Reportable:	YES / **NO**
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

CASE NO:	**2322/2016**
DATE OF HEARING:	**10 SEPTEMBER 2018**
DATE DELIVERED:	**21 SEPTEMBER 2018**

In the matter between:

THE CAPE LAW SOCIETY Applicant

and

STEYN, JAKOBUS LOUIS Respondent

Coram: Olivier ADJP *et* Williams J

JUDGMENT

Olivier ADJP:

INTRODUCTION AND BACKGROUND

[1.] This is an application by the Cape Law Society for the striking of the name of the respondent, Mr Jacobus Louis Steyn, from the roll of attorneys. The relief initially sought in paragraphs 2 to 11.2 of the notice of motion has been abandoned. It basically pertains to the winding-up of the respondent's practice by a curator, and was already granted when the respondent was interdicted from practising as an attorney, as set out in paragraph 2.3 below.

[2.] The factual background to the present application, which is largely common cause, is briefly as follows:

2.1 The respondent obtained his legal qualifications through part-time studies, while completing his articles of clerkship, and on 11 December 1998 he was admitted as an attorney. After practising in two different firms of attorneys the respondent started practising on his own account on 4 July 2005.

2.2 During the financial year from March 2006 to February 2007 the respondent contravened the provisions of section 78(4) of the Attorneys Act[1] by failing to keep "*proper accounting records*".

2.3 In 2008 and 2009 the applicant brought applications to have the respondent interdicted from practising as an attorney. Both those applications were based on the respondent not having acquired a fidelity fund certificate[2]. Only the second of those applications was pursued and on 20 March 2009 the respondent was interdicted and prohibited from practising as an attorney, pending his obtaining a fidelity fund certificate.

2.4 During the period from January to September 2009 the respondent committed criminal offences of fraud, and also contravened the provisions of section 41(1) of the Attorneys Act by practising as an attorney on his own account while not being in possession of a fidelity fund certificate. The fraud charges concerned moneys received in trust and misappropriated by the respondent. It does not appear exactly when this happened, but it is common cause that the respondent misappropriated this money. On the probabilities the misappropriation must have taken place during late 2009, and before or when the

[1] 53 of 1979
[2] See section 42(1), read with the definition of "*fidelity fund certificate*" in section 1, of the Attorneys Act.

respondent closed his practise, which was still in 2009. I will revert to these offences in paragraphs 2.8 and 2.9 below.

2.5 When the respondent closed his practice he moved to KwaZulu-Natal for a period of time, apparently in search of work. He returned to Kimberley and started working as a municipal councillor. He was also at some point elected as a member of the mayoral committee and he served as a trustee of the pension fund of the municipality.

2.6 On 26 June 2013 the respondent repaid the Fidelity Fund[3] the total of the two amounts referred to in paragraphs 2.8 and 2.9 below, after the Fund had reimbursed the seller and the purchaser who were involved in the transaction dealt with in paragraph 2.8 below.

2.7 On 1 October 2013 the respondent appeared in the Regional Court and pleaded guilty to four counts. The factual basis of his pleas was set out in a statement in terms of section 112(2) of the Criminal Procedure Act[4].

2.8 Count 1 was a charge of fraud. During the period from January to September 2009, and whilst the respondent was not in possession of a fidelity fund certificate, he received the amount of R400 000.00 from a purchaser as the purchase sum for fixed property, on the basis that he would pay over the purchase price to the seller upon transfer of the property into the name of the purchaser. Due to the lack of a certificate the respondent was, in terms of section 41(1) of the Attorneys Act, prohibited to practise and he could therefore not in fact at that stage effect transfer of the property. This he did not disclose to the purchaser.

[3] As envisaged in section 25 of the Attorneys Act.
[4] 51 of 1977

The alternative charge on count 1 was one of theft, but the respondent was convicted on the main count of fraud and, more importantly, on the factual basis set out in his statement.

2.9 Count 2 was also one of fraud, with an alternative charge of theft. It pertained to the same transaction. The respondent had received the amount of R39 287.76 from the seller of the property as payment of the transfer costs. The respondent did not disclose to the purchaser that he could not at that stage effect transfer. He was convicted on the main count.

2.10 Count 3 pertained to the respondent's failure to keep proper accounting records, alluded to in paragraph 2.2 above. Count 4 was a charge of the contravention of the provisions of section 83(10) of the Attorneys Act[5], in that the respondent had "*purported*" to practise an attorney while not in possession of a fidelity fund certificate.

2.11 On 4 December 2013 counts 1 and 2 were taken together for purposes of sentence and the respondent was sentenced to 8 years imprisonment, of which 3 years were conditionally suspended for a period of 5 years. Counts 3 and 4 were also taken together, and on them the respondent was sentenced to a fine of R1 000.00, suspended for a period of 5 years. The respondent began serving the sentence of imprisonment on that very same day.

2.12 Having been unsuccessful in an application for leave to appeal against the sentence on counts 1 and 2, the respondent was granted such leave on petition. On 11 July 2014 the sentence on counts 1 and 2 was set aside and substituted with a sentence of 4 years imprisonment, of which a period of 2 years was conditionally suspended for 5 years. This

[5] Read with those of section 41(1).

sentence was antedated to 4 December 2013, in other words to the date of the original sentence.

2.13 On 14 August 2014 the respondent was released from prison on parole.

2.14 After his release from prison the respondent was appointed as a "*Medical Legal Officer*" by the Department of Health in this province. In May 2016 he was appointed as Deputy Director: Medico-Legal cases.

2.15 This application was only launched in October 2016. The answering affidavit was filed on 15 February 2017, and the replying affidavit only on 26 October 2017. After a postponement necessitated by the unavailability of the respondent's counsel, the application was eventually heard on 10 September 2018.

<u>THE APPLICANT'S CASE</u>

[3.] It is, in short, the case of the applicant that the respondent is, as a result of the offences committed by him, not a fit and proper person to remain on the roll of attorneys, and that his name should therefore be struck off that roll.

[4.] Although the issue of suspension from practise as a penalty was not dealt with by the applicant in the founding or replying affidavits it was submitted in argument, on behalf of the applicant, that the fact that the respondent is in any event on his own version not practising renders "*suspension from practise as possible sanction effectively moot*".

<u>THE RESPONDENT'S CASE</u>

[5.] Apart from what has already been set out in sketching the background, the following salient facts appear from the answering affidavit, and are also not in dispute:

5.1 The applicant has since 2009 been aware of the fact that the respondent had stopped practising. On all indications the applicant has also since then been aware of the offences committed by the respondent, because it appears that the purchaser and the seller of the fixed property lodged complaints and that they were indeed compensated by the Fidelity Fund not long after the respondent had ceased practising. The applicant does not deny the allegation that it was, since 2009, aware of these events. It has gone no further than to claim that it only became aware of the "*convictions*" in October 2013. I will revert to this issue below.

5.2 When the respondent received the amounts already referred to he was still involved in attempts to obtain a fidelity fund certificate and still had the expectation that he could obtain same.

5.3 The motive and the explanation for the respondent's having continued to practise without the required certificate and having misappropriated the money referred to in paragraphs 2.8 and 2.9 above was that he did not want to fail his office staff and to cause them hardship. He had financial commitments as far as his practice and the accompanying expenses were concerned.

5.4 Even before the respondent appeared in the Regional Court he apologised to both the purchaser and the seller, but only the latter accepted his apology.

5.5 As already indicated above, he also fully repaid the Fidelity Fund before appearing on the charges.

5.6 The respondent pleaded guilty and made a full disclosure of all relevant facts.

[6.] The respondent has undertaken, on oath, never to practise as an attorney again and he has evidently attempted to settle this application on the basis of such offer. The applicant's only reply to this undertaking is that "*whether or not Respondent intends to practise as an Attorney for his own account or not, is irrelevant*".

THE LAW

[7.] Section 22(1)(d)[6] of the Attorneys Act affords the Court the power to strike off the roll of attorneys or suspend from practise an admitted attorney "*if he or she, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney*".

[8.] In his answering affidavit the respondent submitted that, because he does not at present practise as an attorney and does not intend to do so in future, the applicant was not entitled to apply for his name to be struck from the roll of attorneys. It appears that the submission was based on the argument that, because the respondent does not practise, this Court is not a Court "*within the jurisdiction of which* (the respondent) *practises*", as referred to in section 22(1) of the Attorneys Act. Ms Stanton, counsel for the respondent, wisely did not pursue this submission in argument and, in fact, abandoned it. That the submission never had any merit is clear when regard is had to the case of **Vassen v Law Society of the Cape of Good Hope**[7].

[6] As amended by section 9(c) of Act 108 of 1985
[7] 1998 (4) SA 532 (SCA) (Also reported at [1998] 3 All SA 358)

[9.] In **Hepple & others v Law Society of the Northern Provinces**[8] the Supreme Court of Appeal confirmed the "*threefold enquiry*" described in **Summerley v Law Society, Northern Provinces**[9] as the one to be applied in applications of this nature:

9.1 It must firstly be determined whether the "*offending conduct*" has been proved on a balance of probabilities.

9.2 If it has, the Court has a discretion in deciding whether the person is, in the light of such conduct, not fit and proper to practise as an attorney. The exercise of this discretion "*involves, in reality, a weighing up of the conduct complained of against the conduct expected of an attorney, and, to this extent, a value judgment*"[10].

9.3 Once it has been determined that the person is indeed not fit and proper "*to continue to practise as an attorney*", as envisaged in subsection (d) of section 22(1) of the Attorneys Act, the last part of the enquiry entails the exercise of a discretion in deciding "*whether the person … deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice*".

THE OFFENDING CONDUCT

[10.] It is not in dispute, in this matter, that the respondent made himself guilty of the "*offending conduct*" described above.

[11.] The deponent for the applicant is also correct in stating that the respondent was convicted on all four counts. As far as the fraud charges are concerned it is important to note, however, that the alternative allegations to the effect that the

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[8] [2014] 3 All SA 408 (SCA)
[9] 2006 (5) SA 613 (SCA) para [2] (See also [2006] JOL 17431 (SCA))
[10] **Jasat v Natal Law Society** 2000 (3) SA 44 (SCA) para [10]

respondent had, already at the time when he received the purchase sum, never intended to pay it to the seller, were not admitted in the respondent's section 112(2) statement. He therefore never admitted that he had, at the time of receiving the purchase sum and the instructions to effect transfer, and therefore at the time that he had effectively made the representation that he would pay out the purchase sum to the seller, not actually intended to do so, or that he had at that stage intended to make any misrepresentation in this regard or to misappropriate that money. What the respondent admitted in his statement must be viewed against the background of his belief, or at the very least hope, at that stage that he could still obtain a fidelity fund certificate.

<u>FIT AND PROPER</u>

[12.] The case made out in the founding affidavit is basically that, because the respondent had committed offences in the period from March 2006 to February 2007 and in the period from January to September 2009, he is at present not fit and proper to continue practising as an attorney. I say this, because the applicant did not in its founding affidavit in any way deal with the respondent's conduct and the events in the period since the offending conduct or with his present circumstances.

[13.] It was simply pointed out, in the founding affidavit, that the charges that the respondent was convicted of involved an element of dishonesty. In this regard the deponent for the applicant made reference to both the fraud and theft charges, but as already pointed out the respondent was not convicted of theft.

[14.] The submission was also made that the "*amount involved was substantial*", but this was not in argument demonstrated by reference to comparable cases. In fact, the exact amount misappropriated does not appear from the papers.

[15.] The fact that the respondent, when he accepted the instructions to see to the transfer and received the money, was still trying to obtain a fidelity fund certificate, puts the respondent's misrepresentation in a different light. It would mean that the misrepresentation was only that he was, as at the time of receiving the instructions and the money, able to carry out his mandate immediately. However, because of the belief that he may yet obtain a certificate, it cannot be said that the respondent had at that stage believed that he was never actually going to be able to carry out his mandate and to pay over the purchase sum.

[16.] The respondent did not appropriate money out of greed. He used the money to finance office expenses and, if regard is had to the social report, out of loyalty to his staff.

[17.] It can nevertheless, for present purposes, be assumed that the respondent's conduct, and more specifically the fraud committed by him and the misappropriation of some of the money referred to, would in 2009 have resulted in him not being a fit and proper person to continue practising as an attorney at that stage. Although the deponent for the applicant has not pertinently alleged this, it appears to be the applicant's case that the resulting "*unfitness*", and the degree thereof, would have remained the same to this day, unaffected by the effluxion of time and, more importantly, by the events and the respondent's conduct since then.

[18.] The applicant has chosen not to deal with the period of time that has gone by since the respondent's transgressions or with the events and his conduct during this period, not even after it was pertinently raised in the answering affidavit. The applicant simply failed to deal in any way with the delay/s between, in particular, 2009 and the time when this application was lodged.

[19.] The applicant's only response was to state that this application was brought before the respondent's prison sentence "*lapsed*". In this regard it was stated, in the applicant's replying affidavit, that the respondent's sentence would only lapse on 4 December 2017, and that it had therefore not lapsed at the stage when this application was lodged. It is clear from this statement that the applicant had, for purposes of calculating the date when the respondent's prison sentence would lapse, included the suspended portion of this sentence as part of the period of imprisonment which commenced on 4 December 2013. This approach is clearly wrong. The effective term of imprisonment that was imposed on appeal was only two years, and that period would already have lapsed on 3 December 2015. It would be wrong to regard the suspended portion of the respondent's sentence as effective imprisonment, as if it had been put into operation and was to be served, and as if it formed part of the term of imprisonment that commenced on 4 December 2013. It is also clear from the provisions of section 73 of the Correctional Services Act[11] that the period that has to "*expire*" is "*the term of incarceration imposed*". The period of incarceration, in other words direct and effective imprisonment that had to be served, that was imposed on appeal was two years. Whether or not the respondent was to serve the suspended portion of the sentence would have depended on whether he had, within the period for which that part of the sentence was suspended (which incidentally has also almost expired), breached the conditions of suspension.

[20.] The question is simply whether it can be said, on the papers as they stand, that the respondent is at this point in time a person that is not fit to practise as an attorney.

[21.] In my view the respondent's conduct subsequent to him having committed the offences is unarguably indicative of not only genuine contrition, but indeed also of complete rehabilitation.

[22.] When he was sentenced to imprisonment, the respondent immediately began to serve his sentence, and when he was on petition granted leave to appeal against his sentence on counts 1 and 2, he did not apply to be released on bail pending his appeal.

[11] 111 of 1998

[23.] He was, as already mentioned, released on parole before the expiry of the unsuspended portion of his sentence of imprisonment, on the basis of his good behaviour as a prisoner. As already mentioned, the two year term of effective or direct imprisonment that was imposed on appeal, has in any event long since lapsed.

[24.] Upon his release from prison, the respondent managed to secure employment, having disclosed his criminal convictions and his status as a released prisoner.

[25.] In my view the cases where practitioners applied for re-admission after having been struck off the roll are relevant in the present circumstances, and specifically as regards the approach to be adopted where a significant period of time has lapsed between the offending conduct and the time when it has to be considered whether the offender is a fit and proper person, at the stage of the second leg of the threefold enquiry, to continue practising as an attorney. This is of course subject to the qualification that determining whether a person is fit and proper to continue practising involves the exercise of a discretion, as opposed to the onus on an applicant for re-admission to prove that he or she is a fit and proper person to once again be allowed to practice as an attorney[12].

[26.] Ms Stanton referred us to the references in **Law Society, Transvaal v Behrman** [13] to questions like whether "*there has been a genuine, complete and permanent reformation*" on the part of the offending attorney, whether "*the defect of character or attitude*" which led to the conduct no longer exists and whether the person "*will in future conduct himself as an honourable member of the profession and will be someone who can be trusted to carry out the duties of an attorney in a satisfactory way as far as members of the public are concerned*"[14].

[12] See **Law Society, Transvaal v Behrman** 1981 (4) SA 538(A) (Also reported at [1981] 2 All SA 470); **Nathan v Natal Law Society and another** 1999 (1) SA 706 (C)
[13] **Law Society, Transvaal v Behrman**, supra, at 557B–C
[14] See also **Kudo v Cape Law Society** 1972 (4) SA 342 (C) at 345 H -346 A

[27.] Ms Stanton also referred to **Mtshabe v Law Society of the Cape of Good Hope**[15], in which factors like the nature and degree of the conduct, the explanation for such conduct, the offender's conduct with regard to subsequent enquiries and proceedings, the lapse of time between then and the application, what the offender did during this period and whether the offender is genuinely remorseful and has made efforts to address the harm that the offending conduct has caused to others, were considered to be relevant.

[28.] In my view it is also relevant, in exercising the discretion afforded by section 22(1)(d) of the Attorneys Act, to have regard to what the consequences would be of a finding that the respondent is indeed at this stage still to be regarded as not fit and proper to practise as an attorney. It will, if regard is had to the provisions of section 22(1), result in him either being struck off the roll of attorneys or being suspended from practising for a period of time.

[29.] That the striking of the name of the respondent from the roll of attorneys may result in him losing his employment, or at the very least being disqualified from future promotions, is undisputed. When regard is had to the contents of the policy document that is annexed to the answering affidavit it appears that it is in fact not only the striking of the respondent from the roll that could impact negatively on his present career and employment. In terms of clause 3.2.1 of the document the "*management of litigation*", which is clearly exactly what the respondent's duties entail, "*should be the responsibility of persons who qualify to practise as either attorneys or advocates*". If the respondent is suspended from practising as an attorney he will, for the period of suspension, not "*qualify to practise as* (an attorney)*"*, as required.

[30.] This would compromise his ability to maintain his minor daughter, and would render the degree of rehabilitation and reformation that the respondent has achieved hollow and meaningless. It would permanently deprive him (barring the

[15] 2014 (5) SA 376 (ECM) para [7]

possibility of a future successful application for readmission) of the opportunity of utilising his hard-earned academic qualification and his years of experience.

[31.] In the **Mtshabe** case the application for re-admission failed, but the facts of that matter are clearly distinguishable from those of the present matter. The applicant in the **Mtshabe** matter was burdened with an onus to prove that he was once again a fit and proper person to practise as an attorney. In that matter the offending conduct consisted of repeated dishonest acts. Mtshabe's fraud "*consisted in marking fees and claiming disbursements in respect of each of six separate but identical matters in which he was instructed by the state attorney to act on behalf of the Minister of Defence. Thus, if the applicant had consulted a witness for an hour, he would charge for that hour's consultation in each of the six matters, thereby not only sextupling the charges for work done but charging for work not done. As a result of this fraudulent conduct the applicant had been paid fees in excess of R485 000*"[16] and it was common cause that the motivation was greed. He was blatantly dishonest in subsequent criminal proceedings, as well as in his opposition of an application to strike him off the roll of attorneys, in his attempts to deny responsibility and even to falsely shift the blame to an article clerk in his employment. It was furthermore found that he had even at the time of his application to be re-admitted not come to a full understanding and acceptance of the degree of dishonesty of the actions that had resulted in his imprisonment and in the striking of his name off the roll. There is no indication that Mtshabe was gainfully employed at the time of applying for re-admission, and of him losing such employment if not being re-admitted. In fact, he was at the time of his application still a parolee, and the Court expressed doubt about whether, in principle, a parolee could in any event be readmitted.

[32.] The respondent in the present matter bears no onus. Although he was convicted on two counts of fraud, they were really based on a single misrepresentation. The difference in the degrees of seriousness of the offending conduct of Mtshabe

[16] **Mtshabe v Law Society of the Cape of Good Hope**, *supra*, para [10]

on the one hand and of the respondent on the other hand, is borne out by the difference in the sentences that were imposed. The respondent's conduct was, as already mentioned, certainly not motivated by greed. When the respondent had to face the consequences of his conduct he immediately accepted responsibility and made a full disclosure of all relevant information. When released from prison the respondent found employment and he has managed to secure what is obviously a relatively senior position. The respondent successfully completed his period of parole and his effective term of imprisonment has long since lapsed. Unlike Mtshabe, the respondent has repeatedly and visibly demonstrated his remorse and his realisation of what he had done and of the harm he had caused, and on the facts of this matter it cannot be said that there is any indication at all that the respondent may in future again commit any act of dishonesty in his capacity as an admitted attorney of this Court.

[33.] When all these circumstances are considered I am of the view that, notwithstanding the undoubtedly serious nature of the respondent's transgressions in the past, he cannot on the papers be said to be, at this point in time, not fit and proper to practise.

[34.] I have therefore come to the conclusion that the application cannot succeed, because it cannot be found that the respondent is not presently a fit and proper person to continue practising as an attorney.

COSTS

[35.] In the normal course costs would follow the result. A contributing consideration in this regard would also be that, on the face of it, the applicant has only itself to blame for the unexplained delay in bringing this application.

[36.] On the other hand the capacity in which the applicant has approached this Court is also relevant. It did not do so for its own gain, but entirely with the purpose of protecting the reputation and honour of the attorney's profession and of protecting the funds and interests of members of the public who require legal assistance[17].

[37.] Taking everything into account, I am of the view that the fair result would indeed be that each party should bear its own costs, and consequently no costs order will be made.

ORDER

[38.] In the premises the following order is made:

THE APPLICATION IS DISMISSED.

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C J OLIVIER
ACTING DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION

I concur.

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C C WILLIAMS
JUDGE
NORTHERN CAPE DIVISION

[17] See **Mtshabe v Law Society of the Cape of Good Hope**, *supra*, para [61]; Compare **General Council of the Bar of South Africa v Matthys** 2002 (5) SA 1 (E) para [4]

For the applicant:	**ADV. A D OLIVIER** (Instructed by **Van De Wall Inc.**)
For the respondent:	**ADV. A STANTON** (Instructed by **Engelsman Magabane Inc.**)