THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 948/2018

In the matter between:

YOLANDI HEWETSON **APPELLANT**

and

THE LAW SOCIETY OF THE FREE STATE **RESPONDENT**

Neutral citation: *Hewetson v The Law Society of the Free State* (948/2018) [2020] ZASCA 49 (5 May 2020)

Coram: CACHALIA, LEACH and NICHOLLS JJA and WEINER and HUGHES AJJA

Heard: 7 November 2019

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 5 May 2020.

Summary: Attorney – misconduct – failure of co-director to ensure accounting records and trust account properly maintained – appropriate order – suspension or removal from roll – matter referred back to the court a quo for oral evidence on when the appellant first became aware of the misappropriation of trust funds by her husband and co-director.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mathebula J and Chesiwe AJ sitting as court of first instance):

1 The appeal is upheld to the extent that the order of the high court of 15 December 2017 is set aside only insofar as it refers to the appellant.

2 The high court's order of 23 June 2016 insofar as it applies to the appellant is reinstated pending the finalisation in the high court of the application to strike her from the roll.

3 The application to strike the appellant from the roll of attorneys is referred to a freshly constituted bench of the Free State High Court for its determination after hearing such oral evidence as the parties seek to place before it in regard to the appellant's fitness to remain on the roll, and in particular as to:

(a) when the appellant first became aware of her husband's abuse of trust funds;

(b) the extent of her knowledge;

(c) whether the appellant agreed to or was in any way a party to the withdrawal of trust funds from the account of Mr Ahmed Nabil;

(d) the appellant's explanation for the delay, if any, in reporting trust fund deficiencies to the Law Society.

4 In the event of either party wishing to lead a witness who has not deposed to an affidavit in these proceedings, a summary of such witness's evidence is to be filed and served on the other side not later than 10 days before the hearing.

5 The appellant is suspended from practising as an attorney pending the outcome of the above hearing.

6 The appellant is to pay the Law Society's costs of this appeal on the scale as between attorney and client.

JUDGMENT

Nicholls JA (Cachalia JA and Hughes AJA concurring):

[1] The appellant, Mrs Yolandi Hewetson (Mrs Hewetson), and her husband, Mr Alexander Fowly Hewetson (Mr Hewetson) practised as attorneys in the Free State for many years. They conducted their practice through a company Hewetson Incorporated (the firm) of which they were the sole directors. On 23 June 2016, the Law Society of the Free State (the Law Society) obtained interim relief against them from the Free State high court pending an investigation into the financial affairs of the firm. Thereafter, on 15 December 2017, pursuant to an application by the Law Society for such relief, both Mr and Mrs Hewetson were struck from the roll of practising attorneys and the firm was placed into liquidation. Mr Hewetson did not oppose the application. Only the appellant had opposed the relief sought against her. Whilst conceding that relief against her was justified, she appeals the harshness of the sanction. The appeal is with the leave of this Court.

[2] Such proceedings are of a disciplinary nature and are *sui generis*.[1] Their primary purpose is to protect the public from malfeasance of attorneys. As far back as 1934, in *Solomon v Law Society of the Cape of Good Hope*,[2] this Court described them as follows:

'Now in these proceedings the Law Society claims nothing for itself . . . . It merely brings the attorney before Court by virtue of a statutory right, informs the Court what the attorney has done and asks the Court to exercise its disciplinary powers over him . . . . The Law Society protects the interests of the public in its dealings with attorneys. It does not institute any action or civil proceedings against the attorney. It merely submits to the Court facts which it contends constitutes unprofessional conduct and then leaves the Court to determine how it will deal with this officer [of the court].'

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[1] *Hepple and Others v Law Society of the Northern Provinces* [2014] ZASCA 75; [2014] 3 All SA 408 (SCA) para 9; *Cirota and Another v Law Society, Transvaal* [1979] 1 All SA 179 (A); 1979 (1) SA 172 (A) at 187.
[2] 1934 AD 401 at 408-409.

[3] The application in this matter was brought in terms of s 22(1)*(d)* of the Attorneys Act 53 of 1979 (the Act) which provides that:

'Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he or she practices–

. . .

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

[4] The test to determine whether a person is fit and proper is well established and needs no further elaboration.[3] The first enquiry is to determine whether the offending conduct has been proven on a balance of probabilities. Once this is shown, the second enquiry is to determine whether the person is fit and proper taking into account the proven misconduct. The final enquiry is to determine whether the person concerned should be suspended from practice for a fixed period or should be struck off the roll. The last two enquiries are matters for the discretion of the court, which involve a value judgment.

[5] Only the final stage of the enquiry is relevant in this matter. The appellant, for the purposes of this appeal, has conceded that she is not a fit and proper person to practise and, therefore, the only question that remains is whether the high court was correct in striking her off the roll. The appellant contends that her suspension from practice would have been sufficient.

[6] Although every case must be determined in the light of its own facts, if a court is of the view that after a period of suspension the person will be fit and proper, the appropriate order ordinarily would be one of suspension.[4] This is because the

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[3] *General Council of the Bar of South Africa v Jiba and Others* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) para 20. *Jiba and Another v General Council of the Bar of South Africa and Another, Mrwebi v General Council of the Bar of South Africa* [2018] ZASCA 103; [2018] 3 All SA 622 (SCA); 2019 (1) SA 130 (SCA); 2019 (1) SACR 154 (SCA) para 6. *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); [2009] 1 All SA 133 (SCA) para 4. *General Council of the Bar of South Africa v Geach and Others, Pillay and Others v Pretoria Society of Advocates and Another, Bezuidenhout v Pretoria Society of Advocates* [2012] ZASCA 175; [2013] 1 All SA 393 (SCA); 2013 (2) SA 52 (SCA) para 50. *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); [2000] 2 All SA 310 (SCA) para 10.

[4] *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); [2009] 1 All SA 133 (SCA) para 8.

implications of removing an attorney from the roll for misconduct are serious and far-reaching. It is visualised, prima facie at least, that the attorney will never be permitted to practise again because the misconduct complained of is of such a serious nature that it manifests a character defect and a lack of integrity rendering the person unfit to practise. Any person applying for readmission will have to satisfy a court that he or she is a completely reformed character.[5]

[7] It is well established that an appeal court has limited grounds to interfere with the decision of a high court in matters such as this. As stated by this Court in *Malan v Law Society of South Africa*[6] at para [13]:

'(T)his Court has held consistently that the discretion involved is a strict discretion, which means that a court of appeal may only interfere if the discretion was not exercised judicially: *Kekana v Society of Advocates SA*, 1998 (4) SA 649, [1998] 3 All SA 577 (SCA); *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) 537. This means that a court of appeal is not entitled to interfere with the exercise by the lower court of its discretion unless if failed to bring an unbiased judgment to bear on the issue; did not act for substantial reasons; exercised its discretion capriciously, or exercised its discretion upon a wrong principle or as a result of a material misdirection. (See also Mabaso v Law Society, Northern Provinces 2005 (2) SA 117 (CC) at para 20; Giddey NO v JC Barnard & Partners 2007 (5) SA 525 (CC) at para 20.'

[8] In the exercise of its discretion, the high court decided to impose the more stringent sanction of removing the appellant from the roll rather than merely suspending her from practice. However, in doing so, it materially misdirected itself in its finding that the appellant had made 'loans' totalling R305 489.09 to herself from trust creditors' accounts. There was no proof of that fact, and the high court conceded in its judgment in the subsequent application for leave to appeal that it had erred in that regard. It went on to record that its decision to strike off did not 'turn primarily on the error' but that matters not. The high court was clearly influenced by a material and grave error which by its very nature has a substantial effect upon the issue at hand. Essentially it found the appellant had stolen a substantial sum when there was no

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[5] *Incorporated Law Society, Natal v Roux* 1972 (3) SA 146 (N) quoted with approval in *Cirota v Law Society, Transvaal* 1979 (1) SA 172 at 194B-D.

[6] *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); [2009] 1 All SA 133 (SCA) para 13.

evidence that she did. In the light of the authorities I have referred to this court is therefore free to exercise its discretion on the issue under s 22(1)*(d)* of the Act untrammelled by the decision of the high court. Thus it is necessary to examine the facts to consider whether a suspension would suffice in the circumstances of this particular case.

[9] The appellant and her husband were married in 2001 and soon thereafter set up the law firm of which they were the sole co-directors. The firm's main office was in Welkom with a branch office in Theunissen. In terms of the Rules of the Law Society of the Free State[7] directors in an incorporated company of attorneys are jointly responsible to keep proper books of account, notwithstanding that only one of them may be responsible for the bookkeeping in the firm.

[10] There is no dispute that the firm failed to keep proper accounting records. Significant sums of trust monies were misappropriated over the period 1 May 2013 to 29 February 2016. Notwithstanding this, the firm was given an unqualified audit by its own auditors, Deane & Thresher, over this period until the 2015/2016 financial year where a trust deficit of R1 069 119.81 was reflected.

[11] The appellant's defence is that her husband controlled the finances of the firm to her exclusion. Blame for the financial irregularities and the trust deficit was laid squarely at his door. From September 2011 until January 2014 she was away from the practice on extended maternity leave. On her version, towards the latter part of 2015 she began to realise that something was amiss with the trust account. By that stage, the relationship between Mr Hewetson and the appellant had reached the point of no return.

[12] After an informal investigation within the firm in December 2015, the appellant ascertained that there was a trust shortfall of R 1 789 766.56. She approached her

[7] Prior to 1 March 2016 the Rules of the Free State Law Society were operative. On 1 March 2016 the Rules for the Attorneys' Profession came into operation and replaced the Rules of the Free State Law Society. Where reference is made to rules pertaining to conduct or obligations that occurred or are binding prior to 1 March 2016, reference is made to the Rules of the Free State Law Society. Where reference is made to rules pertaining to conduct or obligations that occurred or are binding after 1 March 2016, reference is made to the Rules for the Attorneys' Profession.

attorney and submitted an affidavit to the Law Society on 15 January 2016, wherein these facts are set out, together with affidavits from staff members. She requested the Law Society to intervene on an urgent basis, assuring them of her full co-operation. At the same time, the appellant instituted divorce proceedings against Mr Hewetson.

[13] Various staff members deposed to the financial irregularities and Mr Hewetson's utilisation of trust funds for personal gain. Mr Andries Knoetze, an attorney in the employ of the firm, confirmed certain financial irregularities and that the appellant was excluded from financial matters over which Mr Hewetson had sole control. He stated that he overheard a confrontation between the appellant and her husband in October 2015 regarding the irregular payments of trust funds. Ms Jacqui Labuschagne, a candidate attorney who worked in the conveyancing department, stated that she became aware of irregularities on the files assigned to her in November and December 2015 which compelled her to discuss the matter with the bookkeeper. Ms Mandie Janse van Rensburg, the conveyancer at the firm, became aware of financial irregularities in certain files during December 2015. She immediately approached the appellant who took steps to remove Mr Hewetson as the managing partner.

[14] In February 2016 Mr Ramoro Maleme, a messenger in the firm, submitted an affidavit to the Law Society. He recorded how he had deposed to false statements at the request of Mr Hewetson. He received cash payments which he did not receipt but handed directly to Mr Hewetson. Properties were registered in his name by Mr Hewetson. He was instructed not to inform the appellant of the above. Mr Maleme was given a motor vehicle and cash by Mr Hewetson in return for his loyalty. In 2015, after a disciplinary hearing, the appellant dismissed Mr Maleme from the firm for theft.

[15] On the strength of the appellant's affidavit, the Law Society initiated an investigation into the financial records the firm. Reports were prepared by PKF Accountants and by the financial forensic investigator of the Attorneys Fidelity Fund. The reports identified weaknesses in the financial controls of the firm, irregular payments and a misappropriation of trust funds. The PKF report highlighted the following: monies were paid from the trust bank account into a personal account of Mr Hewetson; trust monies were paid to fund a property business owned by

Mr Hewetson and his son (from a previous marriage); unpaid personal loans to Mr Hewetson in the sum of R305 489.09 were identified (these were the funds in respect of which the high court misdirected itself); transfers were made from one trust creditor to another for no apparent reason; and interest due to clients on s 78(2A)[8] interest bearing accounts were not paid to the relevant trust creditors but debited as fees and paid into the business account. Another PKF report showed a trust deficit in the amount of R2 132 741.85.

[16] An interdict was granted on 23 June 2016 restraining and interdicting the appellant and Mr Hewetson from operating a trust account. A *curator bonis* was appointed to control and administer the firm's books of account, files and documents. The present application to strike off the appellant and Mr Hewetson from the roll of attorneys was launched in April 2017.

[17] Mr Hewetson did not file any opposing papers but filed an affidavit in response to the PKF report, which is attached to the Law Society's founding papers. He accused the appellant of attempting to take over the business for herself and stated that she had lied to the Law Society that she first became aware of the trust fund shortages in December 2015. In support of this, he referred to three instances which he alleged were proof of her dishonesty. The first is the confrontation during October 2015, overheard by Mr Knoetze, over trust shortages. The second is a series of SMSs between himself and the appellant in November 2015 when the marriage was in the throes of disintegrating. Thirdly, Mr Hewetson attached an affidavit deposed to in July 2016 from Ms Belinda Petzer (Ms Petzer), who was employed as a conveyancing secretary at the firm from February 2012 to July 2014.

[18] Ms Petzer stated under oath that both the appellant and Mr Hewetson bought houses on public auction utilising trust money. In the affidavit she sets out that, in either January or February 2014, Mr Hewetson was required to make payment in

[8] Section 78(2A) of the Act provides as follows:
'(2A) Any separate trust savings or other interest-bearing account —
(a) which is opened by a practitioner for the purpose of investing therein, on the instructions of any person, any money deposited in his or her trust banking account; and
(b) over which the practitioner exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity, shall contain a reference to this subsection.'

respect of two properties, which he had purchased. In the presence of the appellant, he asked Ms Petzer, to identify a trust creditor from whom he could borrow money for a few days. Ms Petzer suggested the trust account of Mr Ahmed Nabil. When the appellant expressed concern as to when the money would be paid back, Mr Hewetson informed her that it would take two days. This is in fact what occurred, said Ms Petzer. She added that there was no room for the appellant to deny her knowledge as Moroka Attorneys had written to the firm in early 2015 accusing it of 'rolling' trust monies.

[19] The appellant vehemently denied the allegations contained in Ms Petzer's affidavit. On 27 February 2015 once Ms Petzer left the firm, and pursuant to an inquiry from a client concerning the refund of municipal charges, it came to light that these trust monies had been paid into the bank account of Ms Petzer's daughter, Ms Britney Lee. It was her job to load all internet payments made on behalf of the firm which Mr Hewetson would check and approve. Upon further investigation it became apparent that Ms Petzer had also fraudulently deposited money into the bank accounts of other family members. The appellant laid a charge of theft against Ms Petzer and reported her conduct to the Law Society in a detailed complaint dated 4 March 2015.

[20] From the letter it emerged that Mrs Hewetson contacted Ms Petzer at her new place of employment on the same day the irregularities were uncovered. Immediately thereafter Mr Bertus Maritz of Moroka Attorneys, apparently acting on the instruction of Ms Petzer, telephoned the firm and spoke to Mr Hewetson. An undertaking was made that the trust monies amounting to R10 142.61 paid into Ms Lee's account by Ms Petzer would be refunded at once. The bank accounts of Ms Petzer's family members would be made available to the firm in order to ascertain what other trust monies had been fraudulently paid by Ms Petzer.

[21] This is the background to the letter from Mr Maritz of Moroka Attorneys dated 5 March 2015, clearly written in response to the allegations of theft against Ms Petzer. It was provided by the appellant in response to Ms Petzer's allegations that she had long been aware of her husband's conduct. In this letter Mr Maritz confirmed the re-payment of the R10 142.61 and stated that he would get copies of other bank statements of family members. In an apparent attempt to exonerate her of the theft and fraud she had committed, he said that Ms Petzer believed that R29 000 was owed

to her as a performance bonus. He further recorded the existence of rumours that she was having an affair with Mr Hewetson. Mr Maritz stated that, without intending to threaten anyone, Ms Petzer wanted it to be known that she had copies of documents from a number of files that proved Mr Hewetson utilised trust money to purchase properties. These were later repaid once a bond was registered or the said properties were sold**.** The appellant's response is that she confronted her husband with these allegations which he denied. Significantly, to date these documents have never materialised.

[22] In respect of Ms Petzer's allegations that the appellant was present when a conversation took place between her and Mr Hewetson in January or February 2014, regarding the borrowing of trust monies to pay for the two properties, the appellant conducted an investigation. She discovered that the said monies were indeed paid from the firm's trust account, not in January or February 2014, but on 13 December 2013 and repaid by Mr Hewetson on 20 December 2013. At this time, she was still on maternity leave and had no knowledge of the transactions.

[23] Pursuant to Ms Petzer's allegations that properties bought with trust monies were transferred into her name, the appellant conducted a deeds office search. She found two properties registered in her name of which she had no knowledge. On drawing the relevant files, she saw her signature had been forged. This was confirmed by a handwriting expert, whose finding was that the disputed signatures were not those of the appellant and were written with the same pen as that of Mr Hewetson, the strong inference being that it was his attempt to forge her signature.

[24] In my view Ms Petzer's affidavit must be treated with circumspection. Her motives are dubious. She may well have stolen trust monies which she had to repay and have harboured a grievance against the appellant for the charge of theft that was laid against her. She was clearly well aware of Mr Hewetson's misconduct and on the face of it may have colluded with him to her own benefit. The question is whether she has provided reliable evidence to impute knowledge to Mrs Hewetson.

[25] A more serious problem for the appellant are the SMS and WhatsApp exchanges between herself and Mr Hewetson, attached by him as further evidence

that she had been aware of the misuse of trust funds for a long period. On 19 November 2015 she wrote (as translated into English):[9]

'I have finally had enough of your use of trust funds for your personal gain . . . . If you want to cut my throat I will cut yours, but the consequences for you will be much worse.'

[26] Relying on Mr Hewetson's affidavit, the Law Society submitted that it was inconceivable that the appellant was not aware of her husband's misappropriation of trust funds and other transgressions in the handling of the trust account. Moreover, she lied under oath when she stated that once she became aware of the true state of affairs she immediately reported it to the Law Society. Having regard to the November WhatsApp messages referred to above, at best for her, she became aware of trust shortages in November 2015 but reported these only in January 2016. Thus even on her own version, she was aware of the trust shortage for several months prior to reporting her husband's misconduct to them. The Law Society argued that the only reason that the appellant approached the Law Society was due to the deterioration of her marriage and the acrimony that had developed between them. Had this not happened, suggested the Law Society, the appellant would not have made the disclosure. In addition, she must have known that the accounting records had been manipulated for a number of years in order to obtain an unqualified audit. Because she had conceded that the trust account in the Theunissen office had never complied with the Act, she should be struck off the roll for this reason alone, the Law Society contended.

[27] This view found favour with the high court. It held, quite correctly, that the appellant had a duty to ensure that proper books of account were kept and that transactions were conducted in accordance with the rules of the Law Society and with generally accepted accounting standards. Because she had not prevented her husband's misconduct, she must have acquiesced to it. It was found that she was 'also a party to the massive dishonest schemes' perpetrated by Mr Hewetson. The high court held, incorrectly, that she had taken a loan in the amount of R305 489.09 from funds of trust creditors. The high court decried the flippant manner in which the

[9] The Afrikaans version reads: 'Ek het nou finaal genoeg gehad van jou aanwending van trustgeld vir persoonlike gewin . . . . As jy my keel wil afsny deur my deur die ore te werk, gaan ek jou bedank deur presies dieselfde vir jou te doen. Jou konsekwensies gaan net erger wees.'

appellant treated the Law Society, refusing to give 'his' co-operation. Whether this is, in fact, a reference to Mr Hewetson is unclear. The next sentence of the judgment then criticises the appellant for what it called her 'flimsy and unconvincing defences' advanced in the face of overwhelming evidence of mismanagement.

[28] In the light of the above facts, it is clear that the appellant is guilty of serious transgressions, and that is not disputed. The question is whether she should be removed from the roll of attorneys, rather than suspended from practising as an attorney for a determinate period.

[29] Notwithstanding that there is no evidence to suggest the appellant in any way benefitted, a crucial factor in determining whether the appellant should be struck from the roll is if she has been dishonest, and/or lied under oath. Although dishonesty is not the *sine qua non* for striking off, it is only in exceptional circumstances that a court will order a suspension instead of striking off where dishonesty has been established.[10]

[30] It is therefore incumbent upon the appellant to explain any contradictions as to when she first became aware of the theft of trust funds by Mr Hewetson and the extent of her knowledge. In her initial affidavit to the Law Society dated 15 January 2015 the appellant stated that '[d]uring December 2015' she started receiving complaints about trust monies being misappropriated by her husband. In the opposing affidavit to this application dated 8 June 2017 she stated that she did not have any knowledge of trust shortages prior to 13 November 2015.

[31] This was contradicted by the affidavit of Mr Knoetze, dated 7 January 2016 which he stated was made on the instruction of the appellant herself, and which was attached as an annexure to the appellant's first affidavit. Mr Knoetze mentioned that on various occasions during October 2015 he overheard the appellant confront Mr Hewetson about business and trust monies being utilised, inter alia, for RJ Constructions, one of his businesses. She accused him of using the business card of the firm for petrol, wages and building materials. Mr Hewetson chased her out of his office, shouting and swearing.

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[10] *Malan* para 10. *Summerly v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) para 21.

[32] Mr Knoetze further stated the firm did various collections for Nian Shun Trading. In October 2015 there was a trust credit of R22 208.83. On drawing the file on 13 November 2015 he noticed that Mr Hewetson had paid an amount of R344.10 to Matsepe Attorneys and an amount of R20 679.45 to the Matjhabeng Municipality. He did not know what these payments were for but they were not made on the instruction of the client. Mr Knoetze immediately reported this to the appellant who confronted Mr Hewetson. In total Mr Knoetze had personal knowledge of R497 023.53 irregularly transferred from the trust account.

[33] No explanation is provided by the appellant for the apparent contradiction as to whether she became aware of the trust shortages in October, November or December 2015. Her uncontradicted evidence is that after the investigation in December 2015 she confiscated Mr Hewetson's bank token used to authorise EFT payments and changed all the bank passwords and pins. In early January she suspended him as an employee and director of the firm pending an investigation into his misappropriation of trust funds.

[34] The WhatsApp exchanges are indicative of an ugly and acrimonious breakdown of a relationship. More importantly, on a plain reading of these messages there is certainly room to suggest that the appellant had knowledge of her husband's misconduct for some time. It could be a reference to Mr Hewetson's previous charge of misuse of trust monies by the Law Society in 2012, of which he was acquitted. But in the absence of an explanation from the appellant it is impossible for this Court to speculate on what she meant and thereby determine the extent, if any, of the appellant's prior knowledge of the misappropriation.

[35] In my view it was not unreasonable for the appellant to take a month (or even longer as it was over Christmas holiday period) to consult her attorneys before reporting the matter to the Law Society. Such a step had far reaching implications not only for her husband but also her family. She would have been well apprised of the professional consequences it would have for herself. One is sympathetic to a spouse who delays in reporting the wrongdoings of her husband for a month or so when the consequences of such action go far beyond the reaches of one's professional life. However, it is difficult to exonerate the appellant if she had been aware of her

husband's conduct over a long period of many months or even years. By electing to remain silent about such conduct over an extended period she would have known that the public was being put at risk unnecessarily.

[36] In her favour the appellant has been an attorney for over 20 years with an unblemished record until now. She reported the misconduct to the Law Society well knowing of the consequences for herself. She fully co-operated in their subsequent investigation. The *curator bonis* appointed by the Law Society observed in November 2016 that the firm was well-managed by the appellant and that she was doing her best to make good the shortfall. The affidavits of the employees at the firm largely absolve the appellant of any misconduct and date her knowledge, at least to the extent of the problem, to late 2015.

[37] Nonetheless, as set out above there are gaps in the appellant's evidence that are cause for concern. If one has regard to the apparent contradictions between her own affidavits and the affidavit of Mr Knoetze there is a discrepancy which requires an explanation from the appellant. Likewise the SMS and WhatsApp exchanges between Mr Hewetson and the appellant require an explanation insofar as they are indicative of prior knowledge of her husband's misuse of trust funds. Ms Petzer's allegations, although not wholly convincing, also require a response. There may well be satisfactory explanations for all the apparent contradiction but, given the nature of the application, it is in the public interest that a hearing be conducted an on these narrow issues. In addition, the appellant is required to explain her delay, if any, in reporting the matter to the Law Society.

[38] A court is loath to impute dishonesty on the basis of untested allegations in motion court proceedings in the absence of clear proof and where these allegations were denied on grounds that cannot be described as far-fetched.[11] But because of the sui generis nature of these proceedings it is in the interest of the public and the appellant herself that these issues be referred to oral evidence in the high court. Only then can a court properly exercise its inherent jurisdiction to penalise the appellant by either striking her from the roll of practising attorneys or suspending her from practising

[11] *Prinsloo NO and Others v Goldex* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) para 19.

for a specific period. For obvious reasons any bench constituted should not include those judges who presided over the original application.

[39] I have had the benefit of reading the second judgment of my colleague Leach JA. He expresses the unequivocal view that the appellant has been dishonest. I am not persuaded that such a far-reaching conclusion can be made on the papers alone. Nor can it be concluded that she necessarily poses any risk to the public. To strike the appellant from the roll of practising attorneys would have a grave impact on her career. Rather than imposing the ultimate penalty on what is, in my view, inadequate evidence, a referral to oral evidence would serve the interests of justice and fairness. A court having heard the relevant evidence will be better placed to determine whether the appellant was indeed dishonest and unjustifiably delayed in reporting the trust fund deficit, thus deserving of such a sanction.

[40] In the light of the *sui generis* nature of these proceedings the appellant, quite correctly, tendered to pay the Law Society's costs on the scale of attorney and client, whatever the outcome of the appeal. This will be reflected in the order set out below.

[41] In the result it is ordered:

1 The appeal is upheld to the extent that the order of the high court of 15 December 2017 is set aside only insofar as it refers to the appellant.

2 The high court's order of 23 June 2016 insofar as it applies to the appellant is reinstated pending the finalisation in the high court of the application to strike her from the roll.

3 The application to strike the appellant from the roll of attorneys is referred to a freshly constituted bench of the Free State High Court for its determination after hearing such oral evidence as the parties seek to place before it in regard to the appellant's fitness to remain on the roll, and in particular as to:

(a) when the appellant first became aware of her husband's abuse of trust funds;

(b) the extent of her knowledge;

(c) whether the appellant agreed to or was in any way a party to the withdrawal of trust funds from the account of Mr Ahmed Nabil;

(d) the appellant's explanation for the delay, if any, in reporting trust fund deficiencies to the Law Society.

4 In the event of either party wishing to lead the evidence of a witness who has not deposed to an affidavit in these proceedings, a summary of such witness's evidence is to be filed and served on the other side not later than 10 days before the hearing.

5 The appellant is suspended from practising as an attorney pending the outcome of the above hearing.

6 The appellant is to pay the Law Society's costs of this appeal on the scale as between attorney and client.

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C H NICHOLLS

JUDGE OF APPEAL

Leach JA (Weiner AJA concurring)

[42] I have read the judgment of my colleague Nicholls JA. For the reasons set out below, I find myself unable to agree with her decision in regard to the outcome of this appeal. In my view, the appellant should be struck from the roll of attorneys and the appeal ought thus to be dismissed.

[43] As set out in the judgment of my colleague, for many years the appellant and her former husband practised as attorneys in Welkom as directors of the company, Hewetson Incorporated (the firm). On ascertaining that there were serious irregularities in the firm's trust accounts, the respondent in these proceedings, the Law Society of the Free State (the Law Society), applied to the Free State Division of the High Court, Bloemfontein to strike both the appellant and her husband from the roll of attorneys and to wind up the firm. The appellant alone opposed the application, and only in regard to the issue of her striking off. In December 2017, however, the high court struck both her and her husband off the roll and wound up the firm. The appellant appeals now solely against her striking off, contending that she had not been responsible for the financial irregularities that had occurred.

[44] It must throughout be remembered that an application for the striking off of an attorney is not an ordinary proceeding but one *sui generis*, of a disciplinary nature,[12] in which the court has the inherent jurisdiction to penalise errant attorneys found unfit to practice by either striking them from the roll or suspending them from practice for a period.[13] There is no room for an attorney to adopt an adversarial position in regard to the enquiry. Instead, as was stressed, inter alia, in *Kleynhans*[14] an attorney is expected to co-operate and to provide all necessary information so that the full facts are placed before the court to enable it to make a correct and just decision.

[45] It is not suggested on the appellant's behalf that the high court erred in finding her to be unfit to practice, and the appeal was conducted solely on the basis that, in the exercise of its disciplinary discretion, the court a quo ought merely to have suspended her rather than striking her name from the roll. In considering this, there are certain general principles which have always to be borne in mind.

[46] First, s 15(1)*(a)* of the Attorneys Act 53 of 1979 (the Act) requires a person who seeks admission as an attorney to satisfy the court, in its discretion, that he or she is a fit and proper person to be so admitted and enrolled. Section 15(3)*(a)* provides that the court may exercise a similar discretion on an application by a person who was previously admitted and enrolled as an attorney, but who has been either removed from or struck off the roll, to readmit such person. As this court observed in *Malan*,[15] it is a matter of simple logic that the combined effect of these two subsections is that a person who is not fit and proper to be an attorney should be removed from the roll. That is in effect what might be referred to as the default position.

[47] However, depending on the circumstances, the default position may operate harshly or unjustly. This was recognised by the legislature which, under s 22(1)*(d)* of the Act, has provided that a person who has been admitted and enrolled as an attorney may be struck off the roll or suspended from practice by the court if he or she, 'in the

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[12] *Law Society of the Northern Provinces v Morobadi* [2018] ZASCA 185; [2019] JOL 40677 (SCA) para 4; *Summerley v Law Society, Northern Provinces* [2006] ZASCA 59; 2006 (5) SA 613 (SCA) para 2 and the cases there cited.
[13] *Malan & another v Law Society, Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA) para 23.
[14] *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA839 (T) at 853.
[15] Para 8.

exercise of the discretion of the court, is not a fit and proper person to continue to practice as an attorney'. Accordingly, even where a practitioner has been shown as not fit and proper to practice, removal does not necessarily follow and the court has a discretion to suspend instead. As Harms ADP pointed out in *Malan*,[16] in deciding which course to follow the court's main consideration is not first and foremost the imposition of a penalty but, rather, the protection of the public (and in my view that is especially important where, as here, the offence has resulted in a substantial shortage of trust funds).[17] The learned judge went on to point out that only '(i)f the court has grounds to assume that after the period of suspension the person will be fit to practice as an attorney in the ordinary course of events it would not remove him from the roll but order an appropriate suspension'.[18]

[48] As appears from this, an order of suspension should be made only where the court is satisfied that after a period of suspension the attorney concerned will have reformed and become a fit and proper person to practice. Unless so satisfied, the only viable course is to strike off the attorney who has been shown to be unfit to practice. The obvious corollary, too, is that the more grievous the misdeed committed by the errant attorney, the less appropriate it will be to merely order a suspension. The authorities are legion that where there is dishonesty involved, it will require exceptional circumstances before suspension will be ordered instead of a removal.

[49] Moreover, in order for the court to properly exercise its discretion, there is an evidential burden at least (for present purposes I put it no higher than that) for an attorney shown to be not fit and proper to practice, to place evidence before court to demonstrate why it would be appropriate that he or she be suspended rather than struck off. By reason of the *sui generis* nature of the proceedings, this would require a full and frank disclosure of all material information so as to allow the court to make a proper and informed decision. There is no room for an attorney who wishes to remain on the roll to be coy about material facts in a matter of this nature. As officers of the court, attorneys are at all times expected to be scrupulously honest and observe the

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[16] Paras 3-4.
[17] See eg *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA); [2002] 4 All SA 441 (SCA) para 7.
[18] Para 8.

utmost good faith in their dealings with the court,[19] even if it means disclosing information which may be adverse to their own interests, and this rule applies equally in applications to strike them off.

[50] The appellant argued that she had herself not been guilty of dishonesty, and relied heavily on the decision of this court in *Summerley*[20] in support of a proposition that striking off is generally reserved for attorneys who have acted dishonestly. As a general rule, dishonesty and remaining on the roll are mutually exclusive. But striking off is not reserved solely for cases involving dishonesty and, for example, attorneys have been struck off for not replying to correspondence, an inaction which not only speaks of a lack of courtesy but constitutes a breach of professional integrity. And as this court pointed out in *Malan*:[21]

'As mentioned in *Summerley* (at para 15), the fact that a court finds that an attorney is unable to administer and conduct a trust account does not mean that striking-off should follow as a matter of course. The converse is, however, also correct: it does not follow that striking-off is not an appropriate order (compare *Prokureursorde van Transvaal v Landsaat* 1993 (4) SA 807 (T); *Law Society of the Transvaal v Tloubatla* [1999] 4 All SA 59 (T)).'

[51] Furthermore, although the court has a discretion under s 22(1)*(d)*, a suspension holds the potential hazard to the public of errant attorneys being returned to practice without having to satisfy either their professional organisation or the court that they have in fact reformed and have become fit and proper to practice. Consequently, the discretion to suspend must be conservatively exercised. As Harms ADP went on to state in *Malan*,[22] even in cases which do not involve dishonesty, in order to stem an erosion of professional ethics the court should adopt a conservative rather than a 'kid-gloves' approach. A court should therefore not be influenced by maudlin sympathy in considering whether suspension rather than striking off is the appropriate remedy. After all, its main consideration is to protect the public, not to feel sorry for a person whose conduct has fallen short of the mark.

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[19] Eg *Incorporated Law Society, Transvaal v Meyer* 1981 (3) SA 962 (T) at 970F and *Society of Advocates, Natal v Merret* 1997 (4) SA 374 (N) at 382J – 383H.
[20] *Summerley v Law Society, Northern Provinces* [2006] ZASCA 59; 2006 (5) SA 613 (SCA) para 20.
[21] Para 11.
[22] Para 11.

[52] In the exercise of its discretion, the high court decided to impose the more stringent sanction of removing the appellant from the roll rather than merely suspending her from practice. Generally this court, on appeal, would not have a free hand to interfere with the high court's decision merely if it would have exercised its discretion differently, but as Nicholls JA correctly points out, it may interfere where there has been a material misdirection or irregularity. And for the reasons set out by my learned colleague the high court in this instance got the facts wrong and materially misdirected itself in effectively finding that the appellant had stolen a substantial amount of trust funds, which she had not done. That leaves this court free to exercise its discretion on the issue at hand.

[53] Bearing all of this in mind, I turn to consider whether on the facts of this matter, a striking off or a suspension is the appropriate order. Much of the background has been set out in my colleague's judgment and I shall attempt insofar as possible to avoid repetition.

[54] The appellant is not a young, inexperienced attorney who possibly did not fully appreciate the scope and ambit of her duties in regard to trust funds. As I have said, she is an experienced practitioner who had practised together with her husband for a good many years. It is indeed so, as is set out in the judgment of my colleague, that their firm's trust account was used by the appellant's husband for his own purposes. He clearly made himself guilty of the theft of trust moneys over an extended period, in particular during the course of 2015, which resulted in a loss of trust funds in excess of R1.7 million. According to the appellant's affidavit of 15 January 2016 used to report the matter to the Law Society, she had been unaware of any irregularities until December 2015 when staff rumours reached her ears and she confronted her husband. In a subsequent affidavit deposed to on 18 March 2016, filed to oppose the application for her striking off, her explanation for the dismal state of the firm's trust accounts was that her husband had been in charge of the financial administration of the firm throughout its existence, and that she had to trust him to attend to the finances as he was the more experienced attorney. In any event, so she alleged further, he had insisted upon attending to all financial affairs at the office and any attempt from her to have a say over the finances, or to make any input regarding the financial affairs of the firm, had been met with his disrespectful and sarcastic response.

[55] Simply put, then, the appellant's excuse was that she had entrusted the handling of the firm's trust funds to her husband. But this excuse holds no water. An attorney cannot abdicate his or her responsibilities in regard to funds held in trust. Over 60 years ago, in an oft quoted passage that remains as true today as it did then, the court in *Incorporated Law Society, Transvaal v K*[23] said:

'It frequently happens in partnership firms that one or more of the partners is concerned with court work and that either another partner or an individual person is entrusted with the books of account and with seeing that the trust accounts are properly kept, and that sufficient trust moneys are properly held at all times . . . no attorney should be heard to say that, because of the arrangement that he would be doing a particular type of work and therefore was not concerned with the manner in which the books of account had been kept, or the trust account, he should not be blamed. He will not be heard in that regard.

Every attorney must realise that it is a fundamental duty on his part, breach of which may easily lead to his being removed from the roll, to ensure that the books of the firm are properly kept . . . .'

[56] Nothing has changed since then. On the strength of numerous previous decisions in which a similar excuse was rejected, this court said in *Hepple*:[24]

'Moreover, that he was not involved with the financial management of the firm, *is no defence at all*. The duty to comply with the provisions of the Act and the Rules is imposed upon every practising attorney, whether practising in partnership or not, and no attorney can therefore be heard to say that under an arrangement between him and his partner, the latter was not responsible for the keeping of the books and control and administration of the trust account, and that he was therefore not negligent in his failure to ensure compliance with the provisions of the Act and the Rules.'(My emphasis.)

[57] Consequently, the appellant failed completely to comply with her statutory obligations to properly control the administration of the funds her firm held in trust. She also conceded that the books of the firm's Theunissen branch that was opened for a time never met the Law Society's requirements. As a result of this gross negligence on her part, there was a trust deficiency of some R1.7 million by the time the matter was brought to the Law Society's attention. This, alone, distinguishes the matter from

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[23] *Incorporated Law Society, Transvaal v K and others* 1959 (2) SA 386 (T) at 391C-E.

[24] *Hepple & others v Law Society of the Northern Provinces* [2014] ZASCA 75; [2014] All SA 408 (SCA) para 21. (Citation omitted.)

the position in *Summerley* in which no financial loss was suffered. This factor, in itself, suffices in my view to strike her off in order to protect the public. There are, however, many other relevant factors which have to be taken into account.

[58] First, but most importantly, the appellant's statement under oath to the Law Society when reporting the firm's trust fund difficulties in January 2016, that she had been unaware of any trust account irregularities before December 2015, was false. As appears from both her subsequent affidavits, of 18 March 2016 and 8 June 2018, the latter filed in opposing the application to strike her from the roll of attorneys, she had learned in mid-November 2015 of the misappropriation of a substantial sum of money from the trust account of a client, Nian Shun. This was confirmed by an affidavit of an attorney employed by the firm as a professional assistant, Mr Andries Knoetze, who stated that on 13 November 2015 he had ascertained that, on 14 October 2015 and 6 November 2015, the appellant's husband had improperly paid two amounts, totalling approximately R365 000, out of an amount being held in trust on behalf Nian Shun. He immediately reported this to the appellant, who promptly confronted her husband about the matter. The appellant never disputed or explained this and we must therefore accept that she learned of the Nian Shun affair much earlier than what she told the Law Society.

[59] This is not the only reason why the appellant's statement that she had no reason to suspect any wrongdoing in respect of trust funds until December 2015 cannot be believed. When the Nian Shun matter came to her knowledge there was, as Mr Knoetze confirms, a confrontation between her and her husband. This led to an exchange of WhatsApp messages between them, during the course of which the appellant berated her husband, at times using language which would have made a sailor blush. In the process, on 19 November 2015, the appellant stated 'I have finally had enough of your use of trust money for your personal gain' (my translation of the original Afrikaans). In my view this admits of only one inference, namely, that the appellant was at that time already aware that her husband had used trust money for his personal benefit on previous occasions. The use of the word 'finally' in this context excludes any other connotation.

[60] It is suggested by my colleague that the appellant may possibly have been referring to either a 2012 incident, when her husband had been charged before the Law Society for the misuse of trust funds, or to a letter from Moroka Attorneys earlier in 2015 in which a similar allegation was made. With respect, in my view, that amounts to impermissible speculation, particularly as the appellant, herself, does not state that to be the case. And therein lies the rub. It should not be necessary for a court to indulge in speculation as to what the appellant may have had in mind when she said what she did. She was obliged to fully explain her outburst, but failed to do so.

[61] Consequently, although the appellant insisted that she had no knowledge of her husband's misappropriations prior to the Nian Shun incident on 13 November 2015 (without explaining why she initially told the Law Society that he was oblivious to his misconduct until December 2015) the only reasonable inference that may be drawn from the words she used in her WhatsApp message when she learned of the Nian Shun incident, leaves no doubt that this is not true. The clear inference of her message is that, prior to that incident, the appellant was aware of at least certain of her husband's abuse of the firm's trust funds and that the Nian Shun incident was, in effect, the last straw that broke the camel's back. If there was any other explanation, it was incumbent upon the appellant to provide it. She did not, and one must infer that she meant what she said. What she said can only mean that she knew, before the Nian Shun incident, that her husband had previously used trust money for his personal benefit.

[62] Any doubt about this is removed by Mr Knoetze's undisputed evidence. He placed on record that the appellant had on a number of previous occasions attempted to obtain clarity from her husband regarding various payments he had made from both the firm's trust and business accounts, but that her husband had repeatedly chased her out of his office, swearing and shouting at her. In particular he stated that during October 2015 the appellant and her husband had a serious confrontation in respect of trust or business funds paid out to another business conducted by her husband under the name of RJ Construction. All of this, he says, he had heard clearly as his office was immediately adjacent to that of the appellant's husband. None of this has been disputed by the appellant and must therefore be accepted. This clearly establishes

that the misuse of trust funds was an issue between the appellant and her husband long before the time she attempted to persuade the Law Society had been the case.

[63] The appellant was not open and frank about this as was to be expected from an officer of the court. Her failure to properly deal with the matter is telling. It must be accepted that she knew of her husband's abuse of trust funds months before the date she attempted to make out to the Law Society and the court as being when she first learned of his mischief. She therefore lied under oath to both the high court and to the Law Society on this issue, and persisted in advancing such untruth in this court. This is inherently dishonest and is deserving of the severest stricture. The cases are legion that a lack of scrupulous honesty and truthfulness constitute a 'fatal barrier' to practice as an attorney.[25] In my view, lies under oath and her attempt to mislead the high court (and this court on appeal), renders a mere suspension from practise wholly inappropriate. The only way to protect the public from dishonest attorneys who are prepared to lie to a court is to remove them from the roll.

[64] That brings me to a chapter of the events involving Ms Belinda Petzer, who had formerly been employed by the firm as a conveyancing secretary. In an affidavit deposed to on 31 January 2016, she alleged that the appellant had occasionally also purchased houses which were funded from trust money. She also attested to an incident in January or February 2014 when, for purposes of speculation, the appellant's husband had purchased two houses at an auction in execution. In response to a question from the appellant's husband, but in the presence of the appellant, she identified a client, Mr Ahmed Nabil, out of whose trust money the amount needed to pay for the two houses could be taken. This was done and the houses were paid for. They were resold shortly thereafter and, within days, the money was repaid to trust. All this she says was done with the appellant's knowledge and consent.

[65] Although the appellant denied these allegations, and alleged that Ms Petzer had perjured herself, they were supported to an extent by the firm's records which indicate that the two properties were, indeed, purchased and resold, albeit in

[25] See eg *Merret* at 382J–383H and the cases there cited.

December 2013 not early in 2014 (but nothing turns on that discrepancy). Furthermore, it would seem at first blush to be wholly improbable that a third party, having no interest in the matter, would make such an incriminating statement if it were not true. However, the appellant points out that she had laid a charge of theft of some R 30 000 against Ms Petzer after she had left the firm's employ in 2014, and suggests that, in all probability, Ms Petzer had been influenced to make a false statement by her husband, who may have been helping her in her defence in the criminal proceedings.

[66] Leaving aside for the moment the truth or otherwise of Ms Petzer's version of events, there are important ancillary matters which arise out of this episode. First, it appears that on 4 March 2015 the appellant wrote to Ms Petzer's new employer, Moroka-Attorneys of Welkom, informing them that she had discovered that Ms Petzer had stolen money (the precise terms of this communication do not form part of the record). Moroka-Attorneys replied the same day, stating that Ms Petzer denied stealing the money and alleged that although the amount had in fact been paid to her as part of her performance bonus, she was prepared to repay it. However, they went on to record that although Ms Petzer was making no threats, she had informed the writer of the letter that she was in possession of documentation relating to a number of files in which trust funds had been used to purchase properties in the name of the appellant's husband, after which the money had been returned once bonds had been registered over such properties. (I should mention that the appellant went on to lay charges of theft against Ms Petzer but it seems nothing came of any prosecution.)

[67] In her opposing affidavit, the appellant stated the following in regard to this incident:

'I did confront [my husband] regarding the allegations by Petzer of him misappropriating trust money and [he] denied these allegations. It was hardly possible for me to magically be aware which monies Petzer was referring to which were, according to her, misappropriated.'

This sarcastic response was of a tone totally uncalled for in responding to her professional organisation attempting to comply with its duty to place facts before court. Her sarcasm in itself shows a lack of professional integrity on her behalf. The Law Society is the watchdog of the profession, obliged to investigate complaints laid against practitioners. A practitioner has a concomitant duty to fully participate in any

enquiry conducted by the Law Society, and a failure to do so serves to undermine public trust in the profession as a whole. Consequently, and as this court pointed out in *Kudo v Cape Law Society*,[26] not only integrity but also loyalty to the Law Society is expected from an attorney, and a practitioner who does not honour and appreciate his or her professional organisation is truly a fly in the ointment. Sarcasm of this nature should never have formed part of the appellant's response.

[68] Furthermore, but most importantly, the appellant's failure to take further steps to investigate a very serious allegation of abuse of trust funds was just not good enough. It was not the first occasion that, to her knowledge, her husband had been accused of misappropriating trust funds. In 2012 he had been charged before the Law Society with abusing trust funds and, although he was not convicted on that charge, that incident constituted a clear warning that he was possibly not to be trusted and the administration of the firm's trust funds might not be in reliable hands. Trust funds are sacrosanct, and even if she had not had this warning, on learning of Ms Petzer's allegations it was wholly insufficient for the appellant to merely accept her husband's denial of any wrongdoing. Instead, in the light of the statutory obligations she bore as a director of the firm it was incumbent upon her to immediately make full enquiries in regard to the trust funds with which her husband had been dealing, especially those with which Ms Petzer had been associated (which required no magic on her part). That was her clear and obvious obligation. Had she done so, the loss of more than R1.7 million out of trust may well have been avoided.

[69] In the light of the previous charges against him, her meek acceptance of her husband's denial of wrongdoing, and her failure to take any steps to investigate the matter further or to report the allegation to the Law Society (and, significantly, she made no mention of this when she wrote to inform the Law Society that Ms Petzer had apparently stolen what appears to have been funds held in trust), was not only reckless but constituted a cavalier attitude towards her trust fund obligations. Not only was this a gross breach of the obligations as an attorney to ensure that her trust accounts were in order, but her failure to appreciate the seriousness of the matter in the present proceedings is, to me, a cause of great concern. It speaks volumes for her lack of

[26] *Kudo v Cape Law Society* 1977 (4) SA 659 (A) at 668E-F.

appreciation of her duties as an attorney and the rules of the Law Society, all of which in my view renders her mere suspension from practice wholly inappropriate.

[70] The appellant's hesitation in reporting her husband's theft of trust moneys is also a cause for concern. I accept that the existence of a marriage relationship between directors of a law firm may make it awkward for one to report the other to the Law Society, but it does not permit greater leeway than would otherwise be the case. With great respect, I am unable to agree with my learned colleague's statement that it was not unreasonable for the appellant to delay reporting her husband for a month or more. Her duty as an attorney was paramount. The protection of the public was at stake. She was obliged in the interests of both the public and her chosen profession to report the matter 'immediately', as is enshrined in the rules of South African Legal Practice[27] (and a delay of months can by no stretch of the imagination be regarded as compliant with this). She did not do so. In any event, as I've set out above, it is clear from the undisputed evidence that she had been aware of the abuse of trust funds for several months before December 2015 and that by then the marriage relationship had effectively ended. The WhatsApp tirade in November 2015, which contains threats of reporting the matter, clearly proves that to have been the case. Surprisingly it was only after the appellant had consulted with legal representatives that she made her report to the Law Society. That consultation, during which she must presumably have been reminded of her duty as an attorney, should not have been necessary at all. On the undisputed evidence, there was a wholly unreasonable delay before the matter was reported.

[71] The Law Society points out that when the appellant realised that her husband had made himself guilty of the Nian Shun abuse, it was unnecessary to do anything more than report the matter to it. Instead, the appellant initially accepted her husband's undertaking to rectify the matter, which the Law Society stated it understood to mean

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[27] Rule 54.14.10 of the South African Legal Practice Rules, promulgated under the Legal Practice Act 28 of 2014, and which reflect what has always been the position for attorneys, provides :
'A firm shall immediately report in writing to the Council should the total amount of money in its trust bank accounts and money held as trust cash be less than the total amount of credit balances of the trust creditors shown in its accounting records, together with a written explanation of the reason for the debit and proof of rectification.
A firm shall immediately report in writing to the Council should an account of any trust creditor be in debit, together with a written explanation of the reason for the debit and proof of rectification.'

that he would repay the money and, if he had, the appellant would not have reported the misconduct. This the appellant does not deny. Accordingly, it is only because her husband had not repaid the debt that she reported him to the Law Society. Not only does it explain her delay but it shows an unwillingness to do the right thing, and that must count heavily against her in considering whether she should be removed from the roll or merely suspended. Whether the trust funds were repaid or not, there was an obligation to report the matter to the Law Society. Of that there can be no doubt. I therefore see no point in referring the matter for oral evidence in regard to the delay which on the undisputed facts was wholly unreasonable.

[72] As detailed above, even if the appellant was not herself guilty of any abuse of trust funds, she has been neither open nor frank with the Law Society, the high court or this court in regard to the material events. In fact, in certain respects she has shown to have been untruthful. Her statements under oath that she first learned of trust fund irregularities in December 2015, which later changed to November 2015, were simply false. Not only does this untruthfulness show a lack of the necessary qualities required of an attorney, it is a weighty consideration militating against any lesser stricture than removal from the roll (as emphasised by this court in *Vassen*).[28] Further, the manner in which an attorney conducts proceedings to strike him or her from the roll may in itself be relevant to the sanction to be imposed and, should the attorney not have been frank and open with the Law Society, this, too, is a pertinent factor to be taken into account. After all, as an attorney the appellant was under an obligation to assist the court in its search for the truth. As mentioned at the outset, the attorney is expected to co-operate and to provide all necessary information so that the full facts are placed before the court to enable it to make a correct and just decision. In contradistinction, as already mentioned, the appellant's conduct of her case in various respects is hallmarked by her lack of candour and truth.

[73] Furthermore, the appellant approached her responsibilities in regard to the firm's trust funds in a cavalier fashion. That is all the more so given the fact that she was aware of alleged irregularities, certain of which she has declined to disclose, for

[28] At 539B-C.

months before she ultimately brought the matter to the Law Society's attention. This brings the element of protection of the public to the fore.

[74] In *Kekana*,[29] Hefer JA stated that absolute integrity and scrupulous honesty are demanded from legal practitioners and that those who have demonstrated a lack of those qualities cannot be expected to play their part. In the present case, the conduct of the appellant detailed above demonstrates a lack of these necessary qualities. As detailed above, she failed to treat the firm's trust funds with the necessary care and attention; she knew of reports that her husband was abusing the firm's trust moneys and failed to make the necessary enquiries in regard thereto; she in fact had learned of certain of his abuses before the Nian Shun incident was brought to her attention but, apart from arguing with her husband, she did nothing to prevent such abuses continuing and failed to report his indiscretions to the Law Society; and, even once the marriage had broken down, it took her two months to report the Nian Shun episode to the Law Society, notwithstanding her threat to do so immediately (which she should have done). And in what is in my view the final nail in the coffin of her argument, it has been shown that she has been untruthful, not only in her reporting of abuse of trust funds to the Law Society, but by not making a full and frank disclosure to both it and the court as she was obliged to do. Indeed, she has been a stranger to the truth, displaying an inherent dishonesty against which the public needs to be protected

[75] It must also be stressed that although the final decision of course lies in the hands of the court, due to the special position the Law Society holds in relation to its members, its views are of great importance in a case such as this: see eg *Prokureursorde, Transvaal v Van der Merwe.*[30] Counsel for the appellant correctly conceded that the Law Society had a measure of sympathy for the appellant who appears to have been abused by her husband, but nevertheless felt that the severity of the matter was such that striking off was necessary. This is a weighty consideration to be placed in the scales in deciding whether suspension would be an adequate order to make. In the light of the appellant's dishonesty and the other factors that I mentioned above, in my opinion the only appropriate sanction is to strike the appellant's name

[29] *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA); [1998] 3 All SA 577 (A) at 656A-B.
[30] *Prokureursorde, Transvaal v Van der Merwe* 1985 (2) SA 208 (T) at 213A-B.

from the roll of attorneys. It has certainly not been shown to me that suspension for a couple of years will ensure that the appellant will thereafter be a fit and proper person to practice as an attorney. If she is struck from the roll, and subsequently wishes to be re-enrolled, it will be incumbent upon her to prove that she has in fact reformed. Striking from the roll will therefore provide a greater degree of protection for the public than a mere suspension.

[76] My learned colleague expresses the view that there are gaps and contradictions in the appellant's evidence which is a cause for concern. I agree wholeheartedly with her. Where I disagree, however, is whether the matter should be referred for the hearing of oral evidence to deal with these gaps and contradictions as she suggests. In my respectful opinion, it was incumbent upon the appellant, in seeking to persuade the court to exercise its discretion in her favour, to fully explain what her case is in regard to these issues. She declined the opportunity and I see no reason for this court to refer the matter back to the high court to investigate, by way of oral evidence issues, which the appellant has declined to either raise or dispute. I see no reason for the high court to take evidence when the matter can readily be decided on the undisputed evidence on record.

[77] Accordingly, although the court of first instance seriously misdirected itself, by reason of the other factors that I have mentioned and which are not in dispute, in my judgment an order striking the appellant from the roll is the only appropriate order to be made.

[78] I have reached this conclusion without reaching a decision on whether the appellant knew of or gave her approval to the misuse of Mr Ahmed Nabil's trust fund, as alleged by Ms Petzer. If the allegations made against the appellant in that regard were to be established, the appellant would have made herself guilty of what has been described by this court[31] as 'about the worst professional sin that an attorney can commit by misappropriating trust funds'. As this is a matter which by a majority is to be referred for the hearing of evidence, it would be wrong for me at this stage to

[31] *Budricks* para 11.

possibly influence the court which is to hear that evidence by expressing any opinion on the papers in regard to the inherent probabilities, one way or the other.

[79] I mention this last aspect merely as an aside. In my view, despite the misdirection of the court of first instance, an order striking the appellant from the roll was correctly made. In my judgment, the appeal should therefore be dismissed with costs on the scale as between attorney and client, such costs having been correctly tendered by the appellant.

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L E LEACH

JUDGE OF APPEAL

APPEARANCES:

For appellant:	S J Reinders
Instructed by:	Symington & De Kok, Bloemfontein
For respondent:	N Snellenberg SC
Instructed by:	Hill, McHardy & Herbst Inc, Bloemfontein