THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 20252/14

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES **Appellant**

and

CHRISTOPHER MABASO **Respondent**

Neutral citation: *Law Society of the Northern Provinces v Mabaso* (20252/14) [2015] ZASCA 109 (21 August 2015)

Coram: Mpati P, Cachalia, Mhlantla and Leach JJA and Dambuza AJA

Heard: 4 May 2015

Delivered: 21 August 2015

Summary: Attorney – Misconduct – Appropriate Sanction – Misappropriation of trust moneys – Whether warranting suspension or removal – Three-stage enquiry for removal of attorneys from roll restated – Attorney guilty of dishonesty - Attorney having failed to take responsibility in initial responses – Sanction of suspension not suitable – Errant attorney struck off.

ORDER

On appeal from: Gauteng Division, Pretoria (Twala AJ and Mabuse J, sitting as a court of first instance):

1 The appeal is upheld, with costs, to be paid on the scale as between attorney and client.
2. The order of the court a quo is set aside and replaced with the following:

'(a) The respondent's name is struck from the roll of attorneys of this court and the respondent is ordered to pay the costs of the application on the scale as between attorney and client.

(b) The respondent is ordered to deliver and hand over his certificate of enrolment as an attorney to the Registrar of this court.

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

(d) There will further be an order in terms of prayers 4 to 12 inclusive of the notice of motion, that relief being contained in annexure "A" hereto.'

JUDGMENT

Mpati P (Cachalia, Mhlantla and Leach JJA and Dambuza AJA concurring):

[1] The respondent is an admitted attorney practising as such in Lebowakgomo, Limpopo. During October 2010 the appellant (the Law Society) instituted motion proceedings against him, seeking an order, inter alia, that his name be struck from

the roll of attorneys. The Gauteng Division of the High Court, Pretoria (Twala AJ, Mabuse J concurring), however, declined to issue a striking off order and, instead, made the following order:

'I. That the respondent be and is hereby suspended for a period of one (1) year from the date of this order;

II. That the respondent is precluded from practising as an attorney for his own account, either as a 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 (I) above;

IV. Should the respondent elect to practise in the manner set out in paragraph (II), after the expiry of the period of two years, he shall satisfy this Court that he should be permitted to practise for his own account;

. . . .'

Further ancillary orders were granted relating to the appointment of a *curator bonis* to take control of the respondent's accounting records, files and documents, etcetera and to administer his trust account. The respondent was also ordered to pay the costs of the application on the scale as between attorney and client. This appeal is against that order with leave of the court below.

[2] It is now settled that an application for the removal from the roll, or suspension from practice, of an attorney involves a three-stage enquiry. First, the court has to determine whether the alleged offending conduct has been established on a balance of probabilities. Second, consideration must be given to the question whether, in the discretion of the court, the person concerned is not 'a fit and proper person to continue to practise as an attorney'.[1] Third, the court is required to consider whether, in all the circumstances, the name of the attorney concerned should be removed from the roll of attorneys or whether an order suspending him or her from practice would suffice. (See *Summerley v Law Society, Northern Provinces* [2006] ZASCA 59; 2006 (5) SA 613 (SCA) para 2 and the cases there cited.)

[1] See s 22(1)(*d*) of the Attorneys Act 53 of 1979.

[3] As to the first stage of the enquiry, namely the offending conduct, the facts have largely become common cause although, initially, some were disputed by the respondent, an aspect to which I shall return later in this judgment. After it had received a complaint against the respondent relating to his alleged failure to account in respect of trust funds held in his trust account, the Law Society instructed an internal auditor, Ms Phossina Mapfumo, to investigate, to inspect the accounting records of the respondent and to identify and report on any contraventions by the respondent of the provisions of the Attorneys Act 53 of 1979 (the Act) and the Law Society's rules (the Rules). Having conducted the investigation and inspection, Ms Mapfumo reported to the Law Society on 14 May 2010. Her report was annexed to the Law Society's founding affidavit deposed to by its president, Mr Carel Pieter Fourie.

[4] The complaint mentioned above was lodged by Mr B S Kekana during October 2009. He had instructed the respondent to institute a third party claim in respect of injuries sustained by his son. Upon making enquiries from the Road Accident Fund during September 2009 he was informed that an amount of R76 500 had been paid into the respondent's trust banking account on 23 March 2008. On 19 October 2009 Mr Kekana received a cheque from the respondent in the sum of R10 000. These facts are thus far common cause. Ms Mapfumo's report reveals that upon inspection the trust banking account of the respondent's firm had a credit balance of only R87,07 whilst the trust creditors' balance was R30 000, which meant that there was a shortage of R29 912,93. The existence of a deficit in the trust banking account constituted a contravention of the provisions of s 78(1) of the Act, read with rule 69 of the Rules, in that the firm did not ensure that the total amount of money in its trust banking account, trust investment account and trust cash was not, at any date, less than the total amount of the credit balances of the firm's trust creditors.

[5] With regard to the complaint lodged by Mr Kekana, it is common cause that on 27 March 2008 the respondent transferred a sum of R26 000 from the firm's trust account to its business account. On 4 April 2009 an amount of R50 000 was paid out

of the trust account. In both his answering and supplementary answering affidavits the respondent averred that the last-mentioned amount was transferred from the trust account to the business account. He explained that the first transfer of R26 000 was made up of a 25% contingency fee of R19 125 and the rest (R6 875) as part of the attorney and client fees due to the firm totalling R7 375. As to the second transfer of R50 000 he said:

'The R50 000,00 . . . was used to hire a secretary, purchasing of office furniture and equipment, advance rental payment and assisting in personal financing of funeral expenses of relatives who passed away as in that time there was no one to assist and the Respondent as an attorney and a breadwinner was expected to assist in this regard.'

The respondent, therefore, admitted the allegation made in the founding affidavit that he misappropriated trust funds, but said this was an error on his part and that 'the said mistake was rectified . . . '.

In this regard the Law Society seemed to have accepted the respondent's assertions to Ms Mapfumo that on 27 November 2009 (after the first payment on 19 October 2009) he made a payment in cash to Mr Kekana in the sum of R10 000 and that during December 2009 and on 21 May 2010 he made further cash payments of R5000 and R25 000 respectively.[2] The respondent, however, admitted that he failed to keep Mr Kekana's moneys available in the firm's trust account and that he failed to account to Mr Kekana and delayed the payment of trust funds. He also admitted that he contravened certain rules relating to transfers and withdrawals of trust moneys

[6] There were two other complaints against the respondent. The first was lodged by Etha Smit Attorneys of Kempton Park, who alleged in a letter to the Law Society dated 1 July 2010, that the respondent had failed to account to them in respect of moneys collected pursuant to instructions to act as their correspondent. The respondent had failed, so it was further alleged, to respond to five letters addressed

[2] Ms Mapfumo reported that the respondent provided her with an affidavit (annexed to the report) allegedly deposed to by Mr Kekana on 28 May 2010 confirming the payments.

to him[3] and to return four calls made to, and messages left for, him.[4] He had also failed to honour an undertaking given on 15 April 2010 to respond to them in writing. The Law Society submitted that the respondent's conduct in this regard constituted a contravention of the provisions of rule 89.23. The respondent's response to these allegations was that the complaint was brought prematurely before the court below as he had never been given an opportunity to reply thereto. In any event, he said, he had personally resolved the matter. He attached to the answering affidavit a copy of a letter from Etha Smit Attorneys dated 4 October 2010, addressed to the Disciplinary Department of the Law Society, in which it was stated that the respondent had returned their file and that they regarded the matter 'as settled'. In his supplementary answering affidavit the respondent merely stated that despite acknowledging receipt of a payment (from his firm) of an amount of R1 100 in their letter of 29 July 2009 and of receipt of a facsimile (from his firm) in the subsequent letter dated 15 September 2009, Etha Smit Attorneys 'still insist and/or act as if they have never received any response from the respondent . . . '. As to his failure to respond to messages his explanation was that 'they did not come to his attention as his handset was stolen by then'.

[7] The second of the two further complaints was lodged by Mr and Ms T E Tseoga who had instructed the respondent to act for them in a matter in the Polokwane Magistrates' Court in which they were defendants. They complained that they had eventually discovered that judgment had been entered against them after the respondent had withdrawn as their attorney of record without having either consulted them or given them reason to do so. The Law Society referred the complaint to the respondent on 20 September 2010 for his comment, but as at the date of signature of the founding affidavit, it had not received any response from him. The respondent's answer to the allegation that he had failed to respond to the complaint referred to him by the Law Society was that, on 23 August 2010, he had

[3] The letters were dated 19 June 2009, 20 October 2009, 14 August 2009, 15 September 2009 and 23 October 2009.
[4] The calls were made and messages left on 17 Mach 2010, 19 March 2010, 29 March 2010 and 1 April 2010.

received the Tseoga complaint from the Limpopo Law Society and had responded thereto by letter dated 15 September 2010. The Law Society's allegation that they had not received any response from him, therefore, surprised him. As to his withdrawal as the complainants' attorney of record, the respondent stated in his answering affidavit that he had done so because the complainants had been disrespectful to him. In his supplementary answering affidavit he elaborated and averred that Mr Tseoga had scolded him and accused him of being a crook in that he had arranged with the Magistrate in Polokwane to steal his money.

[8] The Law Society alleged in its replying affidavit that by failing to respond to its referral relating to the Tseoga complaint and to Etha Smit Attorneys' letters the respondent had contravened the provisions of rules 89.23 and 89.25 and was therefore guilty of unprofessional, dishonourable and unworthy conduct. And when it addressed a letter to an attorney, it said, the latter is obliged to reply. The fact that the respondent had replied to the Limpopo Law Society was, therefore, no excuse for his failure to reply to its letter. I agree. In the unreported judgment in *The Law Society of the Northern Provinces v Tiego Moseneke*, Case no 15588/2000 (delivered on 7 June 2006), Leach J (McLaren J concurring) said the following:

'The importance of an attorney co-operating and dealing with complaints of professional misconduct hardly needs to be stated, and failures to do so are viewed seriously by the courts. Thus, for example, in both the *Human* case and *Prokureursorde van die Noordelike Provinsies v Grové*, an attorney's failure to reply to correspondence from the Law Society about complaints it had received, was taken into account as a material consideration justifying striking off.'[5] (Footnote omitted)

In its judgment the court below referred to the respondent's failure 'to answer correspondence from colleagues and that of the Law Society' as facts that are common cause. In his heads of argument, to which I shall refer later, the respondent confirmed the finding or statement relating to common cause facts. It follows that the Law Society proved the contraventions by the respondent of rules 89.23 and 89.25.

[5] Para 172.

[9] Other transgressions by the respondent found by the court below to be common cause were that he had not maintained any trust creditors' ledger accounts in contravention of rules 68.1 and 68.2; that lists of trust creditors were not available as the respondent had not prepared them (a contravention of rule 69.7.1); and that the respondent had neglected to give proper attention to the affairs of his clients in contravention of rule 89.15. The last-mentioned transgression related to a finding of the Investigating Committee of the Law Society's Council, which investigated Mr Kekana's complaint, that his minor son had been seriously injured and that the settlement amount of R76 500 was 'insufficient by far'.

[10] Lastly, the court below found it to be common cause that the respondent 'failed to attend disciplinary proceedings of the committees of the council' of the Law Society. After it had received and considered Mr Kekana's complaint, the Law Society referred it to the Investigating Committee, which notified the respondent to appear before it on 15 April 2010. On 7 April 2010, the respondent requested a postponement, which was refused because the Investigating Committee was not satisfied with the basis of his request, namely, that he was not feeling well. But the respondent failed to attend the proceedings on the scheduled date and, shortly before the commencement of the proceedings, furnished the Committee with a letter in which he requested to be excused as he was returning from a consultation in Venda. However, in his answering affidavit the respondent alleged that he could not attend the proceedings because he had been involved in an accident and was in pain. The situation, he said, was beyond his control. The respondent failed to explain the contradictory reasons he had given for his failure to attend the proceedings before the Investigating Committee of the Law Society in his supplementary answering affidavit despite his attention having been drawn thereto in the Law Society's replying affidavit. It seems to me that the second explanation, namely, that he failed to attend the enquiry because he had been involved in an accident was clearly an afterthought as it was brought up for the first time in the answering affidavit. This clearly evidences not only a lack of co-operation with the Law Society on the part of the respondent but, importantly, a lack of candour with the court.

[11] In light of all these transgressions, though not fully set out in its judgment, the court below concluded, with regard to the second enquiry, that the respondent 'is not a "fit and proper person" to practise as an attorney of this Court'. I agree with that conclusion and shall now proceed to consider the third enquiry, namely, whether, as argued on behalf of the Law Society, the respondent's transgressions are such that they should be visited with an order striking his name off the roll or whether the order of the court below suspending him from practice for a period of one year suffices. As was said in *Jasat v Natal Law Society* [2000] ZASCA 14; 2000 (3) SA 44 (SCA), the appropriate order 'will depend upon such factors as the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession . . . , the likelihood or otherwise of a repetition of such conduct and the need to protect the public'.[6]

[12] When the matter was called in this court the respondent was neither present nor represented. The registrar's office was directed to enquire from the local correspondents of the respondent's attorneys (J M Mampora Attorneys of Lebowakgomo) whether the respondent had received the notice of the date of the appeal hearing. It was reported to us that the local attorneys, N W Phalatsi & Partners, had assured the registrar that the notice of set-down was forwarded to J M Mampora Attorneys, but that the latter had intimated that the respondent could not be traced. The hearing of the appeal therefore proceeded in the absence of the respondent. However, upon the request of the court, the Law Society's Pretoria attorneys, Rooth & Wessels, were able to trace him through J M Mampora Attorneys. In an affidavit filed on 7 May 2015, Mr Pieter Johannes Smith of the firm Rooth & Wessels testified that on 5 May 2015 he had personally spoken to the respondent, who confirmed that he had been unaware that the appeal had been set down for hearing on 4 May 2015. The respondent was then invited, through the registrar's office, to file heads of argument, if he so wished, which he did. The Law Society decided not to file further heads of argument in response.

[6] Para 10.

[13] In arriving at the sanction ultimately imposed, namely, a suspension from practice, the court below reasoned thus:

'I have no doubt in my mind that the transgressions of the respondent are serious when viewed in totality. The court has now to decide whether they were serious enough to warrant the extreme penalty of striking off. In my view the respondent was not found guilty of dishonesty and therefore the penalty of striking off is rather too severe in this particular case. This is so because, on the respondent's version, he did not have exposure to the administration of the trust account since his first admission as an attorney in 2001. He only started operating a trust account after he started practising on his own account.'[7]

The Law Society took issue with the finding that the respondent 'was not found guilty of dishonesty'. It was submitted on its behalf that the respondent's admitted misappropriation of trust funds and the manner in which he responded to the allegations (of misappropriation of trust funds) involved dishonesty. A further submission was that the court below should have found that by deducting a total fee of R26 000 from the settlement amount of R76 500, the respondent overreached his client. With regard to the last-mentioned submission, and as recorded above (para 5), the fees of R26 000 included a contingency fee of R19 125. However, no document was attached to the respondent's affidavits to prove that a contingency fee agreement had indeed been concluded between the respondent and Mr Kekana. In view of the failure to attach a copy of the agreement to the respondent's answering or supplementary answering affidavit, it is doubtful whether such an agreement was ever concluded. In the view I take of the matter, however, it is unnecessary to pursue the issue further.

[14] In exercising its function in respect of the third enquiry, namely, considering what sanction should be visited on the respondent, the court below was called upon to exercise a discretion. This court, on appeal, therefore, has a limited power to interfere. It can only do so where the court below is found to have 'exercised its discretion capriciously, or upon a wrong principle, or where it has not brought its unbiased mind to bear on the question or where it has not acted for substantial

[7] Para 14.

reasons' (*Vassen v Law Society of the Cape of Good Hope* [1998] ZASCA 47; 1998 (4) SA 532 (SCA) at 537F-G).

[15] Dealing with the complaint lodged by Mr Kekana, the court below said the following:

'Due to financial problems and having to meet his operating expenses, [the respondent] transferred R50 000 into his business account hoping that his other clients would pay him in time so that he could pay Mr Kekana.'[8]

There is no allegation in the respondent's answering and supplementary answering affidavits that at the time he made the transfer he had been hoping that other clients would pay him in time so that he could pay Mr Kekana. The respondent merely stated, in his supplementary answering affidavit, that the delay in accounting to Mr Kekana 'was due to the fact that the respondent failed to raise the client's amount transferred to the business account'. The source from which the money was hoped to be raised was never mentioned. There was no evidence that, at the time he misappropriated the trust money that had been due to Mr Kekana, the respondent had another client, or other clients, who owed him fees that would cover the misappropriated amount. The court below, therefore, misdirected itself on the facts.

[16] Moreover, it is difficult to understand the basis for the court's comment or finding that the respondent 'was not found guilty of dishonesty'. The common cause facts are that the respondent kept the money due to Mr Kekana for a period of more than a year before he transferred the sum of R50 000 from his trust account to the business account, which he subsequently misappropriated. He made payment to Mr Kekana of only R10 000 after a period of more than 18 months following the settlement of the claim and payment of the settlement amount to his firm. In his answering affidavit the respondent stated that the money (R50 000) 'was erroneously transferred' into his business account; that he informed Mr Kekana thereof and that they 'agreed that the amount . . . will be paid'. Thus, on his own version the respondent appropriated the money without the consent of Mr Kekana.

[8] Para 7 of the judgment.

This amounted to theft and the fact that the stolen money may have been repaid does not detract from the seriousness of that offence. (Compare *Vassen* at 537G-H.) The respondent therefore acted dishonestly and the court below should have found accordingly. Its failure to do so amounted to a misdirection. This court is thus at large to interfere with the exercise, by the court below, of its discretion.

[17] As to the other transgressions, the court below characterised them as 'administrative in nature', but observed later that it had no doubt that they 'are serious when viewed in totality'. But, having found that the respondent 'was not found guilty of dishonesty', the court concluded that 'the penalty of striking off is rather too severe in this particular case'. The respondent's version that he never had exposure to the administration and management of a trust account before he commenced practice for his own account also played a part in persuading the court below to arrive at the sanction to which it did. What is of grave concern, though, is the following observation made by the court below:

'The respondent appeared in person and did not strike me as a delinquent person but as someone who is prepared to learn and continue his professional career. Given a chance, the respondent undertook to attend the practise management course being offered by the applicant . . . .'[9]

First, there is no indication in the record that the respondent gave evidence before the court below. The undertaking must, therefore, have been given from the bar and should not have been given as much weight as the court appears to have done. Second, the observation made by the court from the respondent's appearance and its conclusion that he did not strike it as a delinquent person was irrelevant for purposes of considering a proper sanction. What mattered was the conduct of the respondent complained of, his responses and attitude thereto, and whether from that it may be concluded that he should remain in what is known as an honourable profession (*Vassen* at 538I–539A and *Summerley* para 21).

[9] Para 15 of the judgment.

[18] The fact that this court has now made the finding that the respondent's conduct in relation to Mr Kekana's complaint involved dishonesty does not necessarily mean that the more severe sanction of striking off must be visited on him. As was said in *Summerley*, before imposing 'this severe penalty' a court should be satisfied that 'the lesser stricture of suspension from practice will not achieve the objectives of the Court's supervisory powers over attorneys'.[10] In supporting the sanction imposed by the court below the respondent, in his heads of argument, relied on this court's decisions in *Summerley* and *Law Society of The Cape of Good Hope v Peter* [2006] ZASCA 37; 2009 (2) SA 18 (SCA). In each of those matters this court ordered a suspension from practice rather than striking off. The respondent submitted that he made full disclosure to the Law Society of the reason for his misappropriation of trust funds as well as for his failure to keep proper books of account and that, therefore, the court below 'gave a fair and reasonable judgment' in suspending him from practice for a period.

[19] In *Summerley*, the appellant's trust cheque for R30 558 made out to one of his clients as payment for an amount due to the client was dishonoured on presentation, but was subsequently honoured, approximately eight days later, after an amount of R50 000 had been deposited into the account. The appellant in that case had thus breached the Law Society's rule that there should never be a shortfall in an attorney's trust account. His explanation for the shortfall was that he had written out 'certain cheques' on the strength of an assurance from another client that he (the client) had transferred an amount of R50 000 owing to the appellant 'at about that time'. He only realised that the assurance given to him was not true when the cheque was dishonoured. There were other contraventions of the Rules by the appellant which this court found to be 'considerably less serious'. With regard to the transgression relating to the trust account, this court held that the appellant could not be said 'to have misappropriated trust money in the sense of dishonestly using it for himself'.[11] That is not the case in the instant matter, where the respondent dishonestly used trust money for himself and his relatives.

[10] Para 19.
[11] Para 20.

[20] In *Peter*, the respondent, who had started practising with no capital after her admission on 2 August 2002, transferred trust money from her trust account, which she had received during December 2002, to her business account and used it to pay her outstanding practice expenses. Further amounts were subsequently debited to her trust account with the result that at the end of March 2003 she only held R2 272,22 in trust when, on her own calculations, she should have been holding R22 805,28. On 4 June 2003 the Law Society of the Cape of Good Hope (Cape Law Society) sent her a copy of a complaint lodged by one of her clients that he had not received a full accounting from her regarding amounts she had received on his behalf. In her reply she pleaded guilty to professional misconduct and set out certain factors to be considered by the Cape Law Society 'in mitigation of sentence'. The admission was repeated in her answering affidavit. In her case, the court of first instance found that there were exceptional circumstances not to order a striking off. What counted in her favour was 'her frank and full disclosure, accepting responsibility for her conduct, the short duration and limited nature of her misconduct, her expression of contrition and her willingness to effect restitution . . .'.[12] On appeal this court held that she had 'showed herself to be naïve and immature, lacking in experience and insight' and that she was 'not an inherently dishonest person' (Para 23).

[21] In my view, there are no exceptional circumstances present in the instant matter. When the Law Society invited the respondent to comment on the report of the Investigating Committee, he claimed that he had paid the amounts mentioned above (in para 5) and had therefore settled the matter with Mr Kekana. He blamed his former principal for coercing Mr Kekana to report him so that he could be struck off the roll. The only admission contained in the answering affidavit was that the money (R50 000) 'was erroneously transferred into my business account'. There was no explanation as to what had happened to the money. Indeed, in respect of the improper transfer of trust funds and certain other allegations relating to other transgressions he called on the Law Society to provide proof thereof. With regard to

[12] Quoted in para 13 of this court's judgment.

Mr and Ms Tsheoga's complaint the respondent again blamed his former principal who, he alleged, had instructed Mr Tsheoga to lodge a complaint against him. He also accused Ms Mapfumo of choosing 'to fabricate her own story' in response to an allegation in the founding affidavit that there was a trust deficit in his bookkeeping. The respondent thus failed to take responsibility for his conduct and, instead, levied false accusations against others in an attempt to mislead the court. This, in itself, was wholly inconsistent with his duties as an officer of the court and must be viewed in an extremely severe light (see *Reyneke v Wetgenootskap van die Kaap die Goeie Hoop* 1994 (1) SA 359 (A) at 370A).

[22] It was only after the Law Society had referred, in its replying affidavit, to the judgment of this court in *Law Society of the Northern Provinces v Mogami* [2009] ZASCA 107; 2010 (1) SA 186 (SCA)[13] that the respondent deposed to a supplementary answering affidavit, in which he admitted, inter alia, to having misappropriated trust funds and set out the circumstances under which the funds were misappropriated. In *Mogami*, this court issued a warning in these terms:

'It has become a common occurrence for persons accused of a wrongdoing, instead of confronting the allegation, to accuse the accuser and seek to break down the institution involved. This judgment must serve as a warning to legal practitioners that courts cannot countenance this strategy. In itself it is unprofessional.'[14]

As has been shown above, the respondent, instead of confronting the allegations against him sought, in his answering affidavit, to accuse others and to call for proof of the allegations. To my mind the respondent has exhibited a lack of insight into the wrongfulness of his actions and a complete disregard for the Law Society's rules relating to the protection of trust funds. Despite the change of stance in the supplementary answering affidavit, the respondent's initial responses and attitude to the allegations against him preclude me from concluding that a repetition of the transgressions is unlikely in the future.

[13] A copy of the judgment was attached to the replying affidavit.
[14] Para 26.

[23] Although the respondent's other transgressions, which the court below described as being administrative in nature, were serious, they possibly might not, by themselves, have moved this court to find that the respondent was not fit to continue to practise – in the same breath, I should mention that this court has held that the failure to keep proper accounting records is a serious offence rendering an attorney liable to be struck off (see *Cirota v Law Society, Transvaal* 1979 (1) SA 172 (A) at 193C-G). However, the misappropriation of trust funds, which he failed to acknowledge and disclose until very late, taken together with the unacceptably long delay in accounting to Mr Kekana, were extremely serious. Dealing with an argument advanced on behalf of the appellant in *Summerley* 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 this court, acknowledging the distinction, said:

'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.'[15]

I can find no reason for departing from the sanction generally imposed in respect of transgressions involving dishonesty. Taking that dishonesty into account, together with the other features of this case already mentioned, the respondent clearly should not be allowed to practise. The appeal must accordingly succeed.

[24] In its notice of motion the appellant sought a number of detailed prayers customarily made in matters of this nature, authorising it to take various steps to wind-up the respondent's practice. To avoid prolixity, the terms of that relief can be included by reference to the annexure to this judgment.

[25] In the result, the following order shall issue:

1 The appeal is upheld, with costs, to be paid on the scale as between attorney and client.

[15] Para 21. See also *Vassen* at 538G-H.

2 The order of the court a quo is set aside and replaced with the following:

‘(a) The respondent’s name is struck from the roll of attorneys of this court and the respondent is ordered to pay the costs of the application on the scale as between attorney and client.

(b) The respondent is ordered to deliver and hand over his certificate of enrolment as an attorney to the Registrar of this court.

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

(d) There will further be an order in terms of prayers 4 to 12 inclusive of the notice of motion, that relief being contained in annexure “A’’ hereto.’

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L Mpati
President

APPEARANCES

For the Appellant:	P J Smith Instructed by: Rooth & Wessels Inc, Pretoria Phatsoane Henney, Bloemfontein
For the Respondent	No Appearance Instructed by: J M Rampora Attorneys c/o Sekati Monyane Attorneys, Pretoria N W Phalatsi & Partners, Bloemfontein

ANNEXURE ‘A’

‘1. The respondent is prohibited from handling or operating on his trust accounts as detailed in paragraph 5 hereof.

2. Mr Johan van Staden, the head: members affairs of applicant, is appointed as curator bonis (curator) to administer and control the trust accounts of the respondent, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with the respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by the respondent at a bank in the Republic of South Africa in terms of section 78(1)of Act 53 of 1979 or any separate savings or interest-bearing accounts as contemplated by section 78(2) or section 78 (2A) of Act 53 of 1979, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said sub-sections or in which monies in any manner have been deposited or credited (the said accounts being hereafter referred to as ‘the trust accounts’), with the following powers and duties:

2.1 immediately to take possession of the respondent's accounting records, records, files and documents as referred to in paragraph 3 and subject to the approval of the board of control of the attorneys fidelity fund (hereinafter referred to as ‘the fund’) to sign all forms and generally to operate upon the trust account(s), but only to such 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

2.2 subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) or against the respondent in respect of monies held, received and/or invested by the respondent in terms of section 78(1) and/or section 78(2) and/or section 78(2A) of Act 53 of 1979 (hereinafter referred to as ‘trust monies’), to take any legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions, if any, in which the respondent was and may have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);

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

2.4 to call upon such trust creditors to furnish such proof, information or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of, the board of control of the fund, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of respondent and, if so, the amount of such claim;

2.5 to admit or reject, in whole or in part, subject to the approval of the board of control of the fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;

2.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the board of control of the fund;

2.7 in the event of there being any surplus in the trust account(s) of the respondent 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 Act 53 of 1979 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of the respondent, the costs, fees and expenses referred to in paragraph 10 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 respondent, if he/she is solvent, or, if the respondent is insolvent, to the trustee(s) of the respondent's insolvent estate;

2.8 in the event of there being insufficient trust monies in the trust banking account(s) of the respondent, in accordance with the available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s)

which may be available in the trust banking account(s) amongst the trust creditors, alternatively, to pay the balance to the Attorneys Fidelity Fund;

2.9 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, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and

2.10 to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of the respondent has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.

3. The respondent must immediately deliver his accounting records, records, files and documents containing particulars and information relating to:

3.1 any moneys received, held or paid by the respondent for or on account of any person while practising as an attorney;

3.2 any moneys invested by the respondent in terms of section 78(2) or section 78 (2A) of Act 53 of 1979;

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

3.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by the respondent, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;

3.5 any insolvent estate administered by the respondent as trustee, or on behalf of the trustee, in terms of the Insolvency Act 24 of 1936;

3.6 any trust administered by the respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act 57 of 1988;

3.7 any company or close corporation in liquidation administered by the respondent as or on behalf of the liquidator;

3.8 the respondent's practice as an attorney of the High Court, to the curator appointed in terms of paragraph 2 hereof, provided that, as far as such accounting records, records, files and documents are concerned, the respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.

4. Should the respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on the respondent (as the case may be), the sheriff for the district in which such accounting records, records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator.

5. That the curator shall be entitled to:

5.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;

5.2 require from the persons referred to in paragraph 5.1 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or the respondent and/or the respondent's clients and/or fund in respect of money and/or other property entrusted to the respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;

5.3 publish this order or an abridged version thereof in any newspapers he considers appropriate.

6. The respondent is hereby removed from office as –

6.1 executor of any estate of which the respondent has been appointed in terms of the provisions of the Administration of Estates Act 66 of 1965;

6.2 curator or guardian of any minor or other person's property in terms of the provisions of the Administration of Estates Act, No 66 of 1965;

6.3 trustee of any insolvent estate in terms of the Insolvency Act 24 of 1936;

6.4 liquidator of any company or close corporation;

6.5 trustee of any trust in terms of the provisions of the Trust Property Control Act 57 of 1988;

7. The respondent is hereby directed:

7.1 to pay, in terms of section 78(5) of Act 53 of 1979, the reasonable costs of the inspection of the accounting records of the respondent;

7.2 to pay the reasonable fees of the auditor engaged by the applicant;

7.3 to pay the reasonable fees and expenses of the curator, including travelling time;

7.4 to pay the reasonable fees and expenses of any person consulted or engaged by the curator as aforesaid;

7.5 to pay the expenses relating to the publication of this order or an abbreviated version thereof.

8. If there are any trust funds available the respondent shall, within 6 (six) months after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, satisfy the curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to him (respondent) in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof.

9. A certificate issued by a director of the Attorneys Fidelity Fund shall constitute prima facie proof of the curator's costs; and the Registrar is hereby authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.’