THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 270/05

In the matter between :

KEVIN JOHN ROLLO SUMMERLEY **APPELLANT**

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES **RESPONDENT**

CORAM : **MPATI DP, BRAND, CONRADIE, VAN HEERDEN *et* JAFTA JJA**
HEARD : **2006-05-05**
DELIVERED : **2006-05-19**

Summary: Attorney struck from the roll by court *a quo* – misconduct not involving dishonesty – decided that he should rather be suspended from practice with further restrictions imposed after expiry of suspension period.

Neutral citation: This judgment may be referred to as *Summerley v Law Society, Northern Provinces* [2006] SCA 59 (RSA)

JUDGMENT

BRAND JA/

BRAND JA:

[1] The appellant practises as an attorney in the province of Gauteng. On application by the respondent ('the society'), in terms of s 22(1)(d) of the Attorneys Act 53 of 1979 ('the Act'), the Pretoria High Court (Van der Merwe J, with Els J concurring) ordered that his name be struck from the roll of attorneys. Further ancillary orders were made, dealing with such matters as the appointment of a curator to administer and control the appellant's trust account, with the view to ensuring payment of his trust creditors. In accordance with the established custom in matters of this kind, the respondent was also ordered to pay the society's costs of the application on an attorney and client scale. The appeal against the court *a quo*'s judgment is with the leave of this court.

[2] In terms of s 22(1)(d), an attorney may, at the instance of 'the law society concerned, be struck from the roll or suspended from practice by the court . . . – if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney'. It has now become settled law that the application of s 22(1)(d) involves a threefold enquiry (see eg *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) para 10 at 51C-I and *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) para 2 at 13I-14B). The first enquiry is aimed at determining whether the law society has established the offending conduct upon which it relies, on a balance of probabilities. The second question is whether, in the light of the misconduct thus established, the attorney concerned is not a 'fit and proper person to continue to practise as an attorney'. Although this has not always been the position, s 22(1)(d) now expressly provides that the determination of the second issue requires an exercise of its discretion by the court (see eg *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 851C-E). As was pointed out by Scott JA in *Jasat* (at 51E-F), the exercise of the discretion at the second stage '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' (see also eg *Budricks supra* at 14A). The third enquiry again requires the court to exercise a discretion. At this stage the court must decide, in the exercise of its

discretion, whether the person, who has been found not to be a fit and proper person to practise as an attorney, deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice.

[3] As to the appellant's offending conduct, the facts were largely common cause. Factual allegations on the papers which turned out to be contentious, were not held against the appellant by the court *a quo*. I propose to do the same. The complaints, thus established against the appellant on the undisputed facts, fell into two broad categories. Firstly, those relating to the maladministration of his trust account and, secondly, those arising from other contraventions of the society's rules.

[4] Problems relating to the appellant's trust account first came to the notice of the society when he failed to submit the annual report on the audit of the account – as required by the rules of the society – for the financial year which ended on 28 February 2001. In consequence, he could not be provided with the fidelity fund certificate prescribed by s 41(1) of the Act. The appellant was therefore practising for his own account without the required certificate, which in itself constituted a criminal offence under s 83(10) of the Act.

[5] As a result of the appellant's failure to file the annual audit report, the society instructed a chartered accountant, Mr Swart, to investigate the appellant's management of his trust account for the 2001 financial year. From the report subsequently prepared by Swart, it appeared that, during that financial year, the appellant had failed to comply with the most basic rules of the society pertaining to the administration of trust accounts. Although in theory the appellant kept a trust account separate from his business account, as required by s 78(1) of the Act, his business account became dormant because he had exceeded the limit of his overdraft. When that happened, the appellant simply used his trust account for both business and trust purposes. This practice brought him into perpetual conflict with the society's rule that money in an attorney's trust account not owing to trust creditors, should be transferred to his or her business account without delay.

[6] The appellant's practice of utilising his trust account for dual purposes also led to difficulties in identifying trust funds. According to Swart's report, these difficulties were exacerbated by the fact that, apart from his bank statements, the appellant kept no accounting records whatsoever. So, for example, he could not provide Swart with a cash book or any ledger of trust creditors or business debtors. Nor did he keep any updated list of trust creditors, as specifically required by the society's rules. A further infringement of these rules found by Swart, was that trust cheques were regularly drawn by the appellant, not crossed in any way and made out to 'bearer'.

[7] Most disturbing to the society, was the finding by Swart that the appellant's trust account had been in overdraft on numerous occasions. On one such occasion the account was in overdraft for more than one month. It would appear that, in the society's view, every one of these occasions constituted a breach of its most fundamental rule, that the total amount in an attorney's trust account must at all times be sufficient to cover the amounts owing to trust creditors. I do not think this view can be sustained. To me it seems that these overdraft situations resulted directly from the appellant's custom of running his whole business through his trust account. Once it is clear that all the deposits in the appellant's trust account were not trust monies, in the sense that they were held on behalf of another person, logic dictates that the rule referred to would only be contravened by an overdraft on the trust account if, at the time of the overdraft, there was money owing to at least one trust creditor. It is true that in a 'regular' attorney's practice the existence of at least one trust creditor would be virtually axiomatic. But, not so for the appellant. From Swart's report it appears that during the financial year investigated by him, the appellant had handled only one trust transaction. Though the appellant did debt collections on behalf of one client, these collections were paid directly to the client and not into the appellant's trust account. The one trust transaction was a conveyancing matter where, pending transfer of the property, the appellant received the purchase price in trust for the seller, who was his client. As it happens, it was with reference to this transaction that the appellant's most serious transgression occurred. I will come to that. In the circumstances, it appears that the other occasions on

which the appellant's trust account was found to have been overdrawn did not involve any mismanagement of trust money at all.

[8] This brings me to the single trust transaction which related to the sale of an immovable property by the appellant's client, Mrs Hairs. On 11 August 2000, so Swart reported, the purchase price of roughly R330 000 was deposited into the appellant's trust account. On that day the credit balance in the account was only about R400. Immediately after 11 August a number of cheques were drawn on the account which were unrelated to the trust transaction. On 23 August 2000 an amount of approximately R270 000 was paid to Mrs Hairs. The appellant's trust cheque for the balance of R30 558 was, however, dishonoured on presentation, because there were insufficient funds available in the account. According to Swart, the cheque was eventually honoured by the bank after an amount of R50 000 had been deposited into the account on 31 August 2000. With regard to the Hairs transaction, the society was clearly correct in its conclusion that the appellant had breached its rule that there should never be any shortfall in an attorney's trust account. Moreover, on the face of it, the appellant on this occasion appropriated trust funds for purposes other than those for which they were intended.

[9] Compared to his transgressions with regard to the handling of his trust account, and particularly those resulting from the Hairs transaction, the appellant's other contraventions of the society's rules were considerably less serious. In the main, they consisted of two types. Contraventions of the first type resulted from his persistent failure to respond to enquiries by the society, emanating from relatively minor complaints by some of his clients. The second kind of contravention consisted of his failure 'to pay within a reasonable time, the fees and disbursements of other legal practitioners in respect of work that he entrusted to them'.

[10] The appellant's explanations for his misconduct were closely tied up with his narrative about the history of his professional career. Though he was admitted as an attorney on 16 July 1974, the appellant recounted, he only practised for about six months as a professional assistant, at the firm where

he served his articles of clerkship. He thereafter left the profession for more than 18 years, which were largely taken up by his involvement in various business ventures. In July 1993, the appellant said, he was persuaded to return to the attorney's profession. According to the appellant, over the next ten years, which preceded the striking-off application, he never succeeded in establishing a financially viable practice. He always practised on his own. He had very few clients and he constantly struggled to survive. During those ten years, he moved office no fewer than eight times because he could not afford the rental. He mostly did his own typing and administration and his bookkeeping often fell behind. During 2001, when most of his non-trust related transgressions occurred, he worked almost exclusively for one client who was in financial difficulty, hoping that he would be rewarded for his time and effort if the client survived. Unfortunately that did not happen. Towards the end of 2001, the ailing client was finally wound up. Because he had neglected the rest of his practice, so the appellant said, the liquidation of this client left him in an even greater predicament, financially and otherwise, than he had been before.

[11] Against this background, the appellant gave various explanations as to how it came about that he managed his trust account in a way which, at least on the face of it, seemed to demonstrate an almost wanton disregard for the rules of the society. Apart from the fact that he had to do everything himself while under pressure to survive, the appellant explained, he was never good at bookkeeping and he always had problems with accounting. Moreover, he said, he actually had very little practical experience to begin with at the time of his departure from the attorney's profession in 1975. When he eventually returned to practice in 1993, he had been out of what he described as 'the attorney culture' for too long. Although he was therefore aware of the fact that he was administering his trust account in contravention of the society's rules, he had no real appreciation of the seriousness of his transgressions. So, for instance, although he knew that he should not use his trust account for business purposes, he believed that as long as he only used funds due to him personally, 'I could regard the money as being in trust for myself and that it would not do anyone any harm'. With regard to his custom of not crossing

trust cheques and making them payable ‘to bearer’, his explanation was that these cheques were always made out to himself as payee; that he had cashed them at the bank and that he regarded them as ‘merely transfers of my money’.

[12] With regard to the Hairs transaction, the appellant attributed his transgressions to another client, Mr Martin, who had assured him ‘at about that time’ that an amount of R50 000 owing to him, had been transferred into his trust account. On the basis of this assurance, the appellant said, he wrote out ‘certain cheques’ until his cheque of R30 558 in favour of Mrs Hairs was dishonoured. According to the appellant, he only then realised that Martin’s assurance was not true. To the appellant’s way of thinking, his only real mistake was that he accepted Martin’s word without verification before he started writing out cheques. In the end, however, so the appellant contended, Mrs Hairs suffered no prejudice, because she received the amount owing to her once Martin’s deposit of R50 000 was made at the end of August 2000, as was borne out by Swart’s report.

[13] His other contraventions, not arising from the administration of his trust account, were essentially blamed by the appellant on his struggle during 2001 – when most of these contraventions occurred – to keep both his practice and his ailing client alive. In conclusion, the appellant conceded that he had made many mistakes and that ‘I have blundered through certain situations in a manner that I am not proud of’. Nevertheless, he submitted, he does not deserve to be struck from the roll, but he should be allowed to practise as an employee of another attorney, where his inability to manage a trust account would not be of any consequence. In support of this submission he referred to the affidavit of Mr Warwick Jones, an attorney practising for 26 years, who confirmed that he was prepared to take the appellant under his wing, as it were, in the capacity of a ‘consultant’.

[14] Despite these submissions the court *a quo* held, as I have said, that the appellant’s name should be removed from the roll. It’s *ratio decidendi*

seems to be encapsulated by the following quotation from the judgment of Van der Merwe J:

'The [appellant] now wants this court to allow him to continue his practice as an attorney, though as a consultant with another firm of attorneys, and, for the protection of the public, not to allow him to maintain or administer an attorney's trust account.

In my judgment, an attorney who is a fit and proper person to practise as an attorney, must also be able to maintain and administer a trust account. If he is not able to maintain and administer a trust account, he is, in my judgment, not a fit and proper person . . . .

I am satisfied that on the evidence as a whole the respondent is not a fit and proper person to practise as an attorney. His name will therefore be struck from the roll of attorneys.'

[15] In this court it was argued on behalf of the appellant that the court *a quo* had erred in finding, as a matter of principle, that an attorney's inability to maintain a trust account automatically renders him or her not a fit and proper person to continue in practice. In support of this argument it was pointed out, inter alia, that it is no requirement for admission as an attorney that the applicant should satisfy the court of his ability to maintain a trust account and that a separate trust account and a fidelity fund certificate are only required if the attorney wants to practise in partnership or for his own account (see s 41(1) of the Act).

[16] Though this argument is not completely without merit, it is unnecessary to decide in the abstract whether the view held by the court *a quo* can as a matter of principle be sustained. I say in the abstract, because the case against the appellant is not simply that he was unable to maintain and administer a trust account. Even more disturbing than mere inability is his degree of non-compliance with the society's rules which, in my view, showed no less than a total lack of appreciation of both the nature of and the reason for the institution of a trust account. This lack of appreciation is accentuated by some of his statements in mitigation. By way of example I refer to his statement with reference to the Hairs transaction, namely, that his only real mistake was that he had failed to verify Martin's statement that the amount of R50 000 had been transferred to his trust account before he started writing out cheques. What he obviously failed to consider was the question: what would have happened if Martin was unable to meet his obligation? Or, what

would have happened if the appellant's estate was sequestrated before he was eventually paid by Martin? He therefore failed to realise that in these situations Mrs Hairs would clearly have been at risk, while the total absence of risk constitutes the very essence of an attorney's trust account (see eg *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 394B-C).

[17] Added to this are the appellant's other transgressions not related to his trust account. Though they may not on their own have been serious enough to render the appellant not fit and proper, this issue must be decided on the totality of all the evidence. On the evidence as a whole I am satisfied that the court *a quo* cannot be faulted in arriving at the conclusion that the appellant is not a fit and proper person to continue to practise as an attorney, as is envisaged by s 22(1)(d) of the Act. In the light of this finding there were only two options available to the court *a quo*: to suspend the appellant from practice or to strike him from the roll (see *Budricks supra* at 16C-E). Merely interdicting him from practising for his own account, would not suffice.

[18] This brings me to the third enquiry, namely, whether the appellant should be removed from the roll of attorneys or whether an order suspending him from practice would be an appropriate sanction. In answering this question sight should not be lost of the reality that in its effect the imposition of the former stricture constitutes a severe penalty. Apart from the ignominy of being struck off the roll, the attorney will be precluded from practising his profession for a substantial period of time. This is so because, as was pointed out by Galgut AJA in *Law Society of the Cape v C* 1986 (1) SA 616 (A) at 640D-E:

'Such an order envisages that the attorney will not be re-admitted to practise unless the court can be satisfied by the clearest proof that the applicant has genuinely reformed, that a considerable period has elapsed since he was struck off and that the probability is that, if reinstated, he will conduct himself honestly and honourably in the future.'

[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.

These objectives have been described as twofold: firstly, to discipline and punish errant attorneys and, secondly, to protect the public, particularly where trust funds are involved (see eg *Budricks supra* at 16E-G).

[20] It was argued on behalf of the appellant that he did not deserve the ultimate penalty of striking-off, because he was never found to be dishonest. Factually this argument appears to be well founded. None of the appellant's transgressions seems to reflect on his honesty and integrity. Although his trust account was in debit on a number of occasions, these mostly did not involve trust funds at all. It is true that on the one occasion where he was called upon to manage trust funds, he did in effect use those funds for unauthorised purposes. But even on this occasion he cannot be said, in my view, to have misappropriated trust money, in the sense of dishonestly using it for himself. His explanation is that he did so inadvertently because he acted on the assurance of a client that sufficient funds had previously been transferred to his trust account. It is true that his explanation was rather vague, but it is not gainsaid by any direct evidence. On the contrary, his version is to some extent borne out by the investigation of Swart. It is, at least indirectly, supported by both Martin and Hairs.

[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 (see eg *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A); *Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop* 1994 (1) SA 359 (A); *Law Society of the Cape of Good Hope v King* 1995 (2) SA 887 (C) at 892G-894C; *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538I-539A; *Law Society, Cape of Good Hope v Peter* [2006] SCA 37 (RSA) para 19). This distinction is not difficult to understand. The attorney's profession is an honourable profession, which demands complete honesty

and integrity from its members. In consequence, dishonesty is generally regarded as excluding the lesser stricture of suspension from practice, while the same can usually not be said of contraventions of a different kind.

[22] Though not contending that the appellant had been dishonest, the essential theme of the argument on behalf of the society was that the appellant's transgressions were so serious that they show him to be unworthy to remain in the ranks of the attorney's profession. Inter alia, it was contended, his misconduct displayed a complete inability to distinguish between the true nature of trust funds and funds in a business or private account, which lack of insight can only be ascribed to a reckless disregard for the most basic rules of the society aimed at the protection of trust funds. In any event, so the society argued, the appellant had failed to demonstrate a misdirection by the court *a quo* which would warrant an interference with the exercise of its discretion to strike the appellant off the roll.

[23] With reference to the society's last argument, it is, of course, a well-established principle that, in an appeal against the exercise by a court of a discretion, the appeal court has a limited power to interfere; that it cannot do so merely because it would have exercised that discretion differently (see eg *Budricks supra* at 14B). My problem is, however, that it does not appear from the court *a quo*'s judgment in this matter that it had exercised its discretion in a proper manner. From the statement that I have quoted (in para 14 above) the court seemed to suggest that, because it had found the appellant not to be a fit and proper person, his striking-off should follow as a matter of course. That would mean that the third enquiry under s 22(1)(d) had been passed over entirely. The only alternative meaning that can, in my view, be ascribed to the court's statement, is that, if an attorney is found unable to administer and conduct his trust account, his striking-off should follow automatically. For reasons that are, in my view, self-evident, such a broad statement cannot be sustained. Either way, the court's statement therefore reflects a misdirection which obliges this court to exercise its discretion anew.

[24] That the appellant's transgressions were serious, particularly when viewed in their totality, cannot be gainsaid. The question whether they were serious enough to warrant the extreme penalty of striking-off, ultimately depends on a value judgment. On the application of that value judgment, I am persuaded that in all the circumstances the penalty of striking-off is too severe. What weighs heavily in the appellant's favour is the consideration that I have already referred to, namely, that he was not guilty of dishonesty. The society's contention was that, though a finding of dishonesty may not be warranted, the appellant's misconduct displayed a complete lack of insight into an attorney's obligations with regard to his trust account. I agree. What I do not agree with, however, is the inference sought to be drawn by the society that this lack of insight must be attributed to a reckless disregard for its rules aimed at the protection of trust funds. On the appellant's version, which cannot be rejected, his lack of insight resulted from a dearth of knowledge and experience. Though these answers will rarely be acceptable from an attorney such as the appellant, who must be approaching middle age and who has been practising for more than ten years, his situation appears to be quite exceptional. He had no experience of note before he left the attorney's profession for about 18 years and he has hardly had any exposure to trust transactions since his return. Because he always practised on his own, he never benefited from the guidance of more experienced colleagues and, because he was always struggling to survive, he was unable to employ knowledgeable assistance.

[25] The next question is whether protection of the public requires that the appellant be struck from the roll. Again I think not. The appellant has clearly learnt a hard and painful lesson. In the circumstances, the probabilities are, in my view, that if he is suspended from practice for a period of one year, he will no longer suffer from the lack of insight into the nature of an attorney's trust account which now renders him unfit to continue his practice. Moreover, the appellant's declared intention is to practise as an employee for an experienced attorney and not in partnership or for his own account. I propose to secure that undertaking by way of a court order. That, I think, will as far as humanly possible, eliminate any residual public risk. In the end, the type of

order made by the Cape High Court and recently endorsed in a majority judgment of this court in *Peter (supra),* seems to be eminently suitable for this case. Though Ms Peter was found to be unfit to practise as an attorney, because she had dishonestly misappropriated trust money for her own purposes, the majority agreed with the Cape High Court that she did not deserve to be struck off the roll and that an order suspending her from practice for a period of one year would suffice. Writing for the majority, Farlam JA then proceeded as follows (at paras 22-23):

'I am also of the view that it was appropriate for the court *a quo* to impose a further restriction on the respondent after the expiry of the period of suspension, namely that for a minimum period of one year she should not practise for her own account.

At first blush it may appear illogical to impose such a restriction on a person as to whose fitness to practise one is satisfied, but this is in my opinion a case where it is preferable to err on the side of caution. Although a repetition is unlikely there is always, by the very nature of things, uncertainty. The respondent has shown herself to be naïve and immature, lacking in experience and insight. It therefore seems to have been a wise precaution for the court *a quo* to have restricted her from practising for her own account for a further period after the expiry of her suspension so that she has the opportunity to gain the necessary insight and maturity, the lack of which led to her present predicament.'

[26] I believe, however, that whereas Ms Peter was precluded from practising independently for a period of one year after the expiry of her suspension, that period should, as an additional precaution, be extended to two years in the appellant's case. Otherwise I also propose to follow the precedent in *Peter* by ordering that, after that period of two years, he will only be allowed to practise for his own account if he can satisfy the court that it would be appropriate to allow him to do so. Apart from the changes to the court *a quo*'s order which are necessitated by what I have said above, that order can for the rest be confirmed.

[27] For these reasons the following order is made:

1. The appeal is upheld with costs.
2. Paragraph 1 of the order of the court *a quo* is set aside and replaced by the following:

‘1(a) Kevin John Rollo Summerley (hereafter referred to as the respondent) is suspended from practice as an attorney for a period of one year.

(b) The respondent is precluded from practising as an attorney for his own account, either as principal or in partnership or in association or as a director of a private company for a period of two years from the expiry of the suspension in (a) above.

(c) Should the respondent, after the expiry of the period referred to in (b) above elect to practise in the manner set out in that paragraph, he shall satisfy the High Court within the jurisdiction of which he then practises that he should be permitted to practise for his own account.’

3. For the rest, the order of the court *a quo* is confirmed.

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F D J BRAND
JUDGE OF APPEAL

Concur:

MPATI DP
CONRADIE JA
VAN HEERDEN JA
JAFTA JA