



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

Reportable / Not Reportable

CASE NO: 1083/2015

In the matter between:

KWAZULU-NATAL LAW SOCIETY

APPLICANT

and

NKOSINATHI ERASMUS MYEZA

FIRST RESPONDENT

STANDARD BANK OF SOUTH AFRICA

SECOND RESPONDENT

Coram: Koen J, Seegobin et Henriques JJ

Heard: 26 February 2016

Delivered: 19 August 2016

ORDER

[1] The first respondent's name is struck off the roll of attorneys of this Honourable Court. The first respondent is interdicted and restrained from practicing and/ or holding himself out as an attorney of this Honourable Court whilst his name is so struck off the roll.

[2] The first respondent is ordered to deliver and hand over his certificate of enrolment as an attorney to the Registrar of this court.

[3] In the event of the respondent failing to comply with the terms of the order in sub-paragraph (2) within two (2) weeks from the date of this order, the sheriff of the district in which the certificate is kept, is authorised and directed to take possession thereof and to hand it to the Registrar of this court.

[4] To the extent that the relief prayed for in the notice of motion dated 24 January 2015 has not been granted in terms of the order of Mnguni J of 1 April 2015, orders are issued in terms of paragraphs 1.4; to 1.12 (excluding 1.12.6), 1.13 and 3 thereof.

[5] The first respondent is directed to pay the costs of and incidental to this application on an attorney and client scale, including any reserved costs.

JUDGMENT

HENRIQUES J (KOEN AND SEEGOBIN JJ CONCURRING)

Introduction

[1] In the movie "Philadelphia", Denzel Washington, a personal injury lawyer is described as an ambulance chaser. In a scene from the movie he hands his business card to an injured person and says to him 'What do you call a 1000 lawyers at the bottom of the ocean' to which the response is 'a damned good start'. It is not

surprising that lawyer jokes of this kind are told, especially when one has regard to the number of legal practitioners who are suspended or removed from practice more often than not for acts of dishonesty involving trust monies from indigent persons.¹

[2] This application to strike off the first respondent from the roll of attorneys in terms of s 22(1)(d) of the Attorneys Act (“the Act”)² is opposed by the first respondent.

[3] The relevant provisions of s 22(1)(d) of the Act read as follows:

‘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 - ...

(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 test applicable

[4] The Supreme Court of Appeal in *Jasat v Natal Law Society*³ held that the section envisaged a three-stage enquiry. The preliminary question which a court had to decide was whether the alleged offending conduct had been established on a preponderance of probabilities.⁴ Secondly, whether in the discretion of the court the person was a fit and proper person to continue to practice given the conduct

¹ Enquiries with the office of the Registrar, Pietermaritzburg revealed that there have been 21 matters involving strike off applications since 2014 and 43 applications for the suspension of practitioners for the same period.

² Act 53 of 1979.

³ 2000 (3) SA 44 (SCA).

⁴ *Jasat supra* at 44D–E.

expected of an attorney. Thirdly, whether in all the circumstances the practitioner was to be removed from the roll of attorneys or whether an order of suspension from practice for a specified period would suffice.⁵ This approach has been endorsed and subsequently followed in a number of decisions.⁶

[5] In deciding whether or not a person is a fit and proper person to continue to practice as an attorney, the court exercises a discretion which '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.'⁷

[6] At the hearing of the matter, Mr *Choudree* SC, for the first respondent, conceded that the first leg of the enquiry as envisaged in *Jasat* had been met. Insofar as the second leg of the enquiry was concerned, he submitted that given the nature of his conduct, the first respondent was not a fit and proper person to practice as an attorney for his **own** account (my emphasis). Thus, the only issue which this court had to consider was the third leg of the enquiry, being an appropriate sanction - whether it was appropriate to order a strike off of the first respondent or to suspend him from practice.

[7] Mr *Choudree* submitted that the conduct of the first respondent did not warrant a strike off as the sanction to be imposed, but rather a suspension from practice. Such suspension, he proposed, be wholly suspended subject to conditions

⁵ *Jasat* at 51C-I.

⁶ *Malan & another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA); *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) para 2.

⁷ *Jasat supra* at 51E-F.

that the first respondent be subject to the authority of a *curator bonis* until such time as he had attended a course in proper accounting procedures and had been rehabilitated. Whilst on suspension he would not have access to a trust account and trust monies. Mr *Choudree* relied on the decision in *KwaZulu-Natal Law Society v Moodley & another*⁸ in support of this submission.

[8] Mr *Chetty*, who appeared for the applicant, submitted in his heads of argument that this was an appropriate matter in which the first respondent ought to be struck off the roll of attorneys. During the course of argument it became evident that Mr *Chetty* was wavering somewhat from the approach followed in his written heads of argument and appeared to agree with Mr *Choudree*, that this was a proper case for a suspension. However, Mr *Chetty* submitted that the suspension be implemented and not further suspended.

Issue

[9] The issue before us is whether given the conduct of the first respondent, he is a fit and proper person to continue to practice as an attorney. In other words, should he be suspended from practice or removed from the roll of attorneys.

[10] It is perhaps useful at this juncture to set out the circumstances which led to the institution of the application and the first respondent's explanation of the conduct complained of.⁹ It is against this context that the second and third legs of the enquiry

⁸ (3072/2012) [2014] ZAKZPHC 33 (9 May 2014).

⁹ These have been obtained from the affidavits and annexures filed.

must be determined.

Factual Matrix

[11] The first respondent was admitted to practice as an attorney on 23 November 2001 and was thereafter employed at the Road Accident Fund (“RAF”) between 2001 and 2006. Thereafter he resigned and commenced practice for his own account as Nathi Myeza & Company in 2006 and was a member of the RASS Audit Programme. He practiced for a period of approximately nine (9) years for his own account prior to the institution of this application.

[12] The auditors finalised an audit for the 2013 accounting period and certain qualifications were raised by them, one of which included trust deficits. They raised certain queries with the first respondent arising from the audit specifically the trust deficits. A written response was received from the first respondent on 30 January 2014 in which he explained the trust deficits arose as a consequence of overpayments to his clients and that these had been rectified and the books were balanced. He submitted proof of five payments made from his business bank account into the trust bank account to show that the deficit had been rectified.¹⁰

[13] The auditors indicated they were not comfortable merely accepting the

¹⁰ Five (5) payments from the business bank account to the trust bank account to rectify this deficit were made as follows:

- | | | |
|------|---------------|----------------|
| i) | 28 May 2010 | R 151 500.00 |
| ii) | Unknown date | R 50 000.00 |
| iii) | 15 March 2013 | R 1 000 200.00 |
| iv) | 18 March 2013 | R 80 000.00 |
| v) | 5 April 2013 | R 500 000.00. |

payments as proof of rectification of the trust deficits, and they returned to the firm to inspect the 2013 books and to verify the written response received from the first respondent. A further audit was conducted which revealed further transgressions in regard to his trust account and trust deficits involving a substantial amount of trust money. Of significance is that at the end of February 2013 there was a deficit in the first respondent's trust account in the sum of R 1 855 822.23.

[14] An investigation of the first respondent's response that the trust deficits arose due to overpayments made to his clients, revealed that it was not true. The auditors found that no clients were ever overpaid and from a sample of RAF matters, found that numerous payments had been received from the RAF, presumably in settlement of clients' claims and the entire amount received was transferred from the first respondent's trust account to his business account as fees. The clients received no money at all.¹¹

[15] In addition, the auditors highlighted certain transactions in their report¹² to the applicant as follows:

[15.1] On 7 March 2013 an amount of R 3 322 168 was received from the RAF for a client T.T. Dlamini. The deficit was not rectified and an amount of R 2 400 000 was transferred into the first respondent's business account from these funds received. Subsequently three (3) EFT transfers were made into the trust account - R 1 200 000, R

¹¹ PDAM 3, page 25. In respect of 3 matters the entire amount paid by the RAF was transferred as fees to the first respondent's business account and no monies paid to the claimants.

¹² PDAM 2 to PDAM 4, pages 24 to 26 of the indexed papers.

80 000 and R 500 000 on 15 March 2013, 18 March 2013 and 5 April 2013 respectively. These three transfers into the trust account were submitted as proof that the trust deficits had been rectified.

[15.2] The RAF paid an amount of R 1 245 854.50 for a claimant to the first respondent. Fees were debited in the sum of R 355 868.52. Two (2) cheques were issued to the claimant in the sum of R 390 785.69 and R 500 000 respectively. Both cheques were dishonoured and returned to drawer as there were insufficient funds in the trust account to meet the cheques. At the end of February 2013, the claimant had not been paid. The claimant was paid from a suspense account in March 2013.

[15.3] The RAF made payment to the first respondent in respect of another claimant in the amount of R 500 000. An invoice in the client file reflected that an amount of R 357 500 was to be paid to the claimant. Only R 57 500 was paid to the claimant and the remainder of R 442 500 was passed as fees. The first respondent's bill in respect of this matter was taxed in an amount of R 69 911.08 and offered as a cost contribution which the first respondent accepted.

[15.4] The RAF made payment of R 400 000 in respect of another claimant. The first respondent's fees were taxed in an amount of R 34 422.60 and awarded as a cost contribution. The sum of R 150 000 was transferred as fees and R 34 422.60 was transferred to

the first respondent's business account. The trust ledger account in respect of the claimant was overdrawn in the sum of R 36 000.

[15.5] The RAF awarded an amount to a further claimant for R 162 597.40. A perusal of the file indicated that of this amount, R 150 000 was in respect of capital and R 12 597.40 was a cost contribution in respect of the first respondent's costs. The first respondent accounted to the claimant for the sum of R 150 000 only and did not declare the cost contribution. Fees were debited to the claimant in the sum of R 46 749 in addition to the cost contribution of R 12 597.40.

[16] The auditor's report resulted in an inspection committee being formed which interviewed the first respondent and conducted an inspection at his offices on 1 April 2014. A report was subsequently compiled.¹³

[17] In their report the inspection committee found that the transgressions of the first respondent were serious and that there was 'strong evidence of overreaching as well as rolling over of trust funds'. In addition, on questioning the first respondent, of concern to them was the following report made to them by the first respondent:

'...he allegedly had the permission or consent of clients to use moneys they were entitled to, to pay out other clients from trust funds to their credit.'

[18] It would thus appear that the first respondent in response to queries from the inspection team reported that he had the consent of clients to utilise their trust

¹³ PDAM 5 to PDAM 8, pages 28 to 30 is the Inspection report. Pages 30 to 86 of the indexed papers is the Auditors report and annexures.

money to pay other clients and these were totally unrelated transactions.

[19] The report of the inspection committee served before a meeting of the applicant's Council on 29 April 2014 and it resolved unanimously to institute the application for the strike off of the first respondent. Interim relief would be sought for a *curator bonis* to be appointed to take control of the first respondent's trust account, client files and accounting records pending the strike off application.

[20] In the affidavit in support of the application, Pearl Dawn Arnold Mfusi, the manager, regulatory affairs of the applicant, indicated that a perusal of the auditor's report demonstrates the following in relation to the first respondent's conduct:

- '10.4.1 The First Respondent has not kept a proper set of trust accounts.
- 10.4.2 The First Respondent rolled trust funds as and when it pleased him.
- 10.4.3 The First Respondent stole or mis-appropriated trust moneys whilst overreaching clients perpetually.
- 10.4.4 The First Respondent allowed because of the manner in which he handled the trust accounts, for the trust accounts to be in debit.
- 10.4.5 The First Respondent did not account properly to clients and simply transferred large amounts to his business accounts without there being good cause to do so; and
- 10.4.6 The First Respondent has been doing this for a long time and now simply mulcted himself in a situation where the trust records are in absolute shambles.'

[21] On 12 March 2015 when the matter served before court, the first respondent notified of his intention to oppose the application and an order was issued for

affidavits to be filed with costs reserved.¹⁴ The matter was adjourned to 1 April 2015 and the first respondent directed to file an affidavit by 31 March 2015.

[22] On 1 April 2015, an order was granted in terms of which a *curator bonis* was appointed to exercise the powers and duties set out in paragraph 1.2 of the order, in essence placing him in control of the first respondent's practice, specifically his trust accounts. No order was issued suspending the first respondent from practice.

[23] The first respondent filed an answering affidavit on 16 February 2016 opposing the strike off application. In such affidavit he provides an explanation of the circumstances which led to the application and makes common cause with what is contained in the founding affidavit. He admits his conduct in 'not adhering to basic accounting procedures' was 'reckless and in fact demonstrated a lack of sufficient insight into the management of the business and trust accounts of his practice'.¹⁵

[24] He accepts culpability for the management of his business account and for deficits in his trust accounts, but denies that he misappropriated or stole any trust monies belonging to his clients. He indicates the deficit in his client's trust accounts had been occasioned by other factors which he deals with in detail in the affidavit. In summary, the explanation provided is the following:

[24.1] As an indication of his inexperience he joined the applicant's Reformed Audit Support System ("RASS"). He understood that

¹⁴ Page 91 of the indexed papers, court order dated 12 March 2015.

¹⁵ Para 4, page 109 of the answering affidavit.

there would be training on how to conduct the management accounting aspects of his practice but such training did not take place;

[24.2] Annual inspections of the accounting affairs of his practice afforded practitioners the opportunity to rectify any irregularities in accounting procedures. Inspections were only conducted in March 2008 and 2010;

[24.3] In the first audit inspection in 2008 of the 2007 financial year, the auditors informed him that his ledgers were inaccurate and he needed to rectify them. Thereafter he left his accounting affairs to be dealt with by his bookkeeper whom he employed;

[24.4] In the further audit of 2010, a further trust deficit was discovered and he queried it with his bookkeeper who assured him that the records were correct and there was no deficit;

[24.5] He was informed by the RASS auditors that a report would be compiled and furnished to him and he would be able to identify how the deficit arose and awaited the report. Such report which was dated 17 December 2013 was furnished to him via e-mail in January 2014. This identified a deficit in 2010 and he was requested to correct his accounting procedures and refund trust monies in deficit, which he did.

[24.6] He was absent from his office for long periods of time and he was therefore unable to properly monitor and conduct proper bookkeeping of his accounts and left this to his bookkeeper whom he employed. His practice was substantially dependent on RAF claims and often the RAF failed to timeously pay out claimants' monies;

[24.7] He then utilised trust money from one client to pay disbursements towards the cost of expert reports and other expenses to sustain his practice. He would immediately pay back these monies as soon as an amount was paid in favour of another claimant;¹⁶

[24.8] He failed to draw up a bill of costs to claim fees and as a consequence clients' trust accounts were in debit. He indicates that he ought to have dealt more efficiently with the management of his practice, specifically bookkeeping aspects, but his failure to do so was due to a lack of full appreciation of what was being done i.e. it being inappropriate and wrong. He 'also lacked the strength of character at the time to acknowledge and face up to the consequences of his conduct.'

[25] He indicates that after the inspection in April 2014, he anticipated that the applicant would assist in correcting the shortfalls in the management of his

¹⁶ Para 16, page 113 of the indexed papers.

accounting procedures. He alludes to the inspection report¹⁷ in which the inspectors recorded he had a poor understanding of bookkeeping and accounting procedures.

[26] Of significance, the first respondent denies any criminal conduct and denies that any of his clients were detrimentally affected or prejudiced by his actions, which is demonstrated by the fact that no formal complaints were lodged by his clients. In addition he submits:

‘. . .neither any client nor the Fund has suffered any financial losses as a result of any misconduct’.¹⁸

[27] The applicant filed a replying affidavit dealing with certain of the allegations made by the first respondent. In particular, the applicant emphasises that there was a misappropriation of trust funds, a lack of accounting to his clients in respect of trust monies received and a theft of trust monies. The applicant further indicates that the RASS system does not allow for training, and practitioners when they join the audit programme are provided with detailed instructions as to how the programme operates. Practitioners are obliged to file a *self-certified* audit certificate for such accounting period. Moreover, there is no annual audit performed of a practitioner’s trust and business accounts and practitioners are required to provide a *self-audit* certificate each year confirming that their trust books were in order.

The Sanction

[28] At this juncture I propose to consider certain of the cases referred to by the

¹⁷ PDAM 5 to PDAM 64.

¹⁸ Para 32(a), page 121 of the papers.

respective legal representatives in respect of the sanction to be imposed.

[29] As already mentioned Mr *Choudree* relied on the decision in *Moodley* for submitting whether it was appropriate or not to suspend the suspension of the first respondent. In *Moodley's* case, in imposing the suspension the court remarked as follows:

'The first respondent has demonstrated that he was not fit and proper to practise as an attorney. However, I think too that the facts demonstrate that he has learnt a hard lesson and that there is no reasonable danger of the events recurring. The ultimate professional penalty would, in my view, be too harsh in all the circumstances of the case. A suspension from practice, itself suspended for a period upon appropriate conditions uncoupled with an Order for the repayment tendered, would, in my view constitute sufficient punishment. . . .'

[30] The decision in *Moodley's* case did not involve theft. It involved unprofessional conduct in the form of over-reaching in respect of the fee charged. The fee involved was the sum of R 150 000 which the attorney in question had undertaken to repay and did in fact repay. In addition, in *Moodley's* case, despite initially challenging the strike-off application, at the hearing of the matter, the approach of the attorney in question 'focused on an acceptance of his wrong doing'.¹⁹

[31] In *Botha v Law Society, Northern Provinces*,²⁰ the attorney's unprofessional conduct related to contraventions of the Act and the rules made under the Act relating to books of account and trust monies and a failure to give proper attention to his clients' matters. The court endorsed a conservative approach to the sanction, however, emphasised that it was significant that the practitioner had not been found

¹⁹ *Moodley supra* para 19.

²⁰ 2009 (1) SA 227 (SCA).

guilty of any conduct involving dishonesty. This led to the conclusion that the conduct was not likely to recur and consequently a suspension was a more appropriate sanction. The court also took into account that the attorney had not practiced for his own account for three (3) years prior to the hearing of the appeal.

[32] In *Holmes v Law Society of the Cape of Good Hope & another; Law Society of the Cape of Good Hope v Holmes*, NC Erasmus J²¹ was of the view that the only appropriate sanction was a strike-off. Apart from the practitioner's failure to properly administer trust funds, the court was of the view that the fact that the practitioner had failed to be frank and open in her dealings with the Society and with the court, and deceived the Society and court, was inexcusable and warranted a strike-off. The practitioner had misappropriated funds and used this to pay for personal expenses as well. Similarly in *Law Society, Cape v Peter*,²² the court ordered a suspension from practice rather than a strike-off of the practitioner concerned.

[33] In *Summerley v Law Society, Northern Provinces* ²³ there was a shortfall in the attorney's trust account in the sum of R 50 000. A trust cheque had also been dishonoured on presentation. The explanation provided by the practitioner was that the cheque was issued on the basis that he had received an assurance from the client that the monies had been transferred into the trust account. The difference in *Summerley's* decision was that the practitioner had not used the money for himself. In the *Peters* decision the practitioner was frank and honest and made a full disclosure accepting responsibility for her conduct. The court was of the view that

²¹ 2006 (2) SA 139 (C).

²² 2009 (2) SA 18 SCA.

²³ 2006 (5) SA 613 (SCA).

what counted in the practitioner's favour was this disclosure, the fact that the transgression occurred in a short period of time and she accepted full responsibility for such conduct, which was limited. The monies had been used to pay for practice expenses. In *Law Society of the Northern Provinces v Mabaso*²⁴ the practitioner did not provide a full and frank explanation for the misappropriation of funds and attempted to lay the blame at someone else's door. The court was of the view that as the practitioner failed to take responsibility for his conduct and levelled false accusations against others to mislead the court, such was inconsistent with his duties as an officer of the court and ought to be viewed in an extremely serious light, and consequently, was not a fit and proper person to practice and ordered a strike off.

[34] Nugent JA in *Law Society of Cape of Good Hope v Peter*²⁵ indicated that in deciding on a sanction, the court must consider the character of the practitioner, and the fact that the applicant has a duty to protect the public. In *Malan & another v Law Society, Northern Provinces*²⁶ the court was of the view that a practitioner would have to show exceptional circumstances warranting the imposition of a suspension as opposed to a strike off in matters involving dishonesty.

Analysis

[35] The attorney's profession is an honourable one and demands complete honesty, reliability and integrity from its members. The aim of the Act and the

²⁴ 2015 JDR 1695 (SCA).

²⁵ 2009 (2) SA 18 (SCA).

²⁶ 2009 (1) SA 216 (SCA).

responsibility of the court is to ensure that persons who are not fit and proper to practice are prevented from doing so. It may well be that not every attorney who has contravened the Act and the relevant rules, or who has been dishonest ought to be removed from the roll of attorneys. In *Botha v Law Society, Northern Provinces*²⁷ the court held:

'It must be emphasised that dishonesty is not a *sine qua non* for striking-off. As Harms JA said in *Malan*:

"Obviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removalWhere dishonesty has not been established the position is . . . that a court has to exercise a discretion within the parameters of the facts of the case without any preordained limitations."

(Footnote omitted)

[36] The first respondent's contraventions can be summarised as follows: contravening the Act;²⁸ a failure to adhere to and comply with the society's rules and keep proper accounting records;²⁹ misappropriation of funds, maladministration of his trust account and theft of trust monies.³⁰

²⁷ 2009 (1) SA 227 (SCA) para 3.

²⁸ Section 78(1) of the Attorneys Act provides that:

'(1) Any practising practitioner shall open and keep a separate trust banking account at a banking institution in the Republic and shall deposit therein the money held or received by him on account of any person.'

Section 78(4) reads:

'(4) Any practising practitioner shall keep proper accounting records containing particulars and information of any money received, held or paid by him for or on account of any person, of any money invested by him in a trust savings or other interest-bearing account referred to in subsection (2) or (2A) and of any interest on money so invested which is paid over or credited to him or her.'

²⁹ Rules of the law society inter alia provide that trust accounts may not be in debit; that withdrawals only be effected for trust creditors; which prohibits the transfer of moneys with respect to fees until the fee has been correctly debited in the firm's accounting record; and that the total amount in an attorney's trust account must at all times be sufficient to cover the amounts owing to trust creditors.

³⁰ An attorney is obliged to maintain a separate trust account and to deposit therein money held or received by him on account of any person. Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. . . . It

[37] His acts of dishonesty are not confined to the use of funds but in his dealings with the law society, the auditors and in not making full disclosure to this court.

[38] In my view, in showing exceptional circumstances to warrant a suspension as opposed to a strike-off, being an officer of the court, the first respondent is required to be absolutely honest and reliable in dealing with the allegations against him. By him making full disclosure in relation to his conduct, it shows a clear appreciation of the wrongfulness and severity of his actions and also that he is sincere in accepting full responsibility for them.

[39] A reading of these papers, specifically the first respondent's answering affidavit, raises a concern for me. When the inspection committee attended at the offices of the first respondent he indicated that he had permission from his clients to utilise these monies. Nowhere in the answering affidavit is this dealt with. When I raised this aspect with Mr *Choudree* at the hearing, he acknowledged that this was not satisfactorily dealt with in the papers but indicated that he could not make submissions to provide an explanation.

[40] Mr *Choudree* submits that this issue did not really warrant a response from the first respondent as the inspection committee of the applicant chose not to investigate this further and the applicant chose not to raise this as an issue in the strike off application. The approach suggested by Mr *Choudree* loses sight of the

is significant that in terms of s 83(13) of the Attorneys Act a practitioner who contravenes the provisions relating to his trust account and investment of trust money will be guilty of unprofessional conduct and be liable to be struck off the roll or suspended from practice.

duty of the applicant and the obligation of this court. 'As upper custodians of the integrity of the profession, our Courts are bound to be particularly astute to condemn, in the strongest terms, any deviation from that standard.'³¹

[41] In my view, the first respondent, must, if he is to be truly remorseful, show a clear appreciation of his conduct, admit to it and accept it was wrong. I agree with the sentiments expressed in *Holmes* that '[t]he success of our legal system depends not only upon the public having full confidence in the integrity of members of that profession, but also on our Court being able to depend on the ipse dixit of its practitioners. As observed by Hefer JA in *Kekana v Society of Advocates of South Africa*:

Legal practitioners occupy a unique position. On the one hand they serve the interests of their clients, which require a case to be presented fearlessly and vigorously. On the other hand, as officers of the Court they serve the interests of justice itself by acting as a bulwark against the admission of fabricated evidence. Both professions have strict ethical rules aimed at preventing their members from becoming parties to the deception of the Court. Unfortunately, the observance of the rules is not assured, because what happens between legal representatives and their clients or witnesses is not a matter for public scrutiny. The preservation of a high standard of professional ethics having thus been left almost entirely in the hands of individual practitioners, it stands to reason, firstly, that absolute personal integrity and scrupulous honesty are demanded of each of them and, secondly, that a practitioner who lacks these qualities cannot be expected to play his part.'³²(Footnote omitted)

[42] In his response to the auditors, the first respondent chose firstly not to make a full and honest disclosure to them when they raised the query about the trust deficits. He then advised the members of the inspection committee that he had permission from clients to use their trust monies. He elected not to take the court into his

³¹ *Holmes v Law Society of the Cape of Good Hope & another; Law Society of the Cape of Good Hope v Holmes* 2006 (2) SA 139 (C) para 32.

³² Para 21.

confidence and deal with these responses to the auditors and the inspection committee. This is cause for concern and raises serious doubts as to whether he has taken the court into his confidence by making full and frank disclosure and has in fact “come clean”. His response to the auditors was patently false.

[43] The first respondent appears to have indulged in such activity over a long period of time. The monies “repaid” into his trust account to rectify the trust deficits, was done only when he was called upon to do so by the auditors and to compound matters, did not utilise monies in his business account, but trust monies from payments made by the RAF on behalf of other clients.

[44] In addition, it appears from the documents filed in this application that despite the fact that this irregularity was initially uncovered in February of 2010, it was only at the end of February 2013 that these errors were rectified. This was not a once off error in judgment by the first respondent but appears to be a pattern of activity over a prolonged period of time.

[45] In addition, when called upon to provide the auditors with an explanation of the trust deficits, the first respondent’s explanation was that it arose as a consequence of overpayments to clients. This clearly was not true and he appears to have lied in his explanation to the auditors. It is only in this application that he discloses for the first time that he utilised clients’ monies to meet “expenses” and disbursements.

[46] However, this explanation is also downplayed in my view and the first

respondent also engages in a finger pointing exercise, once again, never assuming full responsibility for his conduct. Even though he knew there were problems with the accounting procedures and trust deficits he did not take an active role in resolving these but sat back and “waited for someone to get back to him”.

[47] Having signed contingency fee agreements with the clients, he clearly knew that what would have been owed to him was limited to 25% of the capital paid by the RAF, excluding any fees and costs contribution. He could not have laboured under any misapprehension that he was entitled to transfer the entire amount paid by the RAF for a client, yet he did so.

[48] I have considered the authorities referred to by both legal representatives. These all deal with different transgressions and those which involved theft, on the facts of them are distinguishable from the present.

[49] What is the cause of concern for me is the fact that the first respondent embarked on this conduct over a period of time. The pattern was consistent. He had an opportunity to limit himself to fees due as envisaged in the contingency agreements signed by the respective claimants, but chose to merely transfer what in my view are large sums of money which he was not entitled to. This was theft and blatant dishonesty. Moreover, he has not repaid all these monies and has through his attorneys agreed on a repayment plan with the applicant to repay the sum of R 1,8 million.

[50] Mr *Choudree* at the hearing also indicated that what mitigates against a strike

off is the fact that the integrity of the first respondent's trust account was not seriously compromised as none of his clients lodged formal complaints. He indicated that he did not commit acts of a criminal nature and neither did he act intentionally to the detriment of his clients.

[51] This submission in my view simply cannot hold water. The fact is the integrity of the first respondent's trust account has indeed been compromised. There is a deficit in his trust account which on his own admission he has undertaken to repay—that means that clients have been prejudiced and have not received monies owed to them. Significantly, the first respondent has stolen monies which he now undertakes to repay.³³

[52] I have also considered the attempts that the first respondent has made to redeem himself. I accept that any sanction will not only cause him immense personal upheaval but also upheaval to his family.

[53] However, as was said in *Jasat*³⁴ the appropriate order:

' . . . will depend upon such factors as the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession . . . the likelihood or otherwise of a repetition of such conduct and the need to protect the public.'

[54] I am mindful that in certain cases,³⁵ the courts have remarked that the sanction of a strike off is reserved for those cases involving dishonesty and a

³³ The first respondent, through his current attorney of record has undertaken to make payment of the deficit of R 1 855 822.23 over a period of time.

³⁴ *Supra* para 10.

³⁵ *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA).

suspension for those not involving dishonesty is the general approach followed by the courts, however, it is not 'an inviolable rule'.³⁶

[55] I align myself with the sentiments expressed by the Supreme Court of Appeal in *Law Society of the Northern Provinces v Mabaso*³⁷ where it held:

'What mattered was the conduct of the respondent complained of, his responses and attitude thereto, and whether from that it may be concluded that he should remain in what is known as an honourable profession. . . .'

[56] On the facts before us, I cannot accept that the first respondent's conduct is attributable to his lack of knowledge of accounting procedures. He admits to using funds from one client to pay disbursements and other expenses. Looking at the actual amounts transferred, these are large sums, rounded off and cannot be said to be for disbursements alone. In addition, he knew what he was doing and made a conscious decision to use monies belonging to clients. In my view, this was not a mere rolling of trust funds but theft of trust monies.

[57] It is not, on his own admission, confined to a lack of knowledge of proper accounting procedures. In any event his lack of knowledge, inexperience and training cannot count in his favour. In *Holmes*³⁸ the court remarked as follows:

'Likewise, plaintiff's lack of knowledge due to inadequate training and inexperience cannot mitigate in her favour. As explained in *Die Prokureursorde van die Oranje-Vrystaat v Schoeman* an attorney, and particularly a practising attorney, has a duty to apply himself/herself not only to attending to his/her clients interests, but also to those of his/her Society, and if he/she does not take the trouble to become

³⁶ *Summerley supra* headnote .

³⁷ 2015 JDR 1695 (SCA) para 17.

³⁸ Para 23.

conversant with his/her Society's Rules and his/her obligations, as contained therein and consequently goes astray, he/she does not deserve much sympathy in his/her punishment.' (Footnote omitted)

[58] The following must be borne in mind:

[58.1] The first respondent has been practicing since 2006, a period of approximately nine (9 years). In terms of the RASS audit programme he was signing certificates for each accounting period certifying his trust books of account were in order knowing this to be false.

[58.2] Even though he attempts to blame the lack of knowledge of proper accounting procedures and relying solely on the accountant he employed, this does not excuse him from liability. In any event, this explanation cannot be true, as on his own version **he**, not his accountant, was using trust money belonging to a client to pay disbursements and settle other expenses. In addition, when payment was received from the Fund in respect of another client he would then make good the deficit. This was irregular and he clearly knew this.

[58.3] Even though he "made good" the deficit of R 1 855 822.23 these were from trust monies that were payable to a claimant T. T. Dlamini. Of the R 3 332 168 paid by the RAF in respect of the

claimant T. T. Dlamini, the first respondent knew he was not entitled to payment of R 2 400 000 as fees and this was done to “make good” the trust deficit thereby compounding the theft. He blames his conduct on the lack of knowledge of accounting principles and ‘a lack of sufficient insight into management of the business and the trust accounts of his practice’. This clearly is not the truth.

[58.4] He utilised trust monies of certain clients to pay for expenses of others. This amounts to a misappropriation of trust funds. When this was queried he indicated that he had permission to do so, yet he does not disclose which client gave him permission to utilise their trust monies and one must again conclude that he is being economical with the truth.

[58.5] He allowed trust accounts to have debit balances and allowed trust cheques to be returned as there were insufficient funds in the account. This means that certain clients were not paid monies due and received by the RAF for their account.

[58.6] Most of, if not all the thefts related to monies received from the Road Accident Fund. This is a public entity established to compensate the road accident victims, most of whom are indigent. He thus appears to have stolen money from poor people.

[59] What I have also noted is that the surname of the first respondent in his answering and supplementary affidavits appears to have changed and he does not provide an explanation for this at all.³⁹ In addition, he does not deal with any of the allegations in the replying affidavit filed by the applicant and these are thus unchallenged and not disputed.

[60] In my view deciding on the sanction to impose is a most difficult task – not only because the first respondent is affected by it, but whatever sanction this court imposes affects him, his family and his employees. In my view the sanction ought not to be lightly imposed and it is something which has weighed heavily with the court.

[61] I agree that theft of and misappropriation of funds is ‘amongst the most serious offences of which an attorney may make him or herself guilty of since it undermines the very core of the relationship between attorney and client.’⁴⁰ As aptly stated by Hefer AP in *Law Society of the Cape of Good Hope v Budricks*, a misappropriation of trust funds is “about the worst professional sin that an attorney can commit”.⁴¹

[62] I have in deciding on an appropriate sanction considered the option of a suspension and I am of the view, that given the nature of the transgressions, the first respondent’s attitude and the explanation provided, it will not be the appropriate sanction. On the facts of the matter, despite the supervisory nature of the RASS

³⁹ The papers refer to the first respondent as being “Nkosinathi Erasmus Myeza”. In the supplementary answering affidavit he is referred to as “Nkosinathi Erasmus Mngoma (former Myeza)”.

⁴⁰ *Holmes supra* para 32.

⁴¹ *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) at 17I-J.

system, the first respondent knowingly issued self-certified audit certificates and knowingly used trust monies to pay his practice expenses. He has also not been frank and honest with the auditors, his society and the court.

[63] Given the objectives of the court which are to discipline and punish errant attorneys and to protect the public, particularly where trust funds are involved,⁴² in my view on the facts of this matter a strike-off is justified. On the application of a value judgment I am persuaded that in the circumstances the penalty of a strike-off is not too severe. What weighs heavily with me apart from the dishonest conduct is the fact that the first respondent failed to own up to such dishonesty and take responsibility for his actions and make full disclosure to the court in relation thereto.

[64] In the premises the following orders will issue:

[64.1] The first respondent's name is struck off the roll of attorneys of this Honourable Court. The first respondent is interdicted and restrained from practicing and/ or holding himself out as an attorney of this Honourable Court whilst his name is so struck off the roll.

[64.2] The first respondent is ordered to deliver and hand over his certificate of enrolment as an attorney to the Registrar of this court.

[64.3] In the event of the respondent failing to comply with the terms of the order in sub-paragraph (2) within two (2) weeks from the date of this

⁴² *Budricks* at 16E–G.

order, the sheriff of the district in which the certificate is kept, is authorised and directed to take possession thereof and to hand it to the Registrar of this court.

[64.4] To the extent that the relief prayed for in the notice of motion dated 24 January 2015 has not been granted in terms of the order of Mnguni J of 1 April 2015, orders are issued in terms of paragraphs 1.4; to 1.12 (excluding 1.12.6), 1.13 and 3 thereof.

[64.5] The first respondent is directed to pay the costs of and incidental to this application on an attorney and client scale, including any reserved costs.

HENRIQUES J

KOEN J

SEEGOBIN J

Case Information

Date of hearing : 26 February 2016
 Date of judgment : 19 August 2016

Appearances

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