



THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 15586/13

In the matter between:

THE LAW SOCIETY OF
THE CAPE OF GOOD HOPE

Applicant

And

FRANS JOHANNES SCHOEMAN

Respondent

Heard: 25 April 2014

Delivered: 29 July 2014

JUDGMENT

NDITA; J

[1] This is an application by the Law Society of the Cape of Good Hope for an order striking the name of the respondent from the roll of attorneys and for relief ancillary thereto. The applicant further requests that the respondent be ordered to pay costs of this application on attorney and client scale. The basis for the application is mainly that the respondent is not a fit and proper person to remain on the roll of attorneys because he had misappropriated trust monies.

[2] The factual background which gave rise to this application can be briefly stated as follows: The respondent was admitted as an attorney of the Free State High

Court on 08 July 1993 and practised as a professional assistant from 1999 to 2000. From 15 March 2001 to date, he practised as a partner at Joubert Schoeman Attorneys and later during the same year, on 14 August 2001, he was enrolled as an attorney of this court. The present proceedings arose when Ms Helen Joubert, also a partner in the same firm of attorneys, approached the applicant on 16 March 2012 and reported that there were certain irregularities involving the handling of trust accounts within the firm. She and the respondent were equal partners in the firm and had been intimately involved for approximately twelve years. Ms Joubert was responsible for the writing up of the book of accounts. During 2007, she noticed that the respondent would after consuming alcohol during the night, transfer various amounts from the firm's trust account to his personal credit and cheque accounts. The respondent would thereafter attend the Grandwest Casino and gamble. He would however, transfer the funds back to the trust account on the same day and at other times, a week later. According to Ms Joubert, the transfer of trust monies usually occurred when they were experiencing difficulties in their personal relationship. She was unsure of the exact figure of the respondent's losses or winnings from gambling but was aware of the fact that the respondent had accumulated debt to the amount of R3 million. At the time of her reporting the problems besetting the law firm, the trust account had a shortfall of approximately R100 000, 00. The respondent had his own code for accessing the Internet banking platform but may well have used Ms Joubert's code as he was familiar with it.

[3] Pursuant to the report made to the applicant, and at a meeting held on 16 March 2012 with it, Ms Joubert undertook to take control of the finances of the practice, to the exclusion of the respondent. The respondent was telephonically

advised of the new arrangement and agreed to the terms thereof. A further meeting was held on 22 March 2012, and it transpired that the shortfall in the trust account was in the amount of R90 000,00 which he had transferred to his account on 8 March 2012. However, by 23 March 2012 the respondent had paid back to the trust account the aforementioned amount of R90 000,00. The following is a schedule of the amounts transferred by the respondent from the trust account via internet banking into his business account, credit card accounts as well as his personal cheque account:

8 July – 10 July 2007	R300 000,00
10 July -14 July 2007	R350 000,00
13 February – 15 February 2010	R150 000,00
14 October - 25 October 2010	R38 000,00
02 November – 03 November 2011	R100 000,00
17 November 2011 – 18 November 2011	R70 000,00
06 January 2012	R59 000,00
27 February – 01 March 2012	R100 000,00
04 March – 05 March 2012	R70 000,00
08 March – 23 March 2012	R90 000,00
TOTAL	R1 327 000,00

[4] In all the instances, the monies transferred from the trust account were returned into the trust either on the same day or within a short period. When confronted with these transgressions, the respondent admitted the irregular transfers but explained that he was during the relevant period experiencing emotional turmoil and was being treated by a psychiatrist, Dr Govender, for a Major Depressive Disorder and Post Traumatic Stress Disorder.

[5] The respondent in his affidavit opposing the striking off, averred that he never intended to steal the funds he misappropriated and always paid back the amounts transferred to his accounts. According to the respondent, he had not manifested character defects and a lack of integrity because the moral lapse on his side was as a result of the trauma he had to endure. To this end, the respondent gave an outline of his relationship with Mr Joubert and the circumstances underlying the trauma. He stated that he was involved in an intimate relationship with Ms Joubert from 2000 to 2012. Two children, aged 9 and 7, were born out of the relationship. According to the respondent, the transgressions involving misappropriation of trust funds are inextricably linked to the periods of exceptional strife in his relationship with Ms Joubert, caused, inter alia, by her abuse of alcohol. They were aimed at getting Ms Joubert's attention as she hated gambling intensely. In addition, the transferring of the trust funds was similarly intended to irritate her. This, according to the respondent is clear from the fact that the funds would be repaid within a short period after transfer. To this end, the respondent averred that he even inserted on the transfer notification, the name of a man (also an attorney) who had a relationship with Ms Joubert. This he did in retaliation and was fully aware of the fact that she would be upset by his conduct. The respondent denied that he was under immense financial pressure. He stated that at all times he had sufficient funds to cover the amount of any withdrawal from the trust account.

[6] The respondent annexed to his opposing affidavit a report compiled by his psychiatrist, Dr Ravi Govender, wherein the latter confirms that the respondent's father, deceased in 2009, was also diagnosed with a Major Depressive Disorder. According to Dr Govender the condition is hereditary. The report reflects that the

respondent first consulted with Dr Govender's practice in 2007 and was diagnosed with a Major Depression by Professor Oosthuisen, who had prescribed anti-depressant medication with sleeping tablets. According to the report Dr Govender had 8 consultations with the respondent commencing on 8 December 2011 to 27 January 2014. At that time, the respondent was severely depressed and had two failed suicide attempts. This he did by taking an overdose of the prescribed sleeping pills and slitting his wrists. Dr Govender explained that it became abundantly clear to him that the respondent was suffering from a Post-Traumatic Stress Disorder ("PTSD"). The condition is caused by a wide range of traumatic events such as the witnessing of a death, serious injury where the individual felt intense fear or horror or helplessness. According to Dr Govender, the respondent's relationship with Ms Joubert was fraught with problems over a lengthy period of time, amongst which was alcohol abuse on her part as well as her involvement in three romantic relationships during the subsistence of her relationship with the respondent. He states that Ms Joubert's infidelity had a severe psychological impact on the respondent resulting in the suicide attempts earlier alluded to. In addition, the respondent reported to him that as far back as 1994, while he was still married, he experienced an extremely traumatic event when he caught his then wife "red handed" in bed with a fellow colleague. Notwithstanding the diagnosis, the respondent is according to Govender responding well to treatment. In the report, the psychiatrist confirms that the respondent revealed to him that he embarked on the conduct which forms the subject matter of this application in order to shock Ms Joubert as she was responsible for the writing up of the books of the law firm and the transferring of the money from the trust account would force her to make journal entries to cover the irregularities perpetrated by the respondent.

[7] Based on the facts outlined above, the applicant seeks the striking off of the respondent from the roll of attorneys. Section 22 (1) of the Attorney's Act provides as follows:

“Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck from the roll or suspended from practice by the court within the jurisdiction of which he practices if he, in the discretion of the court, is not a fit and proper person.”

In *Jasat v Natal Law Society* 200(3) SA 44 (SCA) at 51C-G the court reiterated that s 22(1) contemplates that a court in exercising its discretion must first decide whether the alleged offending conduct has been established on a preponderance of probabilities. This in essence is a factual inquiry. The second inquiry is whether, as stated in s 22(1) (d), the person is in the discretion of the court a fit and proper person to continue practising as an attorney. This involves a weighing up the conduct of the conduct complained of against the conduct expected of an attorney, and to this extent, a value judgment. 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 will suffice.

[8] I now turn to determine whether the offending conduct has been established on a preponderance of probabilities. It is clear from the respondent's opposing affidavit that it is not in dispute that he transferred funds from the trust account to his personal accounts. That he returned the funds so transferred within a short space of time does not detract from the fact that the irregularities were committed. Without further ado, it must be found that the offending conduct has been established on a balance of probabilities.

[9] In the light of the findings I have made, the next step entails an assessment of whether the respondent is a fit and proper person to continue practising as an attorney. The applicant argued that the respondent administered trust funds in a reckless and cavalier manner and that clearly demonstrated that he had manifested character defects and lack of integrity. According to the applicant, the respondent is not only guilty of dishonourable and unworthy conduct; he has also brought the profession in disrepute and is thus not fit to practise as an attorney. The applicant strenuously contended that the misappropriation of trust funds strikes at the very heart of the respondent's duties as an officer of Court. In addition, so argued the applicant, an attorney who misappropriates trust monies demonstrates a character defect that renders him/her unfit to remain on the roll of attorneys as he poses an unacceptable risk to the public and to the administration of justice. That he had sufficient funds to cover the funds withdrawn from the trust account is not a defence to the charge levelled against him. The applicant, relying on *Cape Law Society v Parker* 2000 (1) SA 582 at 587 C-D, argued that the respondent is not a fit and proper person to remain on the roll of attorneys. In *Parker*, the court explained that:

“... the availability of a liquid fund may in appropriate circumstances constitute a defence to the common law crime of theft insofar as it may indicate an absence of mens rea. It is not an answer to or an exculpation of the particular form constituted by the misappropriation by the attorney of trust funds, more particularly in that an attorney could not be heard to say when he misappropriated trust monies that he had a right to do so or that the trust client, had he been consulted, would have consented to the misappropriation.”

[10] The respondent on the other hand states that while he admittedly made withdrawals from the trust account, he had no intention of stealing the funds and always intended, and did pay everything back. Although he acknowledges that the transgressions are of a serious nature, he says that no prejudice had been suffered by any of the affected trust clients as the money was timeously returned to the trust account. He states that despite the applicant being aware of his transgressions for two years, it still allowed him to continue practicing without interdicting him. In his opinion, the failure to interdict him clearly demonstrates that the applicant did not consider him unfit to practice as an attorney. In his own words he says:

“The applicant clearly did not regard me as unfit for practice for the past two years, and it is therefore unclear why it is taking the stance now that I should be struck off the roll.”

[11] It is fitting to restate the standard and degree of conduct expected of an attorney. The guidelines are succinctly laid out in *Law Society, Transvaal v Matthews* 1989 (4) SA 389 at 395 F-396A as follows:

“The attorney is a person from whom the highest standards are exacted by the profession and this Court. If an attorney wishes to digress from that standard he may do so but he must then first cast aside his profession by resigning and then pursue his chosen course. In this regard the standards are admirably dealt with in the founding affidavit as follows:

‘An attorney is a professional man whose independence and freedom in the conduct of his practice are recognised and preserved. Within the limits of the law and the rules of professional conduct, an attorney conducts, and in fact should so conduct, his practice with a high degree of independence. The profession itself is not a mere

calling or occupation by which a person earns a living. An attorney is a member of a learned, respected and honourable profession and, by entering it, he pledges himself with total and unquestionable integrity to society at large, to the courts and to the profession . . . only the very highest standard of conduct and repute and good faith are consistent with membership of the profession which can indeed only function effectively if it inspires the unconditional confidence and trust of the public. The image and standing of the profession are judged by the conduct and reputation of all of its members and, to maintain this confidence and trust, all members of the profession must exhibit the qualities set out above at all times.

The attorneys' profession can only fulfil its obligations to the community and comply with its role in the administration of justice in the land if it inspires and maintains the unconditional confidence of the community and if its members devote their absolute integrity to the conduct of their profession and to the fulfilment of all the requirements demanded of the profession and its members."

It follows that the respondent's misappropriation of trust funds renders him unfit and improper to practise as an attorney.

[12] I now turn to consider the appropriate sanction. As earlier alluded to, this court is enjoined to inquire into whether in all the circumstances the respondent is to be removed from the roll of attorneys or whether an order suspending him from practice will suffice. Recently, Mthiyane JA in *Hepple v Law Society of the Northern Provinces* (507/2013) [2014] ZASCA 75 (29 May 2014) restated the approaching to striking off as follows

"[9] In considering whether a case has been made out against an

attorney sought to be struck from the roll it is necessary to bear in mind that the evidence presented by the law society is not to be treated as though one was dealing with ‘a criminal case’ or ‘an ordinary civil case’. The proceedings in applications to strike the name of attorneys from the roll are not ordinary civil proceedings. They are proceedings of a disciplinary nature and are *sui generis*. It follows therefore that where allegations and evidence are presented against an attorney they cannot be met with mere denials by the attorney concerned. If allegations are made by the law society and underlying documents are provided which form the basis of the allegations, they cannot simply be brushed aside; the attorneys are expected to respond meaningfully to them and to furnish a proper explanation of the financial discrepancies as their failure to do so may count against them.”

The guidelines in assessing the appropriate sanction are set out in *Summerlely v Law Society of Northern Province* 2006 (5) SA 613 SCA wherein Brand JA cautioned that sight should not be lost of the fact that the removal from the roll of an attorney constitutes a severe penalty and stated thus:

“[19] Before imposing this severe penalty, the Court should therefore be satisfied that the lesser stricture of suspension from practice will not achieve the objectives of the Court’s supervisory powers over the conduct of attorneys and, secondly, to protect the public, particularly where trust funds are concerned.”

It is also well established that where a court finds dishonesty, there must be exceptional circumstances before it will order a suspension rather than a removal. (See *Malan and Another v Law Society, Northern Provinces* 2009 91) SA 216 (SCA) at 231 G-I).

[13] The sanction to be imposed upon the respondent is primarily for the protection of members of the public. In assessing whether the respondent is a fit and proper person to practice as an attorney, it must be accepted that his misconduct per se, does not necessarily mean that as a matter of course, the severest sanction must be imposed. The court must consider factors such 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 and the likelihood or otherwise repetition of such conduct and the need to protect the public. (See *Jasat v Natal Law Society* 2000 (3) SA 44 SCA). These factors must be weighed against the conduct and standard expected of an attorney, taking into account all relevant factors. The respondent placed the following exceptional circumstances before the court, justifying why he should be suspended rather than struck off the roll:

1. He has been practising as an attorney for 21 years and throughout this period, no similar complaint was recorded against him. Neither had he been found guilty of any misconduct.
2. He suffered from depression and severe Post Traumatic Stress Disorder, which caused him to act foolishly in the hope of salvaging her relationship with Ms Joubert and ultimately preserving the family unit.
3. He never intended to steal the trust funds and had no need to so as he had enough funds of his own to cover his expenses. To this end, he annexed to his papers, a personal income and balance sheet reflecting that he had sufficient funds. In addition the funds were paid back shortly after each withdrawal.
4. He is undergoing counselling and is taking medication to deal with and control his depression and PTSD.

5. He expressed remorse and undertook not to conduct himself in such a manner ever again.

[14] I have already indicated earlier in this judgment that that the respondent did not intend to steal the trust funds does not assist him as misappropriation of trust funds constitutes the worst sin that an attorney can commit, irrespective of the intention. (See *Parker, supra* and *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA11 at 17 I-J). Similarly, that the applicant allowed the respondent to practise as an attorney for two years whilst being aware of the misconduct cannot be considered to be favourable to the respondent. Of course, it is incumbent on the applicant to act promptly when it has information of a misconduct by a practitioner, and failure to do so as well as deprecated delays which have not been explained is unacceptable. (See *Law Society of the Cape of Good Hope v Zietsman* [2010] ZAWCHC 219). I must reiterate that the prolonged failure by the applicant to act promptly prejudices the public which may put its trust in an attorney, who may otherwise be unworthy of such trust. The applicant is entrusted with a duty to regulate the conduct of attorneys and where any aspersions are cast on attorney's integrity and worthiness, the public is entitled to expect that the applicant will timeously take the steps necessary to protect it. In the matter at hand, there is no explanation as to why the applicant allowed the respondent to practise for two years whilst being aware of his misappropriation of trust funds.

[15] Ordinarily, the misappropriation of trust funds points towards a character that is inherently flawed, more so in circumstances where it was not a once off occurrence, but took place over a long period, as is the case in *casu*. But the circumstances of this

matter are not ordinary. What is puzzling is that it is clear from the financial statements attached by the respondent to these papers that he is financially stable and there therefore was no need for him to embezzle trust funds. That said, it not uncommon for people who have more to want more. However, the respondent's modus operandi of returning the money to the trust account as quickly as he took it, suggests that there was more to his conduct. The respondent's conduct must be assessed having in mind the uncontested depressive emotional circumstances resulting from his failed relationship with Ms Joubert. In my view, this lends credence to his version that he was punishing Ms Joubert, who was responsible for the books of the practice. This view is supported by the report by his psychiatrist that he was suffering from depression and PTSD. If one accepts that the respondent's conduct was influenced by his prevailing family circumstances, it follows that it cannot be said that his character is so inherently flawed that if he is at some stage allowed to return to practice, he is likely to repeat the conduct. He states that he has practiced as an attorney for 21 years and no disciplinary proceedings were ever held against him by the applicant. His expression of contrition and unequivocal acknowledgement that his conduct fell short of the high standards expected of an attorney, to some degree show that he fully comprehends the extent of the magnitude of his transgressions. I am alive to the fact that the amount misappropriated by the respondent is a huge amount, and that it has all been repaid. I consider these factors exceptional enough to ward off the strictest sanction of striking him off the roll of attorneys. In my view a suspension from practising as an attorney for a period of time will suffice.

[16] I now turn to the question of costs. The applicant has in both the notice of motion and founding affidavit asked for costs on attorney and client scale. I am

inclined to order the respondent to pay costs on the requested basis as in my view his conduct shows dishonesty in performing his duties and causes harm to the legal profession.

[17] Accordingly the following order is issued:

1. The respondent is suspended from practising as an attorney of this court for a period of 12 months, with effect from the date of this order.
2. upon the expiry of the aforementioned period of suspension:
 - (a) The respondent shall be permitted to practise as a professional assistant or an associate and shall not practise for his own account or as a partner for a further period of three years; and
 - (b) The respondent's undertaking given to the Law Society that he will not administer a firm of attorneys' books of account or trust account, is to remain in place for the said further period of three years.
3. The respondent is to pay the applicant's costs of the application on the scale as between attorney and client.

NDITA; J

I agree.

FOURIE; J