stated that it happened in December 2021. This causes considerable doubt to exist over the alleged occurrence of the incident.

[33] But the real problem behind accepting that the robbery, if it did happen, is the cause of the first respondent's difficulties may be discerned if a chronology of events is considered. On the first respondent's own version, he made no payment to the complainant after he paid the R45 000 to her because he was unsure about the accuracy of her banking details. More about that shortly. But after the applicant became involved in the matter and wrote to him, he indicated in the 16 October 2020 letter that he would pay the balance of the funds to the complainant by 1 November 2020. He could only pay if he was now satisfied that he had the correct banking details. Clearly, his undertaking must mean that he was now satisfied with those details. This would have been reinforced by the fact that he only had to pay R75 000, meaning that the complainant had received the payment of R45 000. The balance of the funds was in his business banking account for the express purpose of allowing for swift payment to the complainant. Everything that was needed for payment to occur to the complainant was in place. But the robbery allegedly prevented that from occurring. The difficulty for the first respondent's version is that the robbery did not occur in November 2020, but in November 2021 (if his argument that it occurred in December 2021 is ignored). There is thus a gap of one year between the 16 October 2020 letter, when the first respondent undertook to pay the complainant by 1 November 2020, and the date of the alleged robbery. For one year the first respondent, on his own version, sat with the balance of the funds in his business account and did not pay it to the complainant. There is no explanation for this conduct.

[34] There is, of course, another insurmountable stumbling block in the first respondent's version pertaining to the robbery. If there was a transactional limit on

his business banking account of R50 000 per day, which I have already indicated that I am disposed to accepting, how did the robbers transfer R80 000 from that account? The first respondent was invited to address the court on this aspect but could only state that he did not know how they did it.

[35] There are further factors that tend to show that the robbery did not occur. The robbers, by transferring the funds from the first respondent's business banking account to their bank account would have had to identify the details of their banking account. With knowledge of the account number, ascertaining the identity of the account holder, and therefore who the robber was, would have been a formality. Yet, no one has apparently been arrested for the robbery. Finally, it is improbable that the first respondent was not provided with a reference number when he allegedly reported the incident to the SAPS. In argument from the bar, the first respondent indicated that the robbers had said at the time of the robbery that they had 'connections' at the local SAPS. The likelihood of them disclosing this to the first respondent appears remote, but if it was said, then given the serious consequences for the first respondent of the robbery why did he not report the matter to a different SAPS station? Why has the first respondent not been more pro-active in galvanizing the SAPS into action? Why has he been so supine in merely accepting the theft of a considerable sum of money? Why did he not report the robbery to the applicant? The answers to all these perfectly legitimate questions are, I believe, self-evident.

[36] But there are other aspects of the first respondent's version that are equally as unappealing as his version of the robbery. I mention hereafter but a few of them.

[37] I have difficulty in accepting that the complainant, who had specifically mandated the first respondent to recover all her funds, would then refuse to communicate with him and would block his telephone number on her cellular telephone. The complainant would have been desirous of information and news on the quest to recover her funds and I can conceive of no reason why she would not want to communicate with the first respondent in those circumstances.

[38] A further difficulty that I have with the first respondent's version is that he claims that he was anxious about the complainant's banking details and thus made

no further payment after paying the amount of R45 000 to her. In argument, he attributed this anxiety to the fact that he had received the complainant's banking details from the firm of attorneys who originally held the funds and he was worried that those details might be stale. That begs the question of why he was content to then make the first payment? Why was he not anxious about those very same banking details before making that payment? If he was not anxious before making that payment, why did he immediately become anxious after making that payment? What changed? No solutions to these questions have been provided by the first respondent. However, the most obvious reason for doubting the first respondent's alleged anxiety and caution over the complainant's banking details is the evidence that she gave to the hearing that he had requested her banking details from her and she sent them to him using WhatsApp.

[39] Finally, the first respondent's explanation as to why the funds were not held in his trust banking account but in his business banking account is beyond belief. That this is what he claims to have done merely serves to show his disregard for the rules of his own profession. Rule 54.11 of the applicant's rules specifically prohibits the holding of trust funds in a business banking account.¹²

[40] It appears to me that the alleged occurrence of the robbery is a recent invention conjured up by the first respondent to try and explain why he is no longer in possession of the balance of the funds. He had not thought of it at the time when he delivered his first answering affidavit and that explains why it is never mentioned in that affidavit. The inference is irresistible that he did not pay the complainant when he promised to do so because he no longer possessed the balance of the funds, having misappropriated them for his own purposes. As a whole, the first respondent's version is unpalatable and unacceptable. I am accordingly satisfied that the conduct of which complaint has been made has been established satisfactorily.

[41] It falls now to be considered whether the first respondent was correctly found to be a person who should not be permitted to continue practising as an advocate.

¹² Rule 54.11 reads, in part, as follows: 'Trust money shall in no circumstances be deposited in or credited to a business banking account. Money other than trust money found in a trust banking account at any time shall be transferred to a business banking account without undue delay. . .'

The question of an appropriate sanction in matters such as the present is always difficult. It is difficult to lose sight of the fact that the first respondent has studied for a number of years to put himself into a position where he is able to practice law. In addition, the Bill of Rights protects a citizen's right to freely choose their trade, occupation or profession.¹³ The first respondent will have members of his family who will be dependent on him for their survival. Sight is not lost of the fact that the amount misappropriated is, in relative terms, not a huge amount of money at all. On the other hand, we have the reasonable demands of the public that dishonesty by people who are trained in the law and who should know better should not be tolerated and, when uncovered, should be appropriately sanctioned.

[42] The opening premise must be that where an advocate has been found to be dishonest and has misappropriated money belonging to his client, there would have to be truly exceptional circumstances in place before a court will order a suspension from practice instead of a removal from practice.¹⁴

[43] Where dishonesty has been established, to avoid striking off, Wallis JA, in a minority judgment, in *Geach* noted that:

'In the context of an advocate who has been shown to be dishonest and lacking integrity, what is called for is evidence showing that the character flaw of dishonesty has been overcome, or will be overcome, if a sanction less than striking off, is imposed.'¹⁵

[44] Thus dishonesty does not ineluctably lead to the imposition of the ultimate professional sanction. If the question of a suspension, in preference to a striking off, is considered, then there must still be evidence of exceptional circumstances that apply to that errant legal practitioner for that consequence to be preferred. There would, in my view, have to be evidence that a suspension from practice would have the effect of remedying the defect in character that had led to the occurrence of the offending conduct and would reconfigure the offender into being a fit and proper person to practise as an advocate once more. As Harms ADP said in *Malan*:

¹³ Section 22.

¹⁴ *Malan and another v Law Society, Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); [2009] 1 All SA 133 (SCA) para 10.

¹⁵ *General Council of the Bar of South Africa v Geach and others* [2012] ZASCA 175; 2013 (2) SA 52 (SCA) para 156.

‘It is seldom, if ever, that a mere suspension from practice for a given period in itself will transform a person who is unfit to practise into one who is fit to practise.’¹⁶

If there is no evidence of this, then a suspension from practice will serve no purpose and the suspended party will return to practice with the defect in his character that caused the suspension, untreated and unhealed.

[45] In considering the first respondent’s conduct, it may be of some assistance to consider what the courts regard as the essential qualities that members of the legal fraternity should possess. In *General Council of the Bar of South Africa v Jiba and others*,¹⁷ the court held that:

‘[2] A successful practitioner, an attorney or an advocate, should possess and display certain qualities, most of which cannot be acquired through learning. Having these qualities could indicate that a person is indeed a “fit and proper” person for the profession. An appropriate academic training may, however, play a vital part in improving them, as they are “by nature at least latent”.

[3] The following are listed as the least of the qualities a lawyer should possess:

- “• (I)ntegrity — meaning impeccable honesty or an antipathy to doing anything dishonest or irregular for the sake of personal gain,
- objectivity — no irrelevant consideration whatsoever should bear upon one's judgment,
- dignity — practitioners should conduct themselves in a dignified manner and should also maintain the dignity of the court,
- the possession of knowledge and technical skills,
- a capacity for hard work,
- respect for legal order, and
- a sense of equality or fairness.” (Footnote omitted.)

[46] If one is to compare the desired qualities enumerated above with those that the first respondent has displayed in this matter, then one is left with a feeling of disappointment and despair for him. I do not mention all of those qualities and I need not dwell at all on the issue of integrity as the finding of dishonesty made against him must mean that he has failed to demonstrate any integrity. He has not conducted

¹⁶ *Malan and another v Law Society, Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); [2009] 1 All SA 133 (SCA) para 8.

¹⁷ *General Council of the Bar of South Africa v Jiba and others* [2016] ZAGPPHC 833; 2017 (1) SACR 47 (GP); 2017 (2) SA 122 (GP); [2016] 4 All SA 443 (GP) paras 2 and 3.

himself with dignity. In his affidavit utilised in support of an application for condonation for the late filing of his heads of argument, the first respondent states:

‘Firstly, I would like to greatly apologize for filing the Heads of Argument out of the required time. The reason being the proceedings to this application has been unfair to me from the beginning.’

There is no basis for his complaint. The proceedings have not been conducted in a manner that is prejudicial to him nor has it treated him unfairly. As shall be seen shortly, it is the first respondent that has been out of order in the way that he has conducted himself.

[47] It is apparent that the first respondent lacks the essential knowledge required of a trust fund advocate. He indicated in argument that he did not know that he contravened the applicant’s rules by retaining trust funds in his business banking account. This is a basic concept relating to trust monies of which he ought to have been aware. His ignorance of this, if true, is alarming.

[48] The first respondent complained further that the applicant’s replying affidavit was not served upon him. I assume that this was in support of his allegation that he had been treated unfairly. This very complaint was one of the reasons why the matter was adjourned on the previous occasion when it was due to be argued. The complaint was without merit. The replying affidavit had been served upon the first respondent. He appears to have overlooked the fact that he had appointed a firm of attorneys to assist him at one stage. Those attorneys came on record and the replying affidavit was properly served on those attorneys. There was thus proper service of the replying affidavit.

[49] Finally, I failed to detect any sense of respect for the legal order arising out of the first respondent’s conduct. Time limits and the requirements imposed by the Uniform Rules were simply ignored by him. Thus:

- (a) He delivered his first answering affidavit out of time, and consequently had to seek condonation therefore;
- (b) He delivered his second answering affidavit without the leave of the court being sought in terms of Uniform rule 6(5)(e); and

(c) He delivered his heads of argument out of time and he consequently had to seek condonation for this failure as well.

All of this paints a bleak picture of an advocate who is both undisciplined and, regrettably, ignorant of the requirements of his own profession. He appears to be quite indifferent to the demands of the profession that he has chosen to serve.

[50] In *Johannesburg Society of Advocates v Edeling*,¹⁸ Wallis JA stated that:

‘An advocate is required to be completely honest, truthful and reliable.’

That, with respect, perfectly sums up the essential qualities that an advocate must possess. When an advocate displays none of these qualities then his future ability to remain an advocate must be open to serious doubt.

[51] Could it possibly be argued that this was a single, unfortunate event that is unlikely to be repeated again in the future? Of course, what the future brings is not known to mortal man. It is possible that the first respondent may repent and never sin again but it is possible that he will repeat his conduct. In *Geach* Nugent JA stated that

‘Once an advocate has exhibited dishonesty it might be inferred that the dishonesty will recur and for that reason he or she should ordinarily be barred from practice.’¹⁹

[52] In my view, the first respondent has persistently over the course of the facts being considered demonstrated dishonest conduct, firstly towards his client by misappropriating her funds, and secondly towards this court in advancing an amateurishly false version of what became of the balance of the funds. In *Hayes v The Bar Council*, the court stated that the need for absolute honesty and integrity applies both in relation to advocates’ duties to their clients and to their duties to the courts.²⁰

[53] When offered the opportunity to give a truthful explanation for events, the first respondent chose to rather give a false explanation. I would regard the brazen yet

¹⁸ *Johannesburg Society of Advocates v Edeling* [2019] ZASCA 40; 2019 (5) SA 79 (SCA) para 17.

¹⁹ *General Council of the Bar of South Africa v Geach and others* [2012] ZASCA 175; 2013 (2) SA 52 (SCA) para 69.

²⁰ *Hayes v The Bar Council* 1981 (3) SA 1070 (ZA) at 1081H-1082D.

false explanation of the alleged robbery as an aggravating factor because it was told under oath and was persisted with in argument before this court.

[54] I have carefully considered the first respondent's conduct, and I can find nothing in it that redeems him in my view. I detect no exceptional circumstances that would allow the first respondent to avoid the inexorable sanction that must follow upon such conduct. Kirk-Cohen J in *Law Society, Transvaal v Matthews*²¹ stated the following in respect of the attorney's profession but it is of equal application to advocates:

'The attorney is a person from whom the highest standards are exacted by the profession and [the] Court . . . In this regard the standards are admirably dealt with in the founding affidavit as follows:

" . . .The profession itself is not a mere calling or occupation by which a person earns his living. An attorney is a member of a learned, respected and honourable profession and, by entering it, he pledges himself with total and unquestionable integrity to society at large, to the courts and to the profession... only the very highest standard of conduct and repute and good faith are consistent with membership of the profession which can indeed only function effectively if it inspires the unconditional confidence and trust of the public. The image and standing of the profession are judged by the conduct and reputation of all its members and, to maintain this confidence and trust, all members of the profession must exhibit the qualities set out above at all times. . . ."

[55] I agree with those words. The first respondent's conduct has fallen short of these high standards. There is no evidence that a period of suspension will be of any benefit and there are no exceptional circumstances to be found. The first respondent's name must be removed from the roll of advocates.

[56] I would therefore propose the following order:

1. The first respondent's application for an adjournment is dismissed with costs.
2. The rule *nisi* granted on 15 September 2022 is confirmed.

²¹ *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 395F-J, approved of in *Botha and others v Law Society, Northern Provinces* [2009] ZASCA 13; 2009 (3) SA 329 (SCA); 2009] 3 All SA 295 (SCA) fn 14.



MOSSOP J

I agree:

SHOBA AJ

APPEARANCES

Counsel for the appellant	:	Mr S N Chetty
Instructed by:	:	Siva Chetty and Company Town Bush Office Park Block C, Second Floor, Suite 10 460 Townbush Road, Montrose Pietermaritzburg
Counsel for the first respondent	:	In person
Instructed by	:	K M Chetty Attorneys Care of: Botha and Olivier Incorporated 239 Peter Kerchoff Street Pietermaritzburg
Date of Hearing	:	17 April 2023
Date of Judgment	:	28 April 2023