

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOODHOPE PROVINCIAL DIVISION)
REPORTABLE
CASE NO. 715/2004**

**LAW SOCIETY OF CAPE OF GOOD HOPE
APPLICANT**

and

**ANNELIZE DIPPENAAR
RESPONDENT**

JUDGMENT DELIVERED ON 31 OCTOBER 2006

DLODLO, J

INTRODUCTION

- (1) On 16 September 2005 this Court gave an order in this matter without the reasons. The reasons for the order given are set forth hereunder. At the end hereof and for the sake of completeness, I will repeat the order given on 16 September 2005.
- (2) The Applicant is a juristic person in terms of the provisions of Section 56(a) of the Attorneys Act, No. 53 of 1979 as amended (the Act) with its offices at Waalburg Building, corner of Wale and Burg Streets, Cape Town. In terms of the Act the Applicant is vested with *inter alia* disciplinary jurisdiction of attorneys, notaries and conveyancers practicing in the area previously known as the Cape of Good Hope. The Respondent is Annelize Dippenaar, an attorney who practised until interdicted from doing so at 4th floor, Hycastle house, corner Loop

and Castle streets, Cape Town, Western Cape. The Respondent was admitted as an attorney and notary public on 6 August 1992 and as such is a member of the Applicant.

- (3) The Applicant whose duty and function it is, to protect the interests of the public in their dealings with attorneys (see: ***Solomon v Law Society of the Cape of Good Hope*** 1934 AD 401 at 409) seeks an order striking the Respondent's name from the roll of Attorneys, Notaries and Conveyancers plus certain other ancillary reliefs.

FACTUAL BACKGROUND

- (4) This application was preceded by an application to interdict the Respondent from practice. The interdict application came about as result of the following brief facts and circumstances. In early 2000 the Applicant Law Society received a number of complaints concerning the Respondent's handling of trust monies. The Respondent was afforded an opportunity to provide the Applicant with a proper reconciliation of her trust account. When this was not done the Applicant resolved to instruct Deloitte and Touche accountants to conduct an inspection and auditing of the Respondent's books of account. The inspection was performed by Steven Powell of the Forensic Services Division of Deloitte and Touche. Mr. Powell reported that his inspection had revealed a number of serious accounting irregularities and that the Respondent was not *"...capable of running a trust account in accordance with the 'Rules of the Society'..."* On the strength of Mr. Powell's findings the Applicant

made an urgent application to this Court on 13 April 2000 under case number 2618/2000 for an order interdicting the Respondent from practising and from operating on her trust banking accounts. The Respondent, via her attorneys, assured the Applicant that the debit items referred to by Deloitte and Touche had resulted purely from incorrect accounting. She offered to surrender control of her trust banking accounts, to bear the costs of the postponement of the matter, immediately to cause her accounting records to be corrected, to prepare an Answering Affidavit dealing with the allegations against her. She asked that the matter be postponed *sine die*, with the Applicant to have the right to set the matter down once more on 24 hours notice should it not be satisfied with the progress made in her fulfilling her undertakings.

- (5) The order of this Court of 13 April 2000 was made by agreement, the matter being postponed *sine die* and the Respondent being ordered, *inter alia*, to file a fresh audit report prepared, at her expense, no later than noon on Friday 5 May 2000 by an auditor nominated by the Applicant. The Applicant nominated Deloitte and Touche and this was communicated to the Respondent on 26 April 2000. Deloitte and Touche did not prepare an audit report as the Respondent failed to comply with her undertakings to them with regard to payment. At the request of the Applicant, the accountant tasked with the inspection (one Jonathan Lizo Jacobs) prepared an affidavit in which he reported what he had discovered.

- (6) Mr. Jacobs reported *inter alia* that:
- i) The Respondent drew cheques on her trust account without any regard to the account to which they were to be debited, with the allocation being done later.
 - ii) Nothing indicated that these cheques were issued in error.
 - iii) Some R96 991.61 worth of trust cheques had been drawn without being debited to any ledger account.
 - iv) A shortage existed in the trust account of R87 950.00.

Mr. Jacobs' report detailed how the irregularities in Respondent's books of account came about and what he reported was done, was demonstrated in a number of specific and documented examples. Mr. Jacobs' account was confirmed by that of the Respondent's erstwhile accountant, one Mr. Pike. Mr. Pike reported that '*...trust funds were taken by the Respondent, ostensibly on account of fees, and the Respondent only afterwards decided which ledger accounts were to be debited...*' And he had been aware of the existence of a second receipt book which he was not asked to bring into the Respondent's books of account.'

- (8) In the light of these new findings the Applicant re-enrolled the matter on 48hours notice. On 12 May 2000 an order was granted increasing the restrictions on the Respondent's handling of trust monies and postponing the matter to 8 June 2000. On that day the matter was postponed again, this time to 26 October 2000, the Respondent having again replaced her legal representatives and having made a substantive application for a postponement. On 26 October

2000 the Respondent did not appear and an order was granted. Subsequent to the granting of the order interdicting the Respondent from practice more complaints were referred to the Attorney's Fidelity Fund. Certain of these fresh complaints are detailed in the founding affidavit in this matter. In summary they demonstrate that on 13 April 2000, when Deloitte and Touche prepared the initial report, the Respondent ought to have had an additional R171 670,80 in trust over and above the sum of the R87 950,00 that was initially mentioned. In total the Applicant states that a sum of R255 332,43 had been misappropriated by the Respondent. The Applicant averred that two facts demonstrated the Respondent's unfitness to remain on the roll of attorneys, namely, her wilful failure to keep proper accounting records and her misappropriation of trust monies.

CONDUCT OF THE RESPONDENT

- (9) An investigation undertaken by Jonathan Lizo Jacobs of Deloitte and Touche mandated by the Applicant on the strength of certain complaints from members of the public showed further the following scenario:

The matter of Mr. G. Wiese – a debit in the ledger account relating to this matter had arisen twice in one week. On both occasions the debit had arisen as a result of payments from the account to the Respondent's business account against money not yet paid into the trust account.

The Muller/Stoneage account – funds were journalized from this account to the Respondent's business account on a number of occasions and it gave rise to a debit balance in the amount of R17 500,00, an amount clearly

misappropriated from the funds held on behalf of the Respondent's general body of trust creditors.

The matter of Graham – showed a debit of R5 000.00 which was subsequently made good by means of a deposit to that account – a clear attempt to conceal misappropriation of trust money by tendering a false ledger account.

(10) Almost similar irregularities affected many other trust creditors of the Respondent. The accountant brought forth a damning report. It set out among many other things:

- i) That the trust cheques were issued by the Respondent without any regard being had to the account to which they were to be debited and that the allocation of debits was only done later.
- ii) The cheques in the total amount of R96 991.61 had been drawn in the year 2000 without being debited to any account at all.
- iii) An amount of R17 500.00 mentioned supra had been appropriated by the Respondent before fees were put through and funds had been transferred from that account for no substantial reason.
- iv) Groenewald, Jordaan and Marais were all professional employees of the Respondent. They agreed with her to pay her the sum of R100 000.00 in order to be employed as candidate attorneys. The accounting officer pointed out that in as much as this was not trust money (it was the

Respondent's own money) it ought not to have been credited to the Respondent's trust account. These funds were then transferred from these ledger accounts to other ledger accounts in the Respondent's books of account. In the professional view of the accounting officer this was done in order to correct or reduce debit balance that had arisen in those ledger accounts.

- (11) The list annexed by the accounting officer showed that as at 13 April 2000 the trust creditors totaled R92 238.37 but the Respondent in her two trust accounts had only R4 288.37 depicting a shortage of at least R87 950.00. He referred to unallocated payments from trust and showed that unallocated cheques totaled R87 950.00. In the professional view of the accounting officer the Respondent had drawn fees without passing debits in individual ledger accounts. I would pause here and quote from the portion of Report tabled for consideration by the Applicant:

"I did observe, when I was working on the Respondent's accounting system early last year, that the Respondent would draw trust cheques in her favour without having regard to whether or not she was entitled to transfer from her trust account to her business account. Trust funds were taken by the Respondent, ostensibly on account of fees, and the Respondent only afterwards decided which ledger accounts were to be debited. I was aware of the existence of a second receipt book not forming part of the Respondent's proper books

of account. I actually saw the book but I was not asked by the Respondent to examine it or to bring it into any of her trust books of account.”

(12) It was established from an examination of the trust account that there was a substantial shortage in the trust funds. The Respondent in an earlier application explained the shortage as resulting from erroneous postings and asked for an opportunity to correct the errors. Although she was granted such opportunity the situation grew from bad to worse. Fresh complaints emerged regarding various trust creditors – various serious amounts of money belonging to the trust creditors. I do not intend to mention individual clients and the extent of their financial loss in the hands of the Respondent. It suffices in my view that same is fully documented in the founding papers. The total sum of money the trust creditors lost in the hands of the Respondent amounted to R171 670.80. In total the Respondent misappropriated the sum of R255 332.43 as at 13 April 2000. The Applicant in the founding papers alleged further that the Respondent had in a number of ways failed to keep proper books of account and she failed to comply with Section 78(4) of the Attorneys Act accordingly. In these circumstances it is clear that the Respondent had made herself guilty of unprofessional, dishonourable and unworthy conduct.

(14) When the matter came before us in March 2005 the Respondent had filed of record an Affidavit in terms of which she sought an order postponing the hearing of the application brought against her. In that Affidavit she

indicated that she would oppose the application on basis of the revelations in the then ongoing criminal proceedings against her, founded on the merits of this very application. The postponement was granted. When the matter once again served before us, her opposition had not been taken any step further by herself. We were supplied with what purports to be a copy of the transcript of the criminal case. This proved to be of no assistance to neither the Respondent nor to the Court. In any event the Respondent did not even appear nor did she instruct anyone to appear on her behalf. The Applicant's case for striking her name off the Roll of Attorneys, Notaries and Conveyancers of this Court remained unanswered and unopposed accordingly.

THE LAW APPLICABLE

(15) In terms of Section 22(1)(d) of the Attorneys Act, No. 53 of 1979 (as amended by Section 9(c) of Act No. 108 of 1984)-

"22(1) Any person who has been admitted and enrolled as an attorney may on application by the Society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he practises...

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

The words "in the discretion of the court" in Section 22(1) (d) of the said Act were incorporated by way of the amendment referred to above, and *"...leave no doubt that the question of fitness is now no longer essentially a*

finding of fact but an exercise of discretion” (per Galgut, AJA in ***Law Society of the Cape of Good Hope v C*** 1986(1) SA at 637 D-E). The aforesaid statutory power supplements the power which the Court has at common law to exercise discipline over attorneys. (***Law Society of the Cape of Good Hope v C supra at 639 D-E***)

(16) The Supreme Court of Appeal in ***Jasat v Natal Law Society*** (2002) 2 ALL SA 310 (A) held that a three stage enquiry is contemplated in applications such as the instant one, namely-

- a) the first is that the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities;
- b) the second is whether as stated in Section 22(1)(d) the person concerned “in the discretion of the Court” is not a fit and proper person to continue to practice. The exercise of the discretion involves a weighing up of the conduct complained of against the conduct expected of an attorney and to that extent is a value judgment.
- c) The third is whether in all the circumstances the person in question should be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice. Whether the Court will adopt the one course or the other will depend on whether 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 worthy 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.

- (17) Although it remains the duty and function of the applicant to protect the interest of the public when dealing with attorneys and its views are given due consideration, it ultimately is the court which is the final repository of disciplinary jurisdiction over attorneys (see: ***Solomon v Law Society of the Cape of Good Hope*** *supra*) The highest standard of good faith and integrity is required of attorneys enrolled to practice as such by this court (see: ***Vassewa v The Law Society of Cape of Good Hope*** 1998 (H) SA 532 (SCA) at 538 G-I). It was stated in ***The Law Society of the Cape of Good Hope v Parker*** 2000(1) SA 582 at 587 D-E that:

“It is clear on authority that the usual penalty for misappropriation of trust funds is striking off and this is understandably so; the proper administration of monies entrusted to an attorney by his client is perhaps the most fundamental and important of the duties of an attorney and anything less than complete observance of those duties will not be tolerated by the Courts.”

Hefer AP in ***Law Society of the Cape of Good Hope v Budricks*** 2003(2) SA 11 (SCA) at 171 I-J described the misappropriation of trust funds as “*about the worst professional sin that an attorney can commit.*”

I fully agree with these sentiments.

THE APPLICATION OF THE ABOVE LEGAL PRINCIPLES TO THE FACTS IN THE MATTER

The approach to be followed in matters of this type is to be found in the following authoritative dictum by Hefer JA (as he then was) in ***Kekana v Society of Advocates of South Africa*** 1998(4) SA 649 (SCA):

- (18) “In terms of section 7(1) of the Admission of Advocates Act 74 of 1964, as amended, the Court may suspend any person from practice, or order that the name of any person be struck off the roll, if it is satisfied that he is not a fit and proper person to continue to practise as an advocate. The way in which the Court had to deal with an application for the removal of an attorney’s name from the roll under a similar provision in the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, as amended (before that Act was repealed), was considered in ***Nyembezi v Law Society, Natal*** 1981 (2) SA 752 A at 756 H to 758 C. It emerges from the judgment that the Court first has to decide whether the alleged offending conduct has been established on a preponderance of probability and, if so, whether the person in question is a fit and proper person to practise as an attorney. Although the last finding to some extent involves a value judgment, it is in essence one of making an objective finding of fact and discretion does not enter the picture. But, once there is a finding that he is not a fit and proper person to practise, he may in the Court’s discretion either be suspended or struck off the roll.

This is plainly how an application for the removal of a person’s name from the roll of advocates must also be handled.” (My emphasis)

Indeed the standard against which the professional conduct of an attorney falls to be judged is an exacting one. The following dicta bear testimony to this:

- (a) *"It is not necessary to expatiate on the high standard of integrity and the necessity for avoidance, not only of criminal conduct, but of misconduct or unprofessional conduct required of an advocate"* (per Murray, J in **Johannesburg Bar Council v Steyn** 1946 TPD 115-117)
 - (b) *"The advocate's duty to the Court requires absolute honesty and integrity."* (Joubert **Lawsa** 1st reissue Vol. 14 para 276)
 - (c) *"The proper administration of justice could not easily survive if the professions (ie of advocates and attorneys) were not scrupulous of the truth..."* (per James JP in **Ex Parte: Swain** 1973 (2) SA 427 (N) at 434H)
- (19) The Attorneys' Profession has rules in place regulating the keeping of an attorney's books of account. It is quite apparent that the Respondent did not bother to give due regard to these rules in the manner she handled her trust account. She was not only reckless but she handled her trust account as though same was her own private savings account wherefrom she could deposit and withdraw at any given moment without the need to pass any entry evidencing the transaction. It remains the duty of this Court to uphold the rules and ethics imposed by the Applicant to its members. An application to strike off an attorney from the roll is ordinarily not in the nature of ordinary civil proceedings. It is and remains *sui generis*

statutory process of a disciplinary nature. In the words of Eloff, JP in **Algemene Balieraad van Suid-Afrika v Burger en 'n Ander** 1993 (4) SA 510 (T) at 516 G-H:

“Daardie subartikel (Section 7(2) of the Act) gee myns insiens statutêre beslag aan die behoefte en inherente reg wat die Hof gehad het om, in die uitvoering van sy toesig oor regspraktisyns, iemand te hê wat die gegewens en bewysmateriaal voor hom sal plaas, ingeval daar 'n vraagteken ontstaan oor 'n regspraktisyn se geskiktheid om langer op die rol te bly.”

- (20) The above applies with equal force on attorneys as well. The sui generis nature of these proceedings is well explained in **General Council of the Bar v Matthys** 2002(5) SA 1 (ECD) at 5A-D:

“B The nature of the proceedings

- (1) *The proceedings are not ordinary civil proceedings, but are sui generis in nature: they are proceedings of a disciplinary nature, of the Court itself, not those of the parties; the Court exercises its inherent right to control and discipline the practitioners who practise within its jurisdiction; the applicant, in bringing the application, acts pursuant to its duties as custos morum of the profession; in the interest of the Court, the public at large and the profession, its role is to bring evidence of a practitioner's misconduct before the Court, for the latter to exercise its disciplinary powers; the proceedings are not subject to all the strict rules of the ordinary adversarial process.*
- Society of Advocates of South Africa**

(Witwatersrand Division v Edeling 1998(2) SA 852(W) at 859 et seq.

2) Evidence which would have been inadmissible in 'civil proceedings may be considered in disciplinary proceedings against a practitioner in the High Court. Incorporated Law Society, Transvaal v Meyer and Another 1981(3) SA 962 (T) at 968F."

(21) This Court should at all times give proper weight to the Applicant's view with regard to matters complained of in this case. (See **Law Society, Cape v Koch** 1985(4) SA 379(C) at 386 G and authorities there collected). The Applicant approaches the Court as the custodian of the prestige, status and dignity of the profession, and in order to protect the interest of the public in its dealings with practitioners (cf. **Society of Advocates of South Africa (Witwatersrand Division v Edeling** 1998(2) SA 852 (W) 860). I am of the view that the offending conduct on the part of the Respondent has indeed been established on a preponderance of probabilities. The conduct proved against the Respondent is certainly not the kind of conduct that this Court expects of an attorney. Accordingly I have no hesitation on the facts of this matter to come to a finding that the Respondent is definitely not a fit and proper person to be allowed to continue to practise. It is common cause that the Respondent was given an opportunity to redeem herself when she was suspended from practice. This, she did not take advantage of. The Respondent clearly has a character problem when it comes to the handling of the public's funds. There remains no other alternative

remedy in the circumstances but to remove the name of the Respondent from the roll of attorneys, notaries and conveyancers. In any event the usual penalty for misappropriation of trust funds is the striking off. One cannot describe any better how important it is that any attorney must handle the monies of the public with utmost honesty and good care. Money has been described as the root of all evil. The standard of care which attorneys must display towards such monies must be such that they do not and should not succumb to temptation. I fully agree with Hefer AP when he in ***Law Society of the Cape of Good Hope v Budricks*** *supra* described the theft of money by an attorney as “*about the worst professional sin that an attorney can commit.*”

- (22) In my view an attorney who misappropriates trust monies as the Respondent clearly did, demonstrates character defects that renders him or her unfit to practise as an attorney because he or she poses an unacceptable risk to the members of the public and to the administration of justice. In my view the Applicant is entitled to an order removing the Respondent’s name from the roll of attorneys, notaries and conveyancers plus ancillary reliefs mentioned in the notice of motion. It is regrettable that the Respondent was so unscrupulous with regard to money that she even resorted to making candidate attorneys to pay in order to have their articles of candidacy served with her. If the Applicant can no longer rely on its members to provide the necessary practical training to its prospective members without such prospective members being subjected to serious financial

strains, this, is but a sign that there will soon be a marked scarcity of members joining the attorney's profession.

THE FORM OF ORDER SOUGHT

(23) It is necessary and helpful to deal briefly with the form of order the Applicant sought in this matter. My brother presiding in this matter was correctly concerned about certain portions of the draft order. His concerns resulted in a rather stimulating argument. I deal *infra* with the form of order sought. The power to interdict an attorney from operating on his trust account, to appoint a curator to control and administer such trust account/s, and to confer rights, duties and powers upon such curator, derives from section 78(8) of the Attorneys Act, 53 of 1979 which provides as follows:

“The court may on application made by the society of the province concerned, and on good cause shown, prohibit any practitioner from operating in any way on his trust account, and may appoint a curator bonis to control and administer such trust account, with such rights, duties and powers in relation thereto as the court may deem fit.”

(24) Section 78(9) of the Attorneys Act, which gives the Master of the High Court the power to appoint a curator to the trust account of an attorney who is struck off the roll or suspended from practice is of application.

This section of the Attorneys Act provides as follows:

“(9)(a) If any practitioner -

- i) dies;
 - ii) becomes insolvent;
 - iii) in the case of a professional company, is liquidated or placed under judicial management, whether provisionally or finally;
 - iv) is struck off the roll or suspended from practice;
 - v) is declared by a competent court to be incapable of managing his own affairs; or
 - vi) abandons his practice or ceases to practice,
- the Master of the Supreme Court may, on application made by the Society of the Province concerned or by any person having an interest in the trust account of that practitioner, appoint a *curator bonis* to control and administer such account, with such of the rights, duties and powers as the Master may deem fit”

“**Prescribed**”, in terms of section 1 of the Attorneys Act, **“means prescribed by rule of by regulation made in terms of section 74, 81 or 82.”** Regrettably no rules or regulations have been made which “prescribe” the rights, duties and powers to be conferred upon a curator under section 78(9) of the Attorneys Act.

- (25) Regard being had to the afore-going, it was Mr. Koen’s submission that the Master cannot therefore appoint a curator in terms of this section as such curator would be without the means to fulfil his statutory functions. He would have no **“rights, duties or powers”**. In the

circumstances I fully agree that it thus must fall to the court to appoint a curator and to confer “**rights, duties and powers**” upon him under section 78(8) of the Attorneys Act. If this is not done the fate of the trust accounts and trust creditors would be left entirely unregulated. The court is given the power by Section 78(8) of the Attorneys Act to confer such powers as it “**may deem fit**” upon the curator. In any event the power so given to the court is wide and the Court will grant such powers to a curator as are practically required by him to “wind up” the trust account of an attorney who has been struck off the roll and who may not lawfully practise. I would agree with Mr. Koen that the power granted to the court under section 78(8) of the Attorneys Act supplements the wide disciplinary discretion conferred by common law upon a court over its officers. The court should and must be able to make orders which provide for the orderly and sensible winding up of the practice of an attorney who is struck off the roll or otherwise prohibited from practising. It would make no sense that a court have the power to prohibit an attorney from practising at common law but be devoid of the power to make an order regulating the manner in which the trust funds under his control should be dealt with.

SHOULD PARAGRAPH 4.2 OF THE ORDER REFER IN ADDITION TO SECTION 78(1)?

26)As paragraph 4.1 of the draft order under discussion covers the funds held or received by an attorney in terms of section 78(1), or otherwise I find myself in agreement with Mr Koen’s submission that it would not serve any purpose

to include any reference to it in paragraph 4.2.

DOES THE COURT HAVE THE POWER TO GO BEYOND SECTION 78(9) AND CONCERN ITSELF WITH THE PROVISION OF SECURITY FOR BUSINESS MONIES?

27) As for the reasons set out in paragraphs 24 and 25 above the provisions of section 78(9) do not find application a court's competence of conferring the necessary powers upon a curator are not truncated by it.

**THE NECESSITY AND SUFFICIENCY OF THE UNDERTAKINGS
IN PARAGRAPHS 6 AND 7 OF THE ORDER:**

(28) Paragraph 6 is intended, in essence, to confer upon the curator the power to hand to clients of the attorney in question the attorney's files relating to matters he handled on their behalf in order that they may obtain the assistance of other attorneys to take over their matters. It is important that the curator is entitled to exercise this power almost immediately upon his appointment as delays will, for obvious reasons, prejudice the interests of the clients and may even lead to claims prescribing, if matters are not timeously dealt with. Accordingly, paragraph 6 of the order is formulated in such a manner so as to give the curator a wide discretion to decide, before releasing a file; whether to require payment of any fees outstanding; whether to require that security be furnished by a client; or whether to release the file to the client without either fees being paid or security being furnished. The nature of an attorney's lien is set out in ***Botha NO v EM Mchunu and Co.*** 1992(4) SA 740 (N) at

743B. An attorney has a lien over every document in respect of which he/she is entitled to charge his or her client a fee, not only those actually prepared by the attorney. However, even where there is a lien a court has a discretion to order delivery of objects over which the lien is exercised to their owner against the provision of adequate security. Each case will depend on its particular facts and the Court, in exercising its discretion, will have regard to what is equitable under all the circumstances, bearing in mind that the owner should not be left out of his property unreasonably and on the other hand should not be given possession if his object is, after obtaining possession, to delay the claimant's recovery of the expenses. (***Spitz v Kesting*** 1923 WLD 45 at 49, quoted with approval in ***Hochmetals Africa (Pty) Ltd v Otavi Mining Co. (Pty) Ltd*** 1968(1) SA 571(A) at 582 D-E))

In my view, the factors, which would weigh with a Court in exercising its discretion to override a lien would be in cases where an attorney has been found to be guilty of grave professional misconduct. It would not be equitable to insist on the provision of security for such fees as are due in these circumstances. Unlike for instance, a builder's lien, an attorney's lien is not one that relates to goods with any intrinsic value the only consequence that he loses is a means of applying court-sanctioned pressure on his debtor. In my view this is a form of pressure that he should not be entitled to exercise in the event of his having his name struck from the roll. Provided that a client undertakes to pay the fees due and provides a *domicilium citandi et executandi* the attorney (or the attorney's trustee, should the attorney's

estate be sequestrated) is afforded a significant procedural advantage in the recovery of monies due to him. Mr. Koen submitted that this provision of the draft order should not be changed. I am in full agreement with him.

- (29) On the question by my brother if a single office bearer should not be named in the order sought rather than a number of named office bearers, Mr. Koen submitted that this should indeed be the case. In his submission any practical difficulties which may arise as a result of the appointed curator being absent for any reason are overcome by the provision of paragraph 10.9 of the order which permits the curator, subject to the approval of the chairman of the Board of Control of the Fidelity Fund, to appoint nominees. Mr Koen submitted that references to the approval of the Board of Control of the Fidelity Fund should not be removed from the order sought as the Board of Control consists of senior practitioners (see section 28 of the Act) who can be relied upon to oversee the exercise by the curator of his/her powers. Another important consideration is that in practice, it is the Fidelity Fund which pays the costs incurred by a society in connection with steps taken by it in terms of sections 22(1) and 78 of the Act (the power to do this derives from section 45(1)(j) of the Act). It therefore appears to be appropriate that the Fund's approval should be sought and obtained before such costs are incurred.

PARAGRAPH 10.8 OF THE ORDER - GENERALLY

(30) In this Division (as well as the Eastern Cape and Natal), until the judgment in **Pollard** was handed down, this part of the order entitled the curator, in the event of there being a trust shortage, to pay whatever trust funds existed to the Fidelity Fund. Trust creditors were then to make claims from the Fidelity Fund which were paid from the funds received from the attorney in question until these were exhausted, and then from the funds of the Fidelity Fund. In the Transvaal, following the judgment in **Ex Parte Law Society, Transvaal**: In re **Hoppe v Visser** 1987 (2) 773 (TPD), this part of the order obliged the curator to distribute the (remaining) trust credit balance to trust creditors who had proved claims. It read:

“In the event of there being insufficient trust moneys in the trust banking accounts(s) of the respondents to pay in full the claims of trust creditors, to distribute the credit balance(s) in the trust banking account(s) amongst the trust creditors whose claims have been proved or admitted.”

In **Pollard** (28 October 2003), although the order ultimately issued by the Court remained as it had been, the Court found the reasoning in **Hoppe and Visser** “to be most persuasive”. **Oberholzer’s** case (22 October 2004) was the next to deal with this part of the order. In **Oberholzer** the precise wording used in **Hoppe and Visser** was not followed. The relevant part of the order which was made read as follows:

“In the event of there being insufficient trust moneys in the trust banking account(s) opened by the

respondent in terms of section 78(1) and (2) of Act 53 of 1979 from which to pay the claims of trust creditors in full, 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 accounts(s)."

- (31) Paragraph 10.8 of the order was given again amended by my sister, Traverso DJP sitting with my brother, Moosa J in the unreported matter of ***Law Society of the Cape of Good Hope v Peter*** on 17 November 2004. In this case funds held by the attorney in terms of section 78(2A) of the Attorneys Act were dealt with. The order read:

'20.12.8 in the event of there being insufficient trust moneys in the trust account(s):

- a) held, in terms of Section 78(1) and/or 78(2) of Act 53 of 1979, to pay the claims of trust creditors reflected in the books of account of the respondent in full, to distribute the credit balance(s) in the trust banking account(s) pro rata amongst the trust creditors whose claims have been proven or admitted; and*
- b) held, in terms of Section 2A of Act 53 of 1979, [this is presumably a reference to section 78(2A) to pay the respective trust creditors on whose behalf the trust funds are held provided such claim(s) have been proven and admitted'.*

- (32) This form of order treats monies held in section 78(2A) accounts in a separate manner. Mr.

Koen, however, was critical of the aforementioned order in that, in his view, the order was framed such that payment to section 78(2A) trust creditors is premised on the assumption that there is no shortage in funds separately invested in terms of this section. It is, in any event trite that identifiable funds held separately in terms of section 78(2A) should be paid to the trust creditors whose funds they are, provided that the curator is satisfied that they indeed belong to those trust creditors. A further concern expressed by Mr Koen about the order set out above, is that no mechanism or rules exist by which claims of trust creditors should be proved or admitted. In truth, in order to calculate a *pro rata* distribution to trust creditors the curator must be able to calculate the extent of the trust liability. Invariably in matters such as the instant one, the extent of an attorney's trust liabilities cannot be ascertained from his/her accounting records, because these may not have been properly kept. Obviously a difficulty could arise if after a *pro rata* distribution is effected another trust creditor proves a claim. Notably in order to cater for the issues canvassed supra the draft order proposed by the Applicant now provides for the payment of a *pro rata* distribution to trust creditors whose identity and entitlement has been established by the curator after having taken reasonable steps to do this, and for the payment directly to trust creditors of section 78(2A) monies, provided that the curator is satisfied of such trust creditors' entitlement to such funds.

THE NEED FOR THE INCLUSION OF PARAGRAPH 11.4 ?

(33) In an endeavour to explain the above Mr. Koen pointed out that it may happen that an attorney is also a creditor in his own trust account even if a shortage exists. The attorney may hold a deposit on account of fees in respect of which he has done work and is entitled to charge a fee. Paragraph 11.4 of the original order is in Mr. Koen's submission, intended to limit to one year the time within which the attorney has to establish his claim. Mr. Koen, however, conceded that if the attorney has one (1) year to establish his entitlement to funds held in his trust account, it will readily be seen that he is, in a sense, his own creditor, and that the calculation of a *pro rata* payment to other trust creditors will be held up for at least a year. That, this will not be in the interests of the other trust creditors, is obvious. In this regard it is once more noteworthy that the Applicant has now amended the original paragraph 11.4 and in the proposed draft order it provided that the attorney proves his entitlement to such funds as are held in trust within a reasonable period after having been required to do so by the curator. That amendment was found to be acceptable.

ORDER

- (36) Accordingly the following order was granted by this Court on 16 September 2006:
- 1) THAT the respondent's name be and is hereby struck off the roll of attorneys and notaries of this Court.
 - 2) THAT the respondent surrender and deliver to the

registrar of this Court her certificates of enrolment as an attorney and notary.

- 3) THAT should the respondent fail to comply with the provisions of the preceding paragraph of the Order within two (2) weeks from date hereof, the sheriff for the District in which such certificates of enrolment are, be and is hereby empowered and directed to take possession of and deliver the same to the Registrar of this Court.
- 4) THAT the respondent deliver her books of account, records, files and documents containing particulars and information relevant to:
 - 4.1 any moneys 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 Section 78(2) and/or Section 78(2A) of Act No. 53 of 1979 of the Republic of South Africa;
 - 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 and notary; 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) THAT should the respondent fail to comply with the provisions of the preceding paragraph of this Order within one (1) week after service thereof upon her 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, be and is empowered to take possession of and deliver them to such curator.
- 6) THAT such curator shall be entitled:
- 6.1 to hand over to the persons entitled thereto all such records, files and documents;
- 6.2 to 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) THAT a written undertaking by a person to whom the records, files and documents referred to in the preceding paragraph 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 purposes of the preceding paragraph hereof provided that such written undertaking incorporates a *domicilium citandi et executandi* of such person.
- 8) THAT such curator be 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 Attorney's Fidelity Fund (herein referred to as "the Fund") in respect of money and/or other property entrusted to the respondent, be re-delivered to such curator.
- 9) THAT the respondent be interdicted and prohibited from operating on her trust account(s) as defined in the following paragraph.
- 10) THAT 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

section 78(1) of the said Act No. 53 of 1979 and/or any separate savings or interest-bearing accounts as contemplated by section 78(2) and/or section 78(2A) of the said Act No. 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 have been deposited or credited (the said account(s) being herein referred to as “trust account(s)”) with the following powers and duties:

- 10.1 subject 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 an extent and 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.

- 10.2 subject 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 Section 78(1) and/or 78(2) and/or Section 78(2A) of the said Act No. 53 of 1979 (hereinafter 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 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 the same to the credit of the trust account(s).

- 10.3 to 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 thirty (30) days of the date to 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;
- 10.4 to call upon such trust creditors to furnish such proof, information and affidavits as he may require 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;
- 10.5 to admit or reject, in whole or 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 the civil courts;
- 10.6 having determined the amounts which he considers are lawfully due to the 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 a 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 section 78(3) of the said Act No. 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 costs, 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 applicant, 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 she 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 monies in the trust banking accounts(s) opened by the Respondent in terms of section 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 section 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 services 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

10.10 to 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) THAT respondent be and is hereby directed:

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

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

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

11.4 within 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, or otherwise, of the amount of the fees and disbursements due (to the respondent) in respect of her former practice, and should she fail to do so, she shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights, if any, as she may have against the trust creditor(s) concerned for payment or recovery thereof.

- 12) THAT this Order be served on the respondent within 14 days of the grant thereof.
- 13) Any person whose rights are affected by the terms of this order shall be entitled, on notice to the respondent, to make application to this Court for a variation of the terms of this order on good cause shown.

DLODLO, J

VAN REENEN, J:

I agree and it is so ordered.

D. VAN REENEN