Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No: 549/11

Heard on: 23-09-2011

Delivered on: 25-11-2011

In the matter between:

THE LAW SOCIETY OF

THE CAPE OF GOOD HOPE **APPLICANT**

AND

DESMOND APPIE **RESPONDENT**

Coram: Phatshoane J et Hughes-Madondo AJ

JUDGMENT

PHATSHOANE J:

1. The application before us is preceded by an interim order issued on 08 March 2010, *inter alia*, interdicting the respondent, Mr Desmond Appie, from practising as an attorney, surrendering and delivering to the registrar his certificate of enrolment as an attorney and such further related relief, pending the final determination of these proceedings.

2. The Law Society of the Cape of Good Hope, the applicant, seeks an order that the respondent's name be struck off the roll of Attorneys. Further ancillary relief to give practical effect to the order is also sought. In his answering affidavit the respondent withdrew his opposition but he is still challenging the relief sought and has furnished extenuating

circumstances for a lenient sanction. In essence therefore he has opposed the application as a sanction to be meted out is an integral part of this application.

3. The respondent was admitted as an attorney of this Court on 01 December 2000. He has since 04 December 2000 practised for his own account under the name and style of Desmond Appie Incorporated in Kimberley. On 27 October 2006 he was enrolled as a conveyancer. His practice included general litigation, debt collections and on a minimal scale conveyancing.

4. The *fons et origo* of the application is the various complaints the applicant received from members of the public from whom the respondent had accepted instructions. The applicant contends that the respondent misappropriated monies belonging to a number of his clients. The Attorneys Fidelity Fund settled some of the claims amounting to R1 791 691.70. During an inspection of his books the respondent admitted to the applicant's senior legal officer in charge of disciplinary matters, Mr Frank Charles Dorey that he misappropriated monies belonging to various clients. In the affidavit he filed challenging the relief sought the respondent argued that the amount claimed cannot be reflective of monies misappropriated. He intimated that some of the small amounts complained of were for services rendered which his firm was entitled to debit as fees.

5. The applicant is for the most part relying on the report compiled by Mr Dorey which succinctly sets out the factual background.

6. The first complaint is from a Kimberley firm of attorneys, Van de Wall &

Partners. Mr Honiball, an attorney in this firm, directed a letter to the applicant on 7 October 2009 complaining that the respondent was instructed to attend to the registration of transfer of the immovable property from Mr Molefi Pascaline Morake to Mr George Lentikile January. The purchase price in the amount of R120 000.00 was paid to the respondent during July 2009. The second complaint was in respect of the transfer of property from the same Morake to Mr Leornard Bongani Sibisi. Sibisi states in his affidavit that he paid the respondent R325 000.00 as the purchase price for the property.

7. Mr Honiball states further that as the above two transactions did not progress the complainants' terminated the respondent's mandate, instructed him to obtain their files from him and to request him to account for the monies paid as well as the interest that had accrued thereon.

8. On 24 August 2009 the respondent delivered two trust cheques post-dated to 30 September 2009 in the amounts of R120 000.00 and R316 000.00 to Van De Wall's offices. He informed Mr Honiball that he had also instructed the bank to cancel these interest bearing investments made on behalf of these two complainants. On 03 September 2009 Mr Honiball dispatched a letter to the respondent confirming that the cheques would be presented for payment on 30 September 2009 and further requested him to account for the interest earned up to 30 September 2009 at that stage. The cheques were deposited into the firm's trust account on 30 September 2009. They were dishonoured by the bank marked *'refer to drawer'*.

9. The respondent did not account for the interest earned on the amounts either. As it turned out he misled his colleague into believing that he held

the funds in trust when in fact there were none. The applicant avers that it solicited a response from the respondent in respect of the complaint but received no satisfactory explanation.

10. In the third complaint Mr Honiball intimates that Sibisi, his client, purchased three properties from the estates administered by the respondent. Sibisi paid the purchase price to the respondent in respect of these properties as follows: R200 000.00 in July 2009 and a further R200 000.00 in August 2009. Early in November 2009 Sibisi terminated the respondent's mandate due to a lack of progress. The respondent undertook to refund him on 10 November 2009 but no payment was received.

11. On 07 December 2009 the applicant forwarded a copy of Sibisi's complaint to the respondent for his comment. Thereafter reminders were sent to him but to no avail. The applicant resolved that these three complaints be further investigated during the visit it was to pay to him for the inspection of his book and the state of affairs of his practice.

12. On 19 February 2010 Mr Dorey attended a meeting with the respondent at his offices and had a discussion with him. During his conversation with Mr Dorey the respondent gave him two contrasting and mutually destructive versions none rational. The first version was that his firm held trust and business accounts at Nedbank and Standard Bank and did not hold any s78(2A) of the Attorneys Act, 53 of 1979, investments save that certain investments were placed with a broker, a certain Mr Cliff Randall. The report by Mr Dorey, *inter alia*, reflects the following:

<u>"Morake / January and Morake /Sibisi Transfers (Complaint Reference: 42942)</u>

Mr Appie advised that no trust ledger accounts were opened in respect of the above two transfers as the funds paid to him in respect of these were paid over directly to Mr Cliff Randall for investment.

Mr Appie advised that Mr Randall was employed at Momentum Life in Kimberley, approximately 3 to 4 years previously, and that Mr Appie purchased two life policies from Mr Randall, which policies had since lapsed. Mr Appie further advised that Mr Randall was, at that stage, operating as a broker between Johannesburg and Kimberley. Mr Appie was however unable to provide any details of the brokerage/organisation through which Mr Randall allegedly operated.

Mr appie explained that during the previous year Mr Randall attended at Mr Appie's offices regularly in an effort to market further insurance products to Mr Appie and that, during one of these visits, Mr Appie enquired from Mr Randall whether Mr Randall could assist him with the investment of trust funds on behalf of Mr Appie's various clients. Mr Appie further explained that he indicated to Mr Randall that he wished to obtain the best possible interest rates for his clients. Mr Appie advised that Mr Randall indicated that he was able to assist Mr Appie and that he was aware of somebody in Johannesburg through whom the funds could be invested. Mr Appie advised that he informed Mr Randall that he would contact Mr Randall as soon as he had funds available for investment. Mr Appie advised that, at that stage, he had Mr Randall's contact cell phone numbers.

Insofar as the Morake / January transfer was concerned, Mr Appie advised that during June 2009 Mr January paid to Mr Appie the R120 00,00 purchase price and that these funds were paid over to Mr Randall for investment. On being requested to advise into which of his trust accounts the funds were deposited Mr Appie explained that the funds were paid over to him by Mr January in cash that the funds were not deposited into his trust account, but were paid over to Mr Randall for investment in cash. Mr Appie was unable to recall the exact date on which the payment was made and was unable to produce a receipt for the funds or any proof that the funds were paid to Mr Randall. Mr Appie advised that he did not issue a receipt for the funds, nor did he require Mr Randall to sign any form of acknowledgment of receipt, or to issue him with any documentation as proof of receipt, of the funds. Mr Appie did however recall that Mr January provided him with a copy of the Deed of Sale at the time.

Mr Appie was requested to advise how he dealt with the cash funds during the period in which he had the funds in his possession and Mr Appie explained that on the same day he received the funds, he contacted Mr Randall telephonically, who happened to be in Kimberley at the time, and that Mr Randall collected the funds in cash from Mr Appie on the same day.

Mr Appie indicated that he understood the arrangement with Mr Randall to be that Mr Randall would review the investment options with the various banks and that Mr Randall would thereafter invest the funds with the institution offering the highest interest rate.

Mr Appie advised that subsequent to paying the funds over to Mr Randall, he did not receive any proof of the investment of the funds from Mr Randall, nor any particulars relating to the investment. Mr Appie advised that as he was aware, the funds were invested, although he received no communication from Mr Randall in this regard.

Mr Appie explained that he did not invest the trust funds himself as he was an inexperienced practitioner insofar as investments were concerned and Mr Randall was willing to attend to the investments on his behalf.

13. According to Mr Dorey's report the respondent admitted also receiving the R316 000.00 purchase price from Sibisi for which he had not issued him with a receipt. He dealt with the money as in the previous complaint of Morake and January by handing over the funds on same day of receipt to Mr Randall for investment. Mr Randall did not furnish him with proof of receipt. The report reflects that around 24 August 2009 the respondent spoke to Mr Randall telephonically and requested him to make the funds and interest in both transfers available for transmission to Mr Honiball's firm. He alleges that Mr Randall informed him of the difficulties he had in securing the release of the funds from the investing institute but undertook to ensure that the funds were available by 30 September 2009.

14. Early in February 2010 the respondent informed Mr Dorey that he lost

Randall's cellular phone numbers. He took no steps to establish Randall's contact particulars. Although he was a bit concerned he believed that Mr Randall would again attend at his offices and that matters would be resolved. When Mr Dorey enquired which telephone instrument he used to contact Mr Randall the respondent advised that he usually called him on either the office landline or used a staff member's cellular phone, but he could not recall which staff member's cellular phone he used. The report further records:

"Mr Appie was then requested to advise why his response to the complaint lodged in respect of these two transfers made no mention of the investments allegedly made via Mr Randall and Mr Appie indicated that he feared advising the Society of the true state of affairs."

15. With regard to the three erven Sibisi purchased, the respondent admitted to having received from him three cheques in the amounts of R1000 000.00; R100 000.00 and R200 000.00 payable to his firm without issuing receipts. In anticipation of receiving these cheques he contacted and made arrangements with Mr Randall to collect the funds for investment. Mr Randall collected the funds without providing proof of receipt. When the time arrived for Mr Randall to release the funds Randall claimed again that he experienced difficulties to comply with the respondent's request.

16. Mr Dorey avers that he confronted the respondent with a letter dated 14 July 2009 he addressed to Sibisi and requested him to explain the reference therein to an ABSA Bank account number. The problem was that this Desmond Appie Incorporated's banking account did not appear in the applicant's records as any of his firm's trust accounts nor did he disclose it at the commencement of the interview. Mr Dorey probed the apparent improbable nature of the explanation the respondent gave in respect of how he dealt with the trust funds. Mr Dorey says that at that

juncture the respondent left the room. On his return he abandoned the version he gave and tendered a fresh one.

17. The respondent's fresh version was that the R120 000.00 he received out of Morake and January property transactions was paid into his personal saving account held with First National Bank and not posted to the firm's books. That it was near month end and his fee income was insufficient to defray the overheads of his practise, prompting him to applying these funds towards payment of the salaries of his employees. His intention was that as soon as he can manage it he would refund the monies misappropriated.

18. In respect of Morake and Sibisi's property transaction the respondent similarly reported to Mr Dorey that the R316 000.00 he received from Sibisi was paid into one of his ABSA Bank personal savings accounts and used toward the payment of his firm's overheads and his personal debts. Therefore it would not be reflected in his firm's books.

19. With regard to the purchase of the three erven by Sibisi the respondent explained to Mr Dorey that on receipt of cheques from Sibisi he cashed them. Some of the cash was deposited into his business accounts and reflected therein as the payment of fees for existing clients whose debts were due to be written off and some to fictitious clients. He used the funds to pay his firm's overheads and his creditors for personal debts.

20. Mr Dorey's report reveals further transactions which show malfeasance on the part of the respondent. The fourth transaction relates to the transfer of property between Changwe and Blignaut. The property was

sold for an amount of R135 000.00. A mortgage bond over the property for an amount of R150 000.00 together with a deed of transfer were registered on 31 August 2009. The respondent received R131 663.14 into his Standard Bank trust account on the date of registration. Of this money he stole R86 662.50 which he utilised largely to pay his firm's overheads.

21. The fifth complaint is that of Baedex Financial Corporation. The respondent informed Mr Dorey that around 2008 he was instructed to attend to the registration of the property registered in the name of Sol Plaatjie Municipality into the name of Mr Hanoor Camerodien and thereafter into the name of certain Mrs Moredi whose full names are not apparent from the papers. According to the respondent the transaction did not take off and the file was forwarded to Elliot Maris Wilmans & Hay attorneys of Kimberley.

22. In his further explanation to Mr Dorey the respondent says with the consent of Camerodien he applied for bridging finance in Camerodien's name who signed the necessary documents. The R74 000.00 borrowed from Baedex for the bridging finance was for the respondent's personal affairs. The funds were paid into his business account. The deal the respondent clinched with Camerodien was that he (the respondent) would apply for and receive funds in Camerodien's name which money was to be refunded on registration of property from the proceeds of the transfer thereof. It is unheard of and in my view quite inappropriate for an attorney to enter into this type of an arrangement with a client.

23. The respondent states that Baedex did not pursue a claim against Camerodien as he (the respondent) signed an acknowledgement of debt

and made certain payments to Baedex. As at date of his meeting with Mr Dorey the respondent was approximately four months in arrears with the repayments. Nonetheless he advised Mr Dorey that he intended to continue effecting payment.

24. The sixth complaint is that of Mr Martin Botha. The respondent confirmed to Mr Dorey that he received a deposit from Botha on the fees in respect of services to be rendered. The money was paid into his FNB business account when he had not yet done any work to earn the fees. The FNB account was not disclosed to Mr Dorey at the commencement of the interview. The respondent says it had escaped his mind as he utilized the Standard Bank's account regularly.

25. The respondent reported that Botha's matter was postponed telephonically on a number of occasions as it was supposed to be heard in a district Court situated a distance from Kimberley. Eventually it was set down for hearing. The respondent was unable to attend the proceedings due to vehicle problems. Mr Dorey avers that Botha's file was available for inspection. There were no accounting records in the file save a letter addressed to Botha reflecting that a fee of R5 888.00 had been earned. Mr Dorey intimates that the respondent was unable to explain how this fee was arrived at.

26. The seventh of the respondent's misdemeanours relates to the transfer of property between Mr and Ms Bagananeng on one hand and Mr and Ms V.K and L.A Pears, whose full names are not apparent from the papers. The respondent advised Mr Dorey that the trust client ledger account was not opened for the transaction. That during March and April 2009 a payment of R100 000.00 and R320 000.00, respectively, in respect of

this transaction was made into his Absa Bank savings account. He did not issue any receipt to the clients nor was the transaction recorded in his books. He used the funds towards the payment of his practice overheads and his personal debts.

27. The eighth impropriety relates to the transfer of property between Mr M B January and Mr D N Poss whose full particulars are also not set out in the papers. The respondent did not open a ledger account for the transaction. He informed Mr Dorey that Poss paid R152 280.00 in cash to him, which he used to pay his practice overheads and personal expenses. Likewise he did not issue a receipt to Poss. The respondent further intimated to Mr Dorey that January required an advance of R20 000.00 on the purchase price prior to the registration of the property. He paid the amount to him. The respondent could not produce proof of this advance payment to January. The property was as at date of the interview conducted by Dorey, not transferred. The respondent claimed that he could not locate the file.

28. The above is not an exhaustive list of claims received by the Attorneys Fidelity Fund against the respondent. In its founding papers the applicant attached a claim browser summary received from the Attorneys Fidelity fund which records 31 claims relating to conveyancing, civil litigation, matrimonial matters, criminal cases and other matters. According to the applicant some of the claims were lodged with the Fund after the respondent had been interdicted from practising.

29. In terms of s 22(1)(d) of the Attorneys Act, 53 of 1979, 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/she practises, if he/she, in the discretion of the Court, is not a fit and proper person to continue to practise as an attorney.

30. The Courts exercise supervisory powers over the conduct of attorneys, not only in order to discipline and punish errant practitioners, but also, and more importantly in order to protect the public particularly in cases such as the present where the theft of trust monies was committed. See ***Law Society of the Cape of Good Hope v Budricks*** **2003 (2) SA 11 (SCA)** at 16E-G para 7 and ***Solomon v Law Society of the Cape of Good Hope*** **1934 AD 401** at 408 - 9*.*

31. Scott JA set out the approach as follows in ***Jasat v Natal Law Society*** **2000 (3) SA 44 (SCA)** at 51B - I para 10:

> ***"In*** *Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop 1994 (1) SA 359 (A)* ***at 369D it was pointed out that the section[s 22(1)(d)] requires a twofold inquiry. However, before one gets to the two inquiries referred to, there is a preliminary question that must be answered. Ultimately, therefore, what is contemplated is a three-staged inquiry. First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities. (See, for example****, Nyembezi v Law Society, Natal 1981 (2) SA 752 (A) at 756H - 758A* ***where the Court was concerned with the equivalent section in the now repealed Attorneys, Notaries and Conveyancers Admission Act 23 of 1934; see also*** *Kekana v Society of Advocates of South Africa 1998 (4) SA 649 (SCA) at 654D* ***in relation to s 7 of the*** *Admission of Advocates Act 74 of 1964****.) The second inquiry is whether, as stated in s 22(1)(d), the person concerned 'in the discretion of the Court' is not a fit and proper person to continue to practise. The words italicised were inserted in 1984 (see*** *Law Society of the Cape of Good Hope v C 1986 (1) SA 616 (A) at 637B - C)****. It would seem clear, however, that, in the context of the section, the exercise of the discretion referred to 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. The discretion is that of the Court of first instance. It is well established that a Court of appeal has a limited power to interfere and will only do so on well recognised grounds, viz where the Court of first instance arrived at its conclusion capriciously, or upon wrong principle, or where it has not brought its unbiased judgment to bear on the question or where it has not acted for substantial *reasons (Law Society of the Cape of Good Hope v C (supra at 637D - H); Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop (supra at 369E - G); Vassen v Law Society of the Cape of Good Hope 1998 (4) SA 532 (SCA) at 537D - G).* ***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. This is similarly a matter for the discretion of the Court of first instance and the power of a Court of appeal to interfere is likewise limited. Whether a Court will adopt the one course or the other 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*** *(Incorporated Law Society, Transvaal v Mandela 1954 (3) SA 102 (T) at 108D - E)****, the likelihood or otherwise of a repetition of such conduct and the need to protect the public. Ultimately it is a question of degree."***

See also ***Law Society, Northern Provinces v Mogami and others*** **2010 (1) SA 186 (SCA)** at 189J - 190B

32. By the respondent's own admission, on various occasions he misappropriated monies which he was supposed to have held in trust on behalf of his clients. He deliberately in most of the instances, if not in all did not issue receipt to his clients in order not to leave paper trail. He knew that he intended to use the funds received for unauthorized purposes. Even a properly trained candidate attorney knows that an attorney would not have the authority to pay his practice overheads or personal debts with monies which were supposed to have been held in trust. The respondent was an experienced attorney. Needless to say, his conduct cannot be said to have been to the benefit of his clients. To the contrary, his drive was quite detrimental to their interest.

33. The principle emerging from our jurisprudence is that the utilisation of the funds in a trust account without the authority of the person on whose behalf the funds are held for purposes which do not benefit the beneficiary and in circumstances where the beneficiary or the benefactor has not authorised such use amounts to misappropriation of trust money, which in turn is a form of theft or even fraud**.** See ***Law Society of the Cape of Good Hope v Budricks*** supra at 17G-H;***Cape Law Society v Parker*** **2000(1) SA 582 (C)** at 586I-J and the definition of theft and or misappropriation in ***Law Society, Cape v Koch*** **1985 (4) SA 379 (C)** at 382C-I.

34. The respondent stole from his clients and was dishonest in his dealings with them. I am satisfied that the evidence overwhelmingly established the offending conduct on the balance of probabilities.

35. The next question which falls to be determined is whether the respondent is a fit and proper person to continue to practice as an attorney. He has surreptitiously and unashamedly during 2008 to 2009 embarked on a conduct of misappropriating monies from his clients as opposed to diligently discharging his mandate by carrying out their instructions. The misconduct was not perpetrated once-off or over a short period of time as the evidence clearly portrays. At various times in 2009 he continually deceived his clients and did not desist from what had become a pattern of misconduct and criminal conduct. He has caused his client untold hardship and has drained the Fidelity Fund of large sums of money which may proof unreasonable.

36.The respondent sought to excuse his untoward behaviour by claiming that most of his transgressions related to conveyancing matters in which he did not receive adequate exposure. The issue central to this application does not concern the respondent’s conveyancing experience. Nothing in the papers suggests that the respondent was out of his depth when it comes to processing the conveyancing related applications. The simple logic is that he did not process and lodge the transfer papers because payment to the seller of the property had to be made upon transfer or registration in the name of the new owner. If that was done it would be discovered that the trust account had no funds.

37.The vexing issue involving this application concerns basic accounting principles which every attorney is expected to be well versed in. Conduct which is clearly impermissible and apparent from the respondent’s way of operation is his deliberate failure to issue receipts to clients upon deposits received from them. He contended that he did not conceal the truth about stealing from the clients by making false book entries or engaging in an elaborate scheme of deceit. He says he cooperated fully with the applicant, made full disclosure and took responsibility for his actions.

38.While the respondent claims to regret his wrongdoing I am not swayed that he truly showed any contrition. It cannot also be said that he gave his cooperation to the applicant. When the applicant solicited a response from him through correspondence he did not respond or if he did it was in a vague, unsatisfactory or deceitful manner. He cooperated when he realized that he had no way to turn to. This realization came after he had furnished a concocted version which stretches credulity beyond limit.

39. The manner in which he attempted to conceal the truth from the applicant when confronted on his misdemeanours demonstrates his ability to mislead not only the applicant but his colleagues in practice. In my view the respondent did not display conduct expected of an attorney or officer of this Court. He brought the attorneys profession into disrepute and therefore is not a fit and proper person to continue practising as an attorney.

40. The last leg of the enquiry is a question whether in all the circumstances the respondent ought to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice. The applicant argued that the respondent has a manifested character defect which warrants that his name be removed from the roll. The respondent countered by requesting that he be suspended from practising as an attorney for a specified period and that when suspending him regard be had to the period from 08 May 2009 to date of the order as a period of suspension already served.

41. The respondent's mitigating circumstances should be considered within the context of the interest of the public which the Court has corresponding duty to protect. The respondent pleads that he is married with two minor children and has to assist his parents financially. He pointed out that his practice was in dire financial straits, which was largely exacerbated by the global economic meltdown. When things went horribly wrong he had in his employ mostly his family members which made it difficult for him to retrench them. He submitted that the funds he misappropriated were used to pay the firm's overheads and not to buy luxury assets. He is from a disadvantaged background and went through difficulties to be an attorney and conveyancer. He has lost his practice and good name and has difficulties securing employment since he was

interdicted from practising. Presently he performs administrative work at Gagayi Attorneys. He says that he has learned his hard and painful lesson.

42. Mr George, for the respondent, referred to the ***Law Society of the Cape of Good Hope v Peter*** **2009 (2) SA 18 (SCA)** in support of his argument that an order of suspension would be more fitting in the circumstances of this case. In that case the respondent had no practical experience and had clearly no knowledge of the functioning of a law firm. The Court concluded that the respondent's theft of an amount of R20 000.00 of the trust monies in the few months of her practising as an attorney in order to pay her expenses and cover her living costs was not the result of a character defect inherent in her, but rather of a moral lapse brought about by the pressure she had been under. Although her submission to temptation meant that she was at the time not a fit and proper person to continue practising, it did not necessarily mean that she had to be struck from the roll. The Court stated that suspension was an option where mitigating factors were present and it was clear that when practice was resumed, the person in question would be purged of his or her unfitness.

43. What sets this matter apart from the case in point is the contrasting factual background. In this case the papers indicate that for the most part of his career it would seem the respondent acted within the confines of the law. He succumbed to the ills of temptation later in his life when he ought to have known better. His transgressions are also many and involve large sums of money.

44. The respondent's case should also be distinguished from these further cases his counsel referred to: ***Law Society, Transvaal v Blumberg***

1987 (3) SA 650 (T), where an attorney was convicted in the Regional Court for illicit diamond buying; ***A v Law Society of the Cape of Good Hope*** **1989 (1) SA 849 (A)** where the attorney's disability resulted in his misdemeanours; ***Incorporated Law Society, Transvaal v G*** **1953 (4) SA 150 (T)** where the charges against the attorney related to three unprofessional conduct. In that case the court found that the complaints relating to the dealings with certain trust moneys and the wrongful failure to keep proper trust accounts had been proved but they were not of such gravity requiring the drastic step of striking the respondent's name off the roll of attorneys; ***Summerley v Law Society, Northern Provinces*** **2006 (5) SA 613 (SCA)** where the Court found that the attorney's transgressions did not reflect on his honesty or integrity.

45. The respondent acknowledged that his actions as evinced in the founding papers were wrong. He states that he has already effected payments of certain of the amount which the complainants thereof nonetheless went ahead and reclaimed. He further contends that his legal representative paid R165 000.00 to the Law Society. That he sold his vehicles and paid R100 000.00; and R80 000.00 respectively to the Law Society through his advocate whom he wittingly or perhaps even unwittingly failed to mention his name. The respondent did not adduce proof of payments of these amounts in the shape of receipts issued to him. Neither did he attach the confirmatory affidavit of counsel that allegedly paid these monies to the Law Society. According to the respondent one Mr Pretorius of the applicant acknowledged receipt of these payments. The respondent also intimates that he intends refunding the Attorneys Fidelity Fund.

46. It is well to remember that the road to the abyss is paved with good intentions. I am not persuaded that the respondent has purged himself of

his wrongdoing. According to the applicant there is no record that those payments were made. The applicant says it also does not have Mr Pretorius in its employ. This cannot bode well for the respondent who even after been caught out and on the verge of being punished for his errant ways is still not exhibiting a concerted effort to come clean.

47. In the Western Cape High Court decision handed down on 21 July 2011 ***Die Wetsgenootskap Van Die Kaap Die Goeie Hoop v Elmar Van Tonder* 4594/2011** an attorney had occasioned shortfalls in the amount of R536 890.87 in his trust account and later paid an amount of R550 000.00 in the same account to correct the shortfall. The attorney's name was nevertheless struck from the roll of Attorneys, Notaries and Conveyancers.

48. In ***Malan And Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA)** at 221 para 10 Harms ADP held:

"The appellants relied on *Summerley v Law Society, Northern Provinces 2006 (5) SA 613 (SCA)* ***for the proposition that unless a court finds dishonesty during the first leg of the inquiry, it ought not to remove the attorney concerned from the roll. In Summerley the following was said in connection with the exercise of this discretion (at para 21):***

'The further argument on behalf of the appellant was that, as a general rule, striking-off is reserved for attorneys who have acted dishonestly, while transgressions not involving dishonesty are usually visited with the lesser penalty of suspension from practice. Although this can obviously not be regarded as a rule of the Medes and the Persians, since every case must ultimately be decided on its own facts, the general approach contended for by the appellant does appear to be supported by authority [citations omitted]. This distinction is not difficult to understand. The attorney's profession is an honourable profession, which demands complete honesty and integrity from its members.'

Obviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal."

49. Nothing exceptional was placed before us to order the respondent's suspension from practise as opposed to the removal of his name from the roll. There is also nothing to show that the cause of the unfitness would be removed should the respondent be merely suspended from practice. It be noted that respondent submitted that if permitted to practice he will serve as a professional assistant at Gagayi Attorneys or any other attorneys' firm on condition, *inter alia*, that he does not operate the firm's trust account. As it turns out, Mr Gagayi has himself been interdicted from practising as an attorney; a fact which the respondent alleges he was unaware of when he filed his papers. The supervised practice may be an option to consider in the event the Court grants an order short of removing the respondent's name from the roll of attorneys in its assessment that the attorney is fit to practice. In the ***Law Society of the Cape of Good Hope v Windvogel*** **1996 (1) SA 1171 (C)** at 1175 the Court held:

"If the Court has to determine whether an attorney is a fit and proper person to continue to practise as such, the Court is obviously vested with a discretion as to the way in which future practice shall be conducted."

50. I am not satisfied that the supervised practice would suffice in the circumstances of the case at hand more so because the respondent did not placed facts illustrating how such supervision would be carried out. Overall, regard being had to his dishonest conduct I am of the view that the respondent is unworthy of practising in the profession which requires the utmost degree of honesty and integrity. The interest of the public cannot be downplayed at the whim of an individual who clearly has instilled a sense of distrust in a number of people he had dealings with as an attorney. The public should be protected from the likes of him. His conduct is by all accounts heavily censurable. The respondent did not

stop the deprecated practice on his own or out of a sense of guilt. If he was not caught out there is no way of telling where it would all have ended. I am unable to envisage any order that would be more fitting than an order removing the respondent's name from the roll of attorneys and conveyancers.

51. In the result I make the following order:

ORDER:

1. The respondent's name is struck off the roll of attorneys and conveyancers of this Court.

2. The respondent shall surrender and deliver to the registrar of this Court his certificate of enrolment as an attorney and conveyancer;

3. Should the respondent fail to comply with the provisions of the preceding paragraph of this order within 2 (two) weeks from date hereof, the sheriff for the district in which such certificate of enrolment is filed is empowered and directed to take possession of and deliver same to the registrar of this Court;

4. The respondent shall deliver his books of account, records, files and documents containing particulars and information relevant to-

   4.1 any monies received, held or paid by the respondent for or on account of any person;

4.2 any moneys invested by the respondent in terms of s 78(2) and/or s 78(2A) of the Attorneys Act, 53 of 1979;

4.3 any interest on moneys so invested which was paid over or credited to the respondent;

4.4 any estate of a deceased person, or any insolvent estate, or any estate placed under curatorship of which the respondent is the executor, trustee or curator or which the respondent is administering on behalf of the executor, trustee or curator of such estate; and

4.5 the respondent's practice as an attorney, to the curator appointed in terms of paragraph 10 hereof, provided that as far as such books of account, records, files and documents are concerned the respondent shall be entitled to have access to them, but always subject to the supervision of such curator or a nominee of such curator;

5. Should the respondent fail to comply with the provisions of the preceding paragraph of this order within seven Court days after service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on the respondent, as the case may be, the sheriff for the district in which such books of account, records, files and documents are, is empowered to take possession of and deliver them to such curator;

6. Such curator shall be entitled-

6.1to hand over to the persons entitled thereto all such records, files and documents;

6.2to hand over all such records, files and documents over which the respondent exercised a lien to the persons entitled thereto as soon as he has satisfied himself that the fees and disbursements in connection therewith, if any, have been paid, or secured as contemplated in paragraph 7 below, or, in the event of any dispute as to the provision of security, in his discretion;

7. A written undertaking by a person to whom the records, files and documents referred to in the preceding are handed to pay such amount as may be due to the respondent, either on taxation or by agreement, shall be deemed to be satisfactory security for the purpose of the preceding paragraph hereof provided that such written undertaking incorporates a *domicilium citandi et executandi* of such person;

8. Such curator is empowered to require that any such file, the contents of which he may consider to be relevant to a claim, or possible or anticipated claim, against him and/or the respondent and/or the respondent's clients and/or the Attorneys' Fidelity Fund "the Fund" in respect of money and/or other property entrusted to the respondent, be re-delivered to such curator;

9. The respondent is interdicted and prohibited from operating on his trust account(s) as defined in the following paragraph;

10.The director for the time being of the applicant be appointed as curator to administer and control the trust accounts of the respondent comprising the separate banking accounts opened and kept by the respondent at a bank in terms of s78(1) of the Act, 53 of 1979, and/or any separate saving or interest-bearing accounts as contemplated by s78(2) and/or s78(2A) of Act, 53 of 1979, in which moneys from such trust banking accounts have been invested by virtue of the provisions of the said sub-section or in which moneys in any manner been deposited or credited (the said account(s) herein being referred to as “trust account(s)”) with the following powers and duties-

10.1subject to the approval of the Board of Control of the Fund, to sign and endorse cheques and/or withdrawal forms and generally to operate upon the trust account(s), but only to such extent for such purpose as may be necessary to bring to completion current transactions in which the respondent was acting at the date of this order;

10.2subject to the approval and control of the Board of Control of the Fund, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against the respondent in respect of money held, received and/or invested by the respondent in terms of s78(1) and/or 78 (2A) of Act, 53 of 1979, (herein referred to as “trust moneys”), to take legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions in which may be due to such persons in respect of incomplete transaction in which the respondent may have been concerned and which may have been wrongfully and unlawfully paid from the trust account(s) and to receive such moneys and to pay same to the credit of the trust account(s);

10.3to ascertain from the respondent's books of account the names of all persons on whose account the respondent appears to hold or to have received trust moneys (hereinafter referred to as "trust creditors") and to call upon the respondent to furnish him, within 30 (thirty) days of the date of this order or such further period as he may agree to in writing, with the names, addresses of and amounts due to all trust creditors;

10.4to call upon the trust creditors to furnish such proof, information and affidavits as he may required to enable him to determine whether any such trust creditor has a claim in respect of money in the trust account(s) and, if so, the amount of such claim;

10.5to admit or reject, in whole or in part, subject to the approval of the Board of Control of the Fund, the claims of any such trust creditor, without prejudice to such trust creditor's right to access to the civil Courts;

10.6having determined the amounts which he considers are lawfully due to trust creditors, pay such claims in full, but subject always to the approval of the Board of Control of the Fund;

10.7 in the event of there being any surplus in the trust account(s) after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce, as the case may be, firstly, any claim of the Fund in terms of s 78(3) of Act, 53 of 1979, in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of the respondent, the cost, fees and expenses referred to in paragraph 11 of this order, or such portion thereof as has not already been separately paid by the respondent to the Law Society, and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the Board of Control of the Fund, to the respondent, if he is solvent, or, if the respondent is insolvent, to the trustee(s) of the respondent's insolvent estate;

10.8 in the event of there being insufficient trust monies in the trust banking account(s) opened by the respondent in terms of s 78(1) and (2) of Act, 53 of 1979 from which to pay the claims of trust creditors in full, and after having taken reasonable steps to ascertain the identity of such creditors and the amounts due to them, to distribute *pro rata* amongst creditors whose claims have been proved or admitted, the amount(s) reflected by the credit balance(s) in the said account(s) provided that the curator shall pay to trust creditors whose funds are held in separate accounts in terms of s 78(2A) of Act 53 of 1979, who satisfy him that they are entitled to such funds, the amounts due to such creditors;

10.9 subject to the approval of the Chairman of the Board of Control of the Fund, to appoint nominees or representatives and/or consult with and/or engage the service of attorneys and/or counsel, and/or accountants and/or other persons, where considered necessary, to assist such curator in carrying out the duties of curator; and

10.10to render from time to time, as curator, returns to the Board of Control of the Fund showing how the trust account(s) has (have) been dealt with, until such time as the said Board notifies him that he may regard his duties as terminated;

11. The respondent be and is hereby directed-

11.1to pay the fees and expenses of the curator, such fees to be assessed at the rate of R300,00 per hour, including travelling time;

11.2to pay the reasonable fees and expenses charged by any person(s) consulted and/or engaged by the curator as aforesaid;

11.3to pay the costs of and incidental to this application on a scale as between an attorney and client;

11.4within a reasonable period after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, to satisfy the curator, by means of the submission of taxed bills of cost, of the amount of the fees and disbursements due (to the respondent) in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights, if any, as he may have against the trust creditor(s) concerned for payment of recovery thereof.

12. Any person whose rights are affected by the terms of this order shall be entitled, on notice to the respondent, to make an application to this Court for a variation of this order on good cause shown.

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MV PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

I agree

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W HUGHES-MADONDO

ACTING JUDGE

NORTHERN CAPE HIGH COURT

On behalf of the Law Society	Adv SL Erasmus
Instructed by	Haarhoffs Inc

On behalf of the Respondent	Adv W George