



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

Case No: 10205/18P

In the matter between:

KWAZULU-NATAL LAW SOCIETY

APPLICANT

and

AZGAR ALLY KHAN

1ST RESPONDENT

FIRSTRAND BANK LIMITED

2ND RESPONDENT

THE STANDARD BANK OF SOUTH AFRICA LTD

3RD RESPONDENT

ORDER

1. The *rule nisi* issued on 6 November 2018 is discharged with costs, such costs to include costs of senior counsel where so employed.

JUDGMENT

Delivered on:

Mngadi J: (Van Zyl J concurring in a secondary judgment)

[1] The applicant seeks, by means of a *rule nisi*, an order for the name of the first respondent to be struck off the roll of attorneys, and pending the outcome thereof, that he be suspended from practising as an attorney. The first respondent opposes the application.

[2] The applicant is the KwaZulu-Natal Law Society, an association of attorneys, notaries and conveyancers admitted and enrolled in KwaZulu-Natal, and a juristic person in terms of section 56 of the Attorneys Act 53 of 1979 (the Act). The first respondent is Mr Azgar Ally Khan a major male, and an admitted and practising attorney in KwaZulu-Natal. The second respondent is Firststrand Bank Limited, a company with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa, conducting the business of a bank. The third respondent is The Standard Bank of South Africa Limited, a company with limited liability, duly incorporated in terms of the company laws of the Republic of South Africa, conducting the business of a bank.

[3] The first respondent conducts his trust banking account, relating to his practice as an attorney, with the second and third respondents. Both the second and third respondents

have been joined in these proceedings for compliance purposes. They have not taken part in the proceedings.

[4] The applicant launched proceedings on 6 September 2018 for the *rule nisi* to be heard on 6 November 2018. On 6 November 2018 the *rule nisi*, with interim relief suspending the first respondent from practice, was issued and remains extant until confirmed or discharged. On 2 May 2019 the first respondent filed his answering affidavit, and on 8 August 2019 the applicant filed its replying affidavit. On 28 May 2020 the matter was heard when the first respondent, as agreed between the parties, was cross-examined. After the parties dispensed with oral arguments, the matter was postponed for judgement, and for filling of supplementary heads of arguments, which has been done.

[5] The relief sought by the applicant is in terms of section 22(1) of the Act, which provides as follows:

'(1) Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he or she practices-

(a) . . .

(b) . . .

(c) . . .

(d) if he or she, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney'.

The Legal Practice Act 28 of 2014 repealed the Act. Section 116(2) of the Legal Practice Act provides that any proceedings for the removal of the name of any person from the roll of attorneys, instituted in terms of any law repealed by this Act, which have not been concluded at the date of commencement, must be continued and concluded as if that had not been repealed. The parties agree that this application falls to be determined in terms of the Act since the Legal Practice Act commenced on 1 November 2018.

[6] In *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at 51B-H; [2000] 2 All SA 310 at 315C-H, it was held that section 22(1) of the Act prescribes a three-stage inquiry:

'First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities. The second inquiry is whether the person concerned "in the discretion of the Court" is not a fit and proper person to continue to practise. The third inquiry is whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice.'

It was held in *Botha v Law Society, Northern Provinces* 2009 (3) SA 329 (SCA) at 332D that: 'The first stage of the inquiry involves a purely factual finding whereas both the second and third stages involve the exercise of a discretion'.

[7] Ms Pearl Dawn Mfusi (Ms Mfusi) deposed to the founding affidavit. She states that she is a director of the applicant. It is part of her duties, *inter alia*, to ensure that members of the applicant comply with the rules made by the council of the applicant in terms of section 74(1) of the Act. The affairs of the applicant are managed and controlled by its council. She states that the first respondent was admitted and enrolled as an attorney on 21 July 2009. He practises as such from that date. She states, as reasons for the application, that the applicant receives three complaints against the first respondent, namely: a complaint from Mrs Ngwenya (Mrs Ngwenya's complaint), a complaint from Coralhead Investment (Pty) Ltd (Coralhead's complaint), and a complaint from the Universal Islamic and Cultural Trust (UIC Trust's complaint).

[8] Ms Mfusi states that pursuant to the receipt of the three complaints, the applicant appointed an inspection committee in respect of each complaint. The inspection committee in respect of the UIC Trust's complaint concluded that there was *prima facie* evidence that the first respondent had misappropriated trust funds. The applicant adopted the view of the inspection committee, and found that first respondent misappropriated trust monies and deserves the sanction of the court. In respect of Coralhead's complaint, the inspection committee found that the first respondent paid over the complainant's money, which ought to have been held in trust, without any mandate to release those funds thus transgressing the rules. The inspection committee in respect of Mrs Ngwenya's complaint found that the money was not in the trust account of the first respondent from the date it was deposited.

[9] Ms Mfusi concludes that the applicant's attitude to the UIC Trust's complaint was the following:

- '1. An enquiry in this matter will produce no other response other than a denial by the complainant that they authorise the payments made by the first respondent.
2. Indeed, it is extremely negligent of the first respondent to deal with such large amounts of trust money in such a cavalier and casual manner.
3. Not maintaining any written mandate nor written instructions or notes of such payments leads to irresistible conclusion that the monies utilised by the first respondent were not on the complainant's instructions but, as the Inspection Committee determined, it was utilised for other purposes.
4. This amounts to nothing more than a misappropriation of trust monies and deserve the sanction of the court.'

[10] Ms Mfusi attached to her affidavit, in respect of each complaint, extracts of the minutes of a meeting of the council, the complaint by each complainant, and the inspection committee's report. In my view, most of these annexures were for consideration by the applicant. The applicant's findings constitute the basis of the application. The contents of the annexures do not constitute proof against the first respondent except if admitted or not denied, but they do show the material that was before the applicant and which informed its decision.

[11] The details of Mrs Ngwenya's complaint was that the first respondent misappropriated the complainant's money in the sum of R300 000. The money was compensation, which was received from the Road Accident Fund. The Road Accident Fund deposited the amount into the trust account of the first respondent. The first respondent had claimed compensation for the loss suffered by Mrs Ngwenya's son, after he was so instructed by Mrs Ngwenya. The first respondent advised Mrs Ngwenya that compensation has been received. Mrs Ngwenya requested the first respondent to account to her but the first respondent failed to do so, so goes the complaint. The first respondent's response to the complaint is the following: He received the compensation into his trust account. A few days after the receipt of the money, he noticed that the money had been paid out of his trust account. He investigated, and discovered that an employee

of his accountant stole the money from the trust account by manipulating the first respondent's internet banking arrangement. The accountant reported the theft to the police. The police subsequently arrested the employee and the accountant paid back the stolen money. Mrs Ngwenya and her son, who had in the meantime become a major, could not agree to whom the money should be paid. The dispute was resolved and the money was paid to Mrs Ngwenya, where after Mrs Ngwenya withdrew the complaint. In my view, the applicant, having accepted the first respondent's version, has not claimed nor shown any offending conduct on the part of the first respondent relating to Mrs Ngwenya's complaint.

[12] The gist of Coralhead's complaint was the following: The purchaser of a franchise business, after arranging with the seller, deposited R420 000 (which was part of the purchase price) into the trust account of the first respondent. The seller, a long-standing client of the first respondent, advised the first respondent of the deposit, and requested the first respondent to pay the money over to him. The first respondent, after having verified the deposit, paid the deposit to the seller. The purchaser complained that the first respondent had paid the deposit to the seller before the conditions stipulated in the sale agreement were fulfilled. The purchaser furnished the first respondent with a copy of the sale agreement, whereupon the first respondent advised the seller to return the money paid to him. After a delay, the seller indeed returned the money. The purchaser withdrew the complaint. The purchaser, in my view, ought to have advised the first respondent of the conditions relating to the payment of the purchase price into the trust account when the payment was made. The first respondent ought to have been more cautious by confirming with the owner of the money whether it could be paid over to the purchaser. However, the applicant has not pointed out a contravention of any particular rule. Therefore, I am of the view that nothing turns on this complaint.

[13] The first respondent raised a number of points *in limine*. The applicant adopted the attitude that these were technical points, and had no substance, without dealing with them in detail. It attributed the raising of the points *in limine* to ignorance on the part of the first respondent, which demonstrated his unfitness to be an attorney. The gist of the first

respondent's view is that the applicant is pursuing a vendetta against him. Individuals within the structures of the applicant are settling their own personal scores with the first respondent through the mechanism of the applicant. In that regard, it was important that the applicant demonstrates that the first respondent's concerns are unfounded, and that it dealt with the matter strictly in terms of the law. Ms Mfusi in her affidavit states that Mrs Ngwenya lodged the complaint by way of an affidavit dated 6 October 2016, Coral head on 26 April 2017 and the UIC Trust on 15 March 2018. However, the UIC Trust was alleging misappropriation of trust funds during November 2016. It is not clear whether the nature of the complaints justified seeking a drastic measure of immediate suspension from practice of the first respondent.

[14] The first respondent's sub-points *in limine* are the following:

- (a) Ms Mfusi's authority to depose to a founding affidavit is challenged by the first respondent. In my view, it must be taken into account that Ms Mfusi is a senior employee of the applicant, and that the applicant is a juristic person and acts through its employees and officers. Further, Ms Mfusi is involved in the management and control of the affairs of the applicant. The matters referred to in the founding affidavit are within the scope of her duties. In my view, there is no merit in the objection to Ms Mfusi deposing to a founding affidavit. The applicant can decide to use an affidavit deposed to by any person who is knowledgeable about the facts averred in the founding affidavit.
- (b) The confirmatory affidavits were deposed to prior to the dates of the founding affidavit being deposed to. In my view, this is undesirable. It conveys the impression that the confirmatory affidavit is a mere step of compliance. The explanation provided that drafts were seen before the confirmatory affidavits were signed does not hold water. It means that the confirmatory affidavits are confirming the contents of the draft affidavit, which is not the issue. In my view, these confirmatory affidavits are not of any importance since they seek to confirm what happened during the investigations of the complaints, which investigations do not form the basis of any complaint.

[15] The main point *in limine* is the following: The application and the inspections were not properly authorised. The first respondent contends that he is a member of the society.

The relief sought in the application has the effect of terminating his membership of the society, whereas the society has not taken a resolution to terminate his membership. The applicant responds that the resolutions, on which the application was instituted, are how the council of the applicant carries out its work. Ms Mfusi makes it clear that the application to have the name of the first respondent struck off the roll is based on a resolution by the council, and that the inspection committees were appointed as per the decision by the president of the council. These following sections of the Act are of importance:

(a) Section 70(1) provides that

‘(1) A council may for the purposes of an enquiry under section 71 of or in order to enable it to decide whether or not such an enquiry should be held, direct any practitioner to produce for inspection, either by the council itself or by any person authorized thereto by the council, any book, document, record or thing which is in the possession or custody or under the control of such practitioner and which relates to his or her practice or former practice.

(2) The refusal or failure by a practitioner to comply with a direction . . . shall constitute unprofessional conduct.’

(b) Section 71 provides that a council may, in the prescribed manner, enquire into cases of alleged unprofessional or dishonourable or unworthy conduct on the part of an attorney, and for that purpose, it may summon any person who is in the opinion of the council able to give material information relating to the subject matter of the enquiry, to appear before it to be interrogated under oath or to produce a book, document, record or thing.

(c) Section 72 provides that a council conducting an enquiry in terms of section 71 may find the person concerned guilty of unprofessional conduct, and may impose an appropriate sanction.

(d) Section 22, as quoted above, provides that any person who has been admitted and enrolled as an attorney, may on application by the society concerned be struck off the roll or suspended from practice by the court, if he or she is not fit and proper person to continue to practise as an attorney.

[16] The applicant seeks to justify the taking of a decision by the president of the council to conduct the inspection, by referring to a standing resolution of the council dated 13

November 2008 wherein the council delegated its powers to its president or vice-president. Section 70 grants the power to order an inspection to the council. The council, in relation to the first respondent, did not exercise the power given to it. The president of the council purported to exercise the power given to council by the Act. The council did not give itself the power. The creator of the power entrusted the power to council. There is no provision in the Act, that apart from giving the power to council, council was given the power to delegate it. In my view, council delegated the power given to it without authority. It is a primary rule of administrative law, that a discretionary power may not be delegated to another body or person, in the absence of an express or implied statutory authority. The prohibition on delegation is contained in the rule *delegatus delegare non potest*. The rule implies that where an administrative organ has been empowered to perform an act, and the performance of this act is accompanied by a discretionary power, the function or task may not be delegated to another organ unless the organ has been expressly authorised to do so. Section 67 of the Act does not cover power to take a decision.

[17] Ms Mfusi, as having authority to apply for the striking off the roll of the applicant, relies on a resolution of council dated 26 June 2018. The council resolved that an application be made for the first respondent to be struck off the roll of attorneys, and pending the determination of the application, that he be suspended from practice. The council again took a similar resolution on 31 July 2018. There is no explanation why a second resolution was taken, and why it relied on the resolution taken on 26 June 2018 and not on the one taken on 31 July 2018. Section 22 empowers the society, not the council, to apply for the striking off the roll of an attorney. The applicant relies on section 60 of the Act as authority that the council was empowered to bring the application. If the applicant is correct, it would mean, as is clear from the above quoted section, that to give different powers to the society and the council has achieved no purpose. It also means that there is no distinction between the council and the society. In that case, why is the council not applying for the striking off in its name? Section 22 does not authorise the society to delegate the power given to it by this section. Section 60 provides that the affairs of a society shall be managed and controlled by a council, which may, subject to

the provisions of subsection 2, exercise the power of the society. It will not make sense to elevate the sub-phrase 'the council may exercise the power of the society' to trump other clear provisions of the Act. It will also result in the absurd situations referred to above. The result is that the council, without being authorised to do so, has assumed the power given to the society. The power given to the society in section 22 by the Act is a power that the society has not been authorised to delegate, and it has not delegated it. Likewise, the power given to the council by section 70 is the power that the council has not been authorised to delegate. The society and the council are two different structures. It would not make sense that the Act would create different structures, and grant them different powers to interpret provisions in such a manner that a power given to a particular structure is exercise by a completely different structure. See Yvonne Burns *Administrative Law under the 1996 Constitution* (1999) at 143; and *Chairman, Board on Tariffs and Trade, & others v Teltron (Pty) Ltd* 1997 (2) SA 25 (A) at 34C-D. In *Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639C-D, Botha JA explained the reason for the principle as follows:

'The maxim *delegatus delegare non potest* is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers'.

[18] The council did not exercise the power given to it by section 70. The first respondent was deprived of the right to have the complaints against him investigated by inspection committees appointed in terms of section 70. Irregularly appointed inspection committees investigated him and irregular recommendations were considered against him, forming the basis of the application to have his name struck off the roll of attorneys.

[19] With regard to the UIC Trust's complaint, the applicant in its conclusion states that to deal with large amounts of money in such a cavalier and casual manner as the first respondent apparently did, amounts to nothing more than misappropriation of trust funds. In my view, this is indicative of muddled thinking on the part of the applicant. If the cavalier

and casual manner was a contravention of the rules of the applicant, it was supposed to point out the actual rule(s) transgressed, and make such transgression(s) part of the grounds for the strike off application. It does not help to point out in reply and in argument, the various rules and various statements allegedly constituting transgressions, which were not part of the case made out in the founding affidavit. See *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd & others* 1974 (4) SA 362 (T) at 369A-B.

[20] The details of the UIC Trust's complaint are the following. It emanates from the sale of a property. The seller was Jacbar Trust, and the purchaser was the UIC Trust. The purchase price of the property was R3 250 000, payable by the purchaser to the seller upon registration of the transfer of the property into the name of the purchaser. The sale agreement was concluded on 14 May 2016. Possession of the property was given to the purchaser on 1 August 2016. The UIC Trust, a long-standing client of the first respondent, arranged as it used to do, that the purchase price of the property would be paid to the first respondent. The first respondent would thereafter pay it over to the conveyancing attorneys when called upon to do so. Over a period of time, the UIC Trust had concluded various transactions, making payments through the trust account of the first respondent. The UIC Trust claims to have paid the full purchase price by making instalment payments to the first respondent. The first respondent, although admitting to receiving various payments from the UIC Trust for other transactions, claims that for the transaction in question, he received only R1 000 000, which he paid over to conveyancing attorneys. The first respondent explains that the balance of the purchase price, namely R2 250 000 was, as arranged by the UIC Trust, to be paid to his trust account from Turkey. Indeed, the transfer did come through, but before the money was cleared by his bank, the South African Reserve Bank seized it as it related to contraventions of Foreign Exchange regulations. The sum that was seized was USD200 000. After the seizure of the money, he advised the UIC Trust, and sought its cooperation to have the money released. The Reserve Bank sought verification of the source of the funds. The first respondent engaged with the Reserve Bank with regard to where the money was going to, but the UIC Trust failed to furnish any documentation relating to the source of the funds. Eventually, the money was declared forfeited to the State.

[21] From the beginning, and at all times, the first respondent contends that he could not pay the balance of the purchase price to the conveyancing attorneys nor could he account for it to the UIC Trust because the funds were seized. The founding affidavit states that the UIC Trust did not accept that excuse as no proof of seizure was produced. If the UIC Trust had nothing to do with the funds sent from Turkey, then why it was interested in the proof of the seizure, is not explained. The full purchase price was payable in October 2016, and the UIC Trust became aware that it had not been paid to the seller. Inexplicably again, the UIC Trust took no action against the first respondent and only did so when it instituted a claim with the Attorneys Fidelity Fund, two years after it paid over the money. The inspection committee never confronted the first respondent with a claim that the UIC Trust was claiming that the seized funds, if there were seized funds, did not belong to the UIC Trust. The nub of the complaint was not pointedly raised with the first respondent. The result is that the case made out in the replying affidavit is a new case. All along, the first respondent prepared himself to meet a case that the applicant and the UIC Trust were claiming that he misappropriated the money as they were denying that the funds meant for the balance of the purchase price were seized.

[22] The UIC Trust produced no documents or evidence to show what each payment to the first respondent was meant for. In fact, the UIC Trust did not know the exact payments it made to the first respondent; it had to be corrected by the first respondent. It was only in reply, when the UIC Trust attempted to set out in full the payments it claimed related to the purchase price of the property, which differed from the amounts it earlier stated. The first respondent, except to testify that all the monies paid to him by the UIC Trust were disbursed in accordance with instructions of the UIC Trust, by paying them to the payees' bank accounts from his trust account, and he produced no other documentation. The applicant did not investigate with the first respondent's bankers to determine the details of the payees of the money paid from the first respondent's trust bank account. The applicant did not investigate with the bank or the Reserve Bank to determine the details of the money seized, namely: for whom it was meant, and the details of where the money came from. Initially, both the UIC Trust and the applicant disputed the seizure and

forfeiture of the money. When this became irrefutable due to publication of the seizure and the forfeiture order in the Government Gazette, number 41625 on 11 May 2018, the UIC Trust claims that it was not its money which was seized. The UIC Trust is through its attorneys, pursuing a claim against the Attorneys Fidelity Fund. It lodged a claim on 15 May 2018, although the full purchase price of the property ought to have been paid by October 2016. The UIC Trust does not dispute that it was advised by the first respondent that the funds were seized. It is strange that the first respondent would advise the UIC Trust of the seizure of funds if it had no interest in the funds. It is even more strange that the UIC Trust would then not claim its own money because of the seizure of the funds, funds it had no interest in them.

[23] The onus is on the applicant to prove the offending conduct on the preponderance of probabilities. The applicant opted not to institute an enquiry envisaged in section 71 of the Act to enable it to determine whether the version of the first respondent or the version of the UIC Trust was the truth. It decided to proceed against the first respondent by motion proceedings, being well aware of the factual dispute, which related to the proof of the offending conduct. It did not apply for a referral of the issue to trial. The cross-examination of the first respondent merely confirmed his confidence in his version, and showed the applicant to be on fishing expedition. It is trite that motion proceedings are not appropriate for deciding real and substantial disputes of fact. It is neither appropriate nor competent for purposes of deciding real and substantial questions in disputes that properly fall for decision by an action procedure. If there is a real and substantial dispute of fact, probabilities may not be relied upon for a decision since established facts determine probabilities. In *Sewmungal & another, NNO v Regent Cinema* 1977 (1) SA 814 (N) at 820E-F it was held that the court should not 'be tempted to settle disputes of fact solely on the probabilities emerging from the affidavits without giving any or due consideration to the advantages of *viva voce* evidence'.

In *Administrator, Transvaal, & others v Theletsane & others* 1991 (2) SA 192 (A) at 197A-C it was held that:

'...in motion proceedings, as a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities, unless the Court is satisfied that there is no real and genuine

dispute on the facts in question, or that the one party's allegations are so far-fetched or clearly untenable as to warrant their rejection merely on the papers, or that *viva voce* evidence would not disturb the balance of probabilities appearing from the affidavits.'

[24] Misappropriation of trust money is a serious allegation with dire consequences, and is not lightly to be assumed. See *Olivier v Die Kaapse Balieraad* 1972 (3) SA 485 (A) at 496G-N. The principle enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635 by Corbett JA is that:

'... where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact ... [and despite the denial] the Court [may be] satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief. ... where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. ...'

In my view, the applicant has failed to prove the offending conduct on the part of first respondent. Further, the investigation against the first respondent and the institution of these proceedings were not properly authorised.

[25] It is trite that applications for the striking off the roll of an attorney's name are not ordinary civil proceedings, they are proceedings of a disciplinary nature and are *sui generis*. The law society is the *custos morum* of the legal profession; it merely gathers facts and places them before court for consideration. Its motivation should be to carry out its statutory duties in order to protect members of the public. However, the high standard expected from its members is also expected from it in the manner in which it handles the strike off applications of its members, and their suspension from practice. It must proceed in a fair and objective manner in the investigation of complaints, and in the presentation of facts. Where there are indications of being remiss in the manner the investigation was

done, in my view, the court should not hesitate to point that out and to make an appropriate costs order.

[26] I, accordingly, make the following order:

The *rule nisi* issued on 6 November 2018 is discharged with costs, such costs to include costs of senior counsel where so employed.



.....
Mngadi, J

Original

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

CASE NUMBER: 10205/2018P

In the matter between:

KWAZULU-NATAL LAW SOCIETY

Applicant

and

AZGAR ALLY KHAN

First Respondent

FIRSTSTRAND BANK LIMITED

Second Respondent

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Third Respondent

JUDGMENT

VAN ZYL, J.:-

[1] This is a secondary judgment. I have had the privilege of reading and considering the main judgment by my brother Mngadi, J. After considerable reflection I have concluded that my own approach to the matter differs to the extent where it is desirable to set out my views by way of a separate secondary judgement.

[2] The applicant society instituted proceedings against the first respondent, at the time a practicing attorney and a member of the applicant, as well as the second and third respondents, both banking institutions used by the first respondent as his bankers. The second and third respondents have taken no active part in these proceedings and as a matter of convenience the first respondent is herein referred to simply as the respondent, unless otherwise indicated.

[3] The proceedings thus instituted took the form of application proceedings wherein the applicant sought, at the outset, the suspension of the applicant from practice pending a decision to strike his name from the roll of attorneys.

[4] In the result and on 6 November 2018 the applicant obtained a *rule nisi* with interim relief suspending the respondent from practice pending the final determination

of the application to strike his name from the roll of attorneys. However, the respondent opposed the striking off application. On 15 March 2019 and by consent the rule was extended until confirmed or discharged and the respondent directed to deliver his answering affidavits on or before 18 April 2019 with respondent also to pay the costs of the adjournment. However the respondent's answering affidavits were only delivered on or about 2 May 2019 and the applicant's replying affidavit on 8 August 2019.

[5] Subsequently the matter was enrolled for opposed argument but, because of factually conflicting versions relevant to the three complaints against the respondent it was postponed and scheduled for the hearing of *viva voce* evidence.

[6] At the hearing which, commenced on 28 May 2020 the applicant did not call any further witnesses. The respondent was required to and submitted to cross examination, where after the parties agreed to submit written argument for consideration by the court

[7] Although the respondent had raised certain issues *in limine* in his answering affidavit, these were not persisted with at the hearing and did not form part of the argument later submitted for consideration. Ultimately the disputes between the parties related to the three areas of complaint upon which the applicant relied.

The Complaint by Mrs Ngwenya:

[8] The first of these related to a complaint lodged with the applicant by a Mrs Ngwenya. The complainant had been a client of the respondent's practice. It was alleged that although her claim against the Road Accident Fund had been settled and payment made by it to the respondent's practice, there had been a failure to account to her for the proceeds.

[9] In response thereto the respondent admitted that there had been a delay in accounting to the complainant. The respondent explained that what had occurred was that an employee of the firm of accountants employed by his practice had misappropriated the money recovered on behalf of the complainant. The matter was reported to the police and efforts were made to recover the loss from the accountants whom the respondent held vicariously responsible for the misconduct. The employee

involved had in the meantime absconded. After some delay the accountants refunded the misappropriated sum to the respondent's practice. Payment was thereafter made to the complainant and according to the respondent the matter was considered as resolved. The respondent complained that this complaint was unfairly revived by the applicant some fifteen months later to form part of the proceedings instituted against him. There was no rebuttal of the respondent's allegations by the applicant in reply.

The Complaint by Coralhead Investments (Pty) Ltd:

[10] The complaint arose from an agreement which the complainant company as purchaser had entered into for the acquisition of a fried chicken franchise and in respect of which a deposit of R420 000-00 was payable. The seller nominated the respondent's practice for payment thereof and the complainant concern duly paid the deposit to it by way of electronic transfer into the practice trust account. The sale agreement was, however, subject to the suspensive conditions that the franchisor approved of the purchaser as franchisee and that the purchaser secured a suitable lease for the premises where the business was conducted from. These suspensive conditions failed, *inter alia* by reason of the franchisor rejecting the purchaser as a franchisee. The purchaser accordingly considered the purchase agreement as having lapsed and requested return of its deposit.

[11] When this was not forthcoming correspondence ensued, also between the attorneys for the complainant and those acting for the erstwhile seller who advised that the seller intended instituting legal proceedings against the franchisor to compel it to accept the complainant as franchisee. In the process the seller's attorneys requested the complainant's assistance in the contemplated legal proceedings and its consent to the retention of the deposit which they said they had been advised had been paid to the respondent's firm. Curiously, the attorney dealing with the matter on behalf of the seller was Mr Attorney Siva Chetty who, in the present proceedings, represented the applicant and who cross examined the respondent with regard to this complaint. However, no objection to Mr Chetty representing the applicant in these proceedings was raised on behalf of the respondent.

[12] The respondent admitted that the aforementioned deposit was electronically paid into his firm's trust banking account. The respondent explained that the seller had

been a client whose integrity and financial standing he had no reason to doubt at the time. After his firm had closed for the Christmas recess period he had been telephonically advised of the deposit. Subsequently the seller advised that the transaction had been satisfactorily concluded and requested that payment of the deposit, thus received in trust, be made to the seller. The respondent explained that he complied in good faith on the strength of the representation made by his client, the seller. At the time he had not had sight of the agreement of sale and he had not been involved in the transaction, other than as recipient of the trust deposit.

[13] According to the respondent he had been misled by the seller. Had he known at the time that the conditions for payment to the seller of the monies he had received had not been satisfied, he would not have effected payment. Once the complainant requested repayment of the deposit from the respondent's firm the respondent sought to obtain repayment from the seller. However, the latter initially failed to comply before eventually making repayment to the respondent, who then in turn repaid the complainant. According to the respondent this matter was also considered resolved some twelve months prior to being revived by its inclusion when the present application was launched.

The Universal Islamic and Cultural Trust (the Trust) Complaint:

[14] The complaint in this regard also arose out of an agreement of purchase, but in this instance the purchase of land. The Trust alleged that it had paid the purchase price for certain immovable property it purchased to the respondent who was tasked with attending to the registration of transfer from the name of the seller into the name of the Trust. Registration of transfer was due to take place in Bloemfontein, Free State and the respondent issued a letter of undertaking (guarantee) to the conveyancers for the payment of the balance of the purchase price upon registration of transfer. However, when called upon to make good on his undertaking and to pay, the respondent failed to do so. According to the Trust he had misappropriated portion of the purchase price for the property which the trust had previously paid to his firm.

[15] The respondent denied having misappropriated any funds, either as alleged or at all. He explained that he had had a long standing relationship with the Trust and had attended to various significant matters on its behalf prior to the transfer in issue.

In the process he had, from time to time, received large sums of money from or on behalf of the Trust in relation to such matters. He admitted having issued the guarantee in respect of the transfer, but said that he did so on the strength of assurances that when the time came to honour the undertaking, the Trust would ensure that he was placed in sufficient funds to effect the required payment.

[16] The respondent explained that the shortfall in respect of which the guarantee was issued related to a payment of two hundred thousand United States Dollars (US\$ 200 000-00) which, at the then prevailing exchange rates, amounted to about R2,2 million and which was transferred to his firm for the benefit of the Trust from a source in Turkey. However, the transfer was seized by the South African Reserve Bank who demanded an acceptable explanation as to the origin of funds before the funds would be released. In this regard the respondent referred to the letter from the Reserve Bank dated 3 July 2017 and where, in para 4 thereof, the Divisional Head confirmed that a block had been placed upon the said sum in the respondent's trust account. The letter went on to warn of its forfeiture should any representations be unsuccessful.

[17] The respondent claimed that despite repeated requests to the Trust, the Trust failed to provide any information as to the origins of the transfer and effectively disowned the foreign payment, which was then forfeited to the State. By reason thereof the respondent said that he was unable to effect payment in terms of his undertaking to the conveyancers and he suggested that the reason for the complaint against him was to enable the Trust to recover its loss from the Attorneys' Fidelity Fund.

[18] The respondent also asserted that various other sums, paid to his firm by or on behalf of the Trust, related to other matters in which he had acted for the Trust and not to the transfer in issue. In the circumstances he denied any misappropriation of monies belonging to the trust.

[19] In reply the complainant provided additional financial figures and calculations, which arguably were open to interpretation, but no expert or other witness was called to give *viva voce* evidence in regard thereto in order to contradict the version of the respondent. An illustration of the lack of accounting clarity occurred when counsel for the applicant suggested to the respondent under cross examination that the payment of 1R million, admittedly made to the conveyancers in Bloemfontein, was suspicious because it had been made from a Nedbank account while the respondent had no trust

account with Nedbank. When the respondent pointed out to counsel that annexure G154, the document relied upon, was in fact a receipt issued by Nedbank as the recipient's bankers, counsel abandoned that line of cross examination.

[20] In the final analysis there remained unresolved a number of material factual conflicts between the versions of events as contended by the applicant and that averred by the respondent. Insofar as the striking from the roll is concerned, the process of adjudication comprises a three stage enquiry (*Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at par 10; *Malan v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) at par 4).

[21] The first stage involves a factual enquiry as to whether the conduct attributed to the respondent has been established on a preponderance of probabilities. If so, then the second stage involves the weighing the conduct of the respondent against what is expected of an attorney in order to decide whether (in court's discretion) the respondent is still a fit and proper person to practice as an attorney. Depending upon the finding in the second stage, the third stage involves a decision whether, in the circumstances of matter, the respondent's name should be struck from the roll of attorneys, or whether the lesser sanction of being suspended from practice, or some other penalty such as a fine, should be imposed.

[22] Turning to consider the first stage of the enquiry relevant to proof of the factual allegations relied upon by the applicant, the onus or duty to establish the conduct complained of rests upon the applicant. Where, as here, there are factual conflicts, the usual approach in application matters apply, namely that these conflicts are to be decided on the respondent's version (*Malan v Law Society (supra)* at par 12; *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) in para 4 at 231D).

[23] In the present matter the applicant sought to resolve the factual conflicts, not by seeking to take the matter on trial, or identifying the specific conflicts and seeking to lead evidence in regard thereto, but merely exercised its right to cross examine the respondent. The process of cross examination covered limited ground and achieved no decisive result because the respondent was resolute in maintaining his version as per his answering affidavit. He did not materially contradict himself, nor did he impress as a poor witness, bearing in mind that demeanour is not necessarily a reliable

indicator of truthfulness (*Allie v Foodworld Stores Distribution Centre (Pty) Ltd* 2004 (2) SA 433 (SCA) at par 37 to 41).

[24] However, the respondent's evidence was not inherently improbable, so that the factual enquiry into the conduct attributed to him essentially needs to be resolved upon his version of events. With regard to the first complaint it was common cause that there was a delay in payment to the complainant. On the respondent's version this was caused, in the first instance by the theft perpetrated by his accountant's employee and the tardiness of his accountant to repay the proceeds of the theft. A further delay was occasioned, according to the respondent, by a dispute between the complainant and her son, a minor at the time the claim for compensation was instituted, but who had attained his majority by the time the claim had been settled and the proceeds paid to the respondent's practice. The dispute involved who as between the mother and son should give instructions as to the disposal of the monies held in trust. The respondent said that this dispute had been dealt with by one of his staff at his Pietermaritzburg office and that he himself had not dealt with the clients personally. No misappropriation of funds in this regard by the respondent was established.

[25] With regard to the second complaint the respondent likewise denied any misappropriation or dishonest conduct. On his version the deposit involved in the abortive sale of the franchise was electronically paid into his trust account during the December recess period and whilst he was on holiday. When he was subsequently advised by his client, the putative seller, that it was in order for him to pay over the deposit and he did so in good faith because he had no reason to doubt his client's instruction. When it appeared that his client had misinformed him as to the position, he was not able to effect repayment to the complainant until the sum concerned had been refunded by his client. The delay was attributable, according to him, to the endeavors of his client to save the sale and its failure to refund the deposit to the respondent, or to the complainant directly. When his client did finally repay the deposit to the respondent, the latter repaid the complainant. In the circumstances he denied any misappropriation.

[26] With regard to the third complaint the crux of the respondent's explanation related to the US\$200 000 interdicted and ultimately confiscated by the SA Reserve Bank from the respondent's trust account for want of any plausible explanation as to

the source of the funds which originated in Turkey. On the respondent's version he did not know and could not explain the source of the funds and the complainant trust, for whatever reason, declined to do so. According to the respondent and but for the loss of this foreign transfer, he would have been able, in compliance with his instructions and the undertaking he gave to the conveyancers, to have paid the balance of the purchase price of the property purchased by the trust. He denied misappropriating the amount involved in the transfer from Turkey, or indeed any of the other funds paid to him from time to time by or on behalf of the complainant trust.

[27] In my view no misappropriation of trust funds as alleged by applicant was established. The respondent's versions relevant to the three complaints were not so far-fetched or clearly untenable that the Court would be justified in rejecting them merely on the papers (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C). As already indicated, the limited cross examination of the respondent did not resolve the existing factual conflicts.

[28] That is not to say that the respondent's conduct was free from criticism. Far from it. With regard to the first complaint he was lax in his supervision and control of the accounting system of his practice. When he eventually established that there was a shortfall and that his accountant's employee had misappropriated his client's monies from his trust account he was not justified in withholding repayment until he had recouped his loss from his accountant, whom he held vicariously liable. He should forthwith have refunded the shortfall in his trust account from his own resources. As regards resolving the alleged dispute between the complainant and her son he was equally tardy in addressing the issue, instead leaving it to an employee in his Pietermaritzburg office to resolve.

[29] With regard to the second complaint the respondent was remiss in the casual manner in which he dealt with the unexpected deposit into his trust account. Not only did he not open a file or even a ledger, or enquire into the nature of the transaction, but he also took no steps to verify the reason for the deposit, or the conditions relevant to his holding or dealing with the amount thus held in trust. He was grossly negligent in simply accepting his client's statement and oral instruction to pay over the trust deposit without confirming with the complainant. Once he realized the payment was unauthorized, he was obliged to repay the complainant forthwith from his own

resources and recover from his client in due course thereafter. In relation to the complainant the respondent was at fault in paying out the trust amount when not authorised to do so and was not entitled to delay repayment until he had recouped the amount from his client.

[30] With regard to the third complaint the respondent was again grossly negligent. Not only did he fail to keep proper and detailed records of the various instructions he received from the complainant trust in relation to the particular, as well as other transactions, but on his own version he acted and effected payments in terms of oral instructions which were later disputed. Even more serious, he issued as attorney a guarantee to the conveyancers for payment upon the registration of transfer when he was not assured that he would have sufficient financial cover from his client to honour the guarantee when called upon to do so, once transfer had been registered. To issue such a guarantee and then default on payment undermines the entire system of trust in terms of which immovable property transfers operate. It is no justification to say that he believed that his client would provide him with sufficient financial cover when the time came. The issue of the guarantee was not only grossly negligent, but bordered upon the reckless.

[31] It should nevertheless be noted that the court's supervisory powers over the conduct of legal practitioners, including attorneys, involve firstly the imposition discipline and the punishment of errant practitioners. Secondly, to protect members of the public and in particular where trust funds are concerned (*Summerley v Law Soc NPs* 2006 (5) SA 613 (SCA) at par 19). In the present matter serious dishonesty attributable to the respondent has not been established, but his conduct nevertheless calls for sanction.

[32] The issue to be decided at the second stage of the enquiry is then whether, in the light of the factual position as discussed above, the respondent remains a fit and proper person to practice as an attorney. After anxious consideration I have come to the conclusion that the conduct of the respondent, whilst both negligent and unprofessional, deserves disapproval, but not a sanction as drastic as the striking of his name from the roll of attorneys.

[33] Considered holistically, I would have suspended the applicant from practice for a considerable period of time in order to bring home to him that discipline in the

practice of an attorney is one of the necessary attributes required in order to protect the interests of the clients of his practice. The slap-dash manner in which he conducted his practice and which gave rise to the complaints against him resulted, on his own version, from his inattention to detail, his lack of dedication to a disciplined approach to the conduct of his clients' affairs and his inadequate and tardy responses to shortfalls in his trust accounts, when the shortfalls came to his notice.

[34] However, given the passage of time which has elapsed since the respondent was suspended from practice by virtue of the interim order, in my view no purpose would be served at this point in time in imposing upon him a further suspension from practice. Effectively he has already served a sufficient period of time suspended from practice as a sanction for his misconduct and would hopefully have learnt from the experience. I have therefore come to the conclusion and respectfully agree with my colleague, but for different reasons, that the most appropriate order in the circumstances would be simply to discharge the rule *nisi* in terms of which the respondent was suspended from practice.

[35] There remains, however, the issue of costs. It is clear that the applicant did not succeed in its approach that the respondent's name should be struck from the roll of attorneys. That being so the question arises what costs order would be appropriate where the applicant, while acting as *custos morem* of the attorneys' profession, was nevertheless not substantially successful.

[36] On behalf of the respondent it was submitted that the applicant should be ordered to pay the costs of the application on the punitive scale as between attorney and client. In *Botha v Law Society, Northern Provinces (supra)* at para 22 the court held that the preferable order, where the law society was unsuccessful, would be to make no order as to costs. The relevant passage from the judgment of Cloete, JA reads as follows:

"I nevertheless prefer to follow the approach of Tindall J (Solomon J concurring) in Incorporated Law Society v Taute [Society v Taute 1931 TPD 12] where it was held that where a law society fails to prove charges against an attorney and the society's conduct is not open to criticism, the correct order is no order as to costs."

[37] My colleague, however, has adopted the view that in this matter costs should follow the result. In the circumstances it becomes necessary for me to consider whether I am persuaded that this is indeed the correct costs order to issue in all the circumstances of this matter.

[38] It is not without significance that Tindall J (as he then was) in *Taute* (supra) limited the approach that an unsuccessful law society should not be mulcted in costs to cases where "*the society's conduct is not open to criticism*". In the present matter it appears to me that the conduct of these proceedings by the applicant was indeed open to criticism.

[39] At the outset some of the affidavits relied upon by the applicant were defective. The founding affidavit of Ms Mfusi was deposed to on 20 August 2018 while the supporting affidavits of Messrs S J Taverner and R S Green, both purporting to have read the affidavit of Ms Mfusi, were deposed to on 7 and 3 August 2018 respectively. After the respondent had drawn attention to these defects and in reply Mr Green explained that despite the express wording of his earlier affidavit, he had deposed thereto on the assumption that Ms Mfusi was deposing to her affidavit on the same day. The applicant also tendered in reply a document styled as an affidavit by Mr Taverner which merely noted, but without explanation, that his affidavit was signed prior to that of Ms Mfusi and then purported to confirm that he subsequently read her affidavit. However, the "*replying affidavit*" by Mr Taverner is unsigned, so that no value can be attached thereto. All in all these documents speak of poor attention to detail in the presentation of the applicant's case.

[40] More significantly, however, was the conduct of the proceedings when the matter was heard. Applicant was intent upon obtaining an order striking the name of the respondent from the roll of attorneys, primarily on grounds of dishonesty by misappropriating to himself monies of clients held in his trust account. The respondent vigorously disputed these allegations and the conflicting factual allegations emerging from the affidavits were obvious. Nevertheless, when the matter initially came before court to be argued as an opposed motion, counsel for the applicant wanted to argue the matter on the papers. However, after the difficulties arising from the factual conflicts were drawn to his attention, the matter was postponed for the hearing of evidence.

[41] When the matter was called for the hearing all that the applicant required was to cross examine the respondent. It called no countervailing witnesses, nor did the respondent deviate materially from his version as set out in his answering affidavit. In my view counsel for the applicant demonstrated a fundamental lack of appreciation with regard to the approach to conflicts of fact on affidavits as explained, *inter alia*, in *Plascon Evans Paints* (supra).

[42] In the applicant's initial written argument the stance adopted was that there were no material conflicts of fact arising with regard to any of the three complaints relied upon. The cross examination of the respondent at the later hearing did not resolve the conflicts which manifestly existed in the absence of counter veiling witnesses. In *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 635B-C the court was concerned with a conflict of fact between the versions on affidavit of the respondent and one Martin. The appellant (applicant in the court *a quo*) did not call Martin as a witness after the respondent had given evidence. It was held that "*the Court a quo was not justified, in the absence of viva voce evidence from Martin, in finding that respondent was a liar*" (at 636C-D).

[43] At the end of the day the applicant's quest to strike the name of the respondent from the roll of attorneys was unsuccessful and its conduct of the proceedings are subject to criticism. Cost orders adverse to professional societies such as the applicant in this instance, whilst uncommon, are not unknown. In *Law Society of the Cape of Good Hope v C* (supra) it was held that the Law Society had failed and its appeal was dismissed, with costs including the costs of two counsel. In *Summerley v Law Society of the Northern Provinces* (supra) the practitioner's appeal against an order striking his name from the roll of attorneys succeeded, with costs and an order of suspension for a limited period was imposed. In *Kwazulu-Natal Law Society v Sharma and Ano* [2017] 3 All SA 264 (KZP), a judgment of the Full Court of this Division, a costs order adverse to the Law Society and including the costs of two counsel was made upon an unsuccessful application for leave to appeal against the refusal of the court *a quo* to make a costs order on an unsuccessful application to strike the practitioner's name from the roll.

[44] In these circumstances and after considerable reflection I have been persuaded that the costs order adverse to the applicant, including the costs of senior counsel

where employed and as proposed by my colleague, would be appropriate in this matter. I therefore concur, but for different reasons, in the order proposed by Mngadi, J. in the main judgment.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid horizontal line.

VAN ZYL, J.

APPEARANCES

Case Number : 10205/18P

For the Applicant : Mr Chetty

Instructed by : Messrs Siva Chetty & Company
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For the first respondent : Adv. M.S. Khan SC

Instructed by : SG Attorneys
c/o Faheim Ebrahim Attorneys.
Pietermaritzburg

Matter heard on : 28 May 2020

Judgement delivered on : 03 September 2021