/SG

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 05/02/2009
CASE NO: 5273/2005

UNREPORTABLE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES	APPLICANT
And	
BENJAMIN SELLO SETSHOGOE	RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This is an application by the applicant professional body to have the name of the respondent attorney struck from the roll of attorneys in terms of the provisions of section 22(1)(d) of the Attorneys Act 53 of 1979 ("the Act").

[2] Section 22(1)(d) of the Act reads as follows:

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

(a) …

(b) …

(c) …

(d) If he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney; …"

[3] Before us, Mr Lamey appeared for the applicant and Mr Joubert appeared for the respondent.

Introduction and Background

[4] The respondent was admitted as an attorney on 22 November 1988. At all relevant times he was practising for his own account under the style of Benny Setshogoe Attorneys, in Pretoria. As will be pointed out, he also, from time to time, ceased practising, *inter alia* to become an acting magistrate, thereafter returned to the profession, or attempted to do so, and is again, according to his latest affidavit, serving as a magistrate under contract.

[5] As an attorney, the respondent is also a member of the applicant Law Society.

[6] As a result of the receipt by the applicant of a complaint from a client of the respondent concerning his professional conduct, the applicant

resolved during July 2004 to request its auditor, Deleeuw Swart ("Swart") to conduct an inspection of the respondent's accounting records.

[7] Swart is a Chartered Accountant (SA) and Registered Accountant and Auditor with many years experience in this field. He is an expert in the field of attorneys' accounting records and the manner in which they should be kept in terms of the Act and in terms of generally accepted accounting practice.

[8] The Law Society has instructed Swart in many similar matters in the past. The findings which he has made and reports which he has submitted have been used by the Law Society in support of applications, similar to the present one, in respect of practitioners who had made themselves guilty of dishonourable, unworthy or unprofessional conduct.

[9] Swart visited the respondent's office on 12 July, 25 August and 9 September 2004 in order to fulfil the aforesaid mandate. He thereafter prepared a report dated 30 September 2004 ("the Swart report"), a copy of which is attached to the founding papers.

[10] The applicant also received a number of complaints from erstwhile clients of the respondent. Some are dealt with in the Swart report, and others came to light at a later stage.

[11] After receipt of the Swart report, the applicant resolved to launch this application to this Court for an order striking the name of the respondent off the roll.

[12] The application was launched in March 2005. Part A of the notice of motion was aimed at obtaining an order suspending the respondent from practice as an attorney pending the final determination of this application. Part A was crafted in such a way as to allow for the respondent to surrender and deliver to the registrar his certificate of enrolment and to interdict the respondent from operating his trust account. There was also provision for Mr Johan van Staden, the head – members affairs of the applicant, to be appointed as a curator to administer and control the trust accounts of the respondent, to take possession of the respondent's accounting records and to perform a wide range of functions and execute certain powers generally to be vested in such a curator in applications of this nature.

[13] Part B of the notice of motion, which is the application that came before us, contains the following prayers:

> "1. That on a date which will be allocated by the Honourable Deputy Judge President applicant will apply for the following order:

1.1 That the name of the respondent is struck off the roll of attorneys of this honourable court.

1.2 That the relief set out in section A paragraphs 1.3 up to and including 1.11 is incorporated in this order of court.

1.3 That the respondent is hereby directed:

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

1.3.2 To pay the reasonable fees and expenses of the curator;

1.3.3 To pay the reasonable fees and expenses of any person (s) consulted and/or engaged by the curator as aforesaid;

1.3.4 To pay the cost of this application on an attorney and client scale."

[14] Although Part A of the notice of motion was enrolled for hearing on 15 March 2005, it was not proceeded with on that date, presumably because of notification from the respondent that he was in the process of winding-up his business. In his answering affidavit, the respondent says that he gained employment as a magistrate with effect from 8 February 2005.

[15] The papers do not present a clear picture as to the reason for the 2005 postponement and as to events following such postponement but it is clear that the applicant was determined to proceed with the application, ,and, on 6 February 2006, this Court granted an order in terms of Part A of the notice of motion. It appears that the respondent was represented by counsel on that day. Respondent's counsel initially asked for a postponement, having told the presiding judge, MYNHARDT, J that he only received instructions the previous weekend, and counsel also told the learned judge that "my instruction was that that order was not granted (presumably a reference to the March 2005 postponement) … respondent was no more practising as from the end of 2004, so that it was not necessary for that order to be granted".

Nevertheless, after some debate between the presiding judge and counsel, the Part A order was granted and the respondent filed an answering affidavit on 28 February 2006.

[16] The answering affidavit was followed by a replying affidavit on behalf of the applicant in which, *inter alia*, details are recorded of four further complaints against the respondent received from erstwhile clients of his during the interim period. The replying affidavit was filed on 3 May 2006.

[17] On 26 April 2007 the applicant filed a supplementary affidavit and I find it convenient to quote a few paragraphs from this affidavit:

> "2.12 This application has previously been enrolled for hearing on 6 February 2006. On this day the Honourable Court interdicted the respondent from practising as an attorney. Ancillary relief was also granted. I refer the Honourable Court to a copy of the order of court dated 6 February 2006 …
>
> 3. The respondent persisted in his failure to cooperate with the Law Society. Consequently, the Law Society was unable to execute the order of court dated 6 February 2006.
>
> 4. On 5 May 2006 the Law Society instructed its attorney of record to instruct the sheriff of the High Court to serve and execute the court order.

5. The sheriff was unable to serve and execute the court order due to the fact that the respondent left his last known address, being 641 Koedoeberg Drive, Fearie Glen, Pretoria, Gauteng. A copy of the return of non-service is attached hereto …

6. The respondent failed to advise the Law Society of his change of address as he was obliged to do in terms of the provisions of rule 3 of the Law Society's Rules.

7. The Law Society then instructed its attorney of record to appoint a tracing agent in order to ascertain the respondent's whereabouts.

8. The tracing agent was unable to locate the respondent.

9. On 24 August 2006 the respondent's attorney of record addressed a letter to the Law Society's attorney of record. A copy of this letter is attached hereto …

10. The respondent, *inter alia*, submitted that he did not understand why his conduct and behaviour was regarded as serious. This submission is with respect significant. He admitted, however, that the complaint received by the Law Society from Rashedo was in fact serious (my note:

Rashedo is one of the complainants, to whom reference will be made later).

11. The Law Society considered the abovementioned letter and instructed its attorney to reply thereto. A copy of this reply, dated 4 October 2006, is attached hereto …

12. Both the aforementioned letters (annexures 3 and 4) are relevant and important for purposes of this application.

13. It appears from the letters that the respondent is not prepared to cooperate with the Law Society or to comply with an order of this Honourable Court.

14. In the letter dated 4 October 2006 (annexure 4) the respondent was specifically referred to the fact that he has failed to furnish the Law Society with his accounting records and client files.

15. On 24 November 2006 the Law Society's attorney of record addressed a further letter to the respondent's attorney of record. A copy thereof is attached hereto as annexure 5. The respondent's attorney of record was specifically requested to advise where the respondent's

accounting records in respect of his practice up to September 2004 were.

16. The respondent's attorney of record replied to the abovementioned letter on 8 December 2006. A copy of this letter is attached hereto as annexure 6.

17. The respondent's attorney of record explained that the firm's accounting records were indeed available. It was, however clear from the letter that the respondent persists in his failure to hand his accounting records to the Law Society in accordance with this Honourable Court's order, alternatively to indicate where these accounting records were.

18. The Council of the Law Society recently considered all the relevant facts, including the contents of the correspondence referred to above and concluded that this matter was to be proceeded with without delay.

19. I submit that an order that the respondent's name be struck from the roll of attorneys is the only appropriate order in the circumstances …"

[18] Annexure 6 referred to in the above extract from the affidavit, is a letter of 8 December 2006 addressed to the applicant's attorney by the respondent's attorney. Part of the letter reads as follows:

> "We enclose herewith a cheque of R5 000.00 being part-payment of the costs, balance to paid by our client by not later than 15 January 2007.
>
> Kindly confirm that you will hold writ in abeyance until then.
>
> In regard to enquiry about accounting records of our client as per your letter dated 24 October 2006, we wish to confirm that such records are available, but our client has been legal (*sic*) advised that as the matter have reached *litis* contestation it will be improper for him to produce such records in terms of the request.
>
> Our client has applied for a transcript of record of the proceedings of the 6th February 2006 with the view to instruct us to apply for the setting aside of the orders granted in such proceedings, save for the postponement and the costs thereof.
>
> You will hear from us in due course."

[19] This letter, in my view, constitutes an example of a hostile and recalcitrant attitude adopted by the respondent towards the applicant throughout these proceedings: refusal to produce the accounting records amounts to contempt of the court order of 6 February 2006. The threat to set aside the order of 6 February 2006 is difficult to understand in view of the fact that the respondent's counsel, on that occasion, and after some debate with MYNHARDT, J *supra*, conceded that the order should be granted.

[20] Further examples of the attitude displayed by the respondent towards the applicant, as his professional body and watchdog, which I consider to be inappropriate and a strong pointer towards a conclusion that the respondent is not a fit and proper person to practise as an attorney, will be detailed later in this judgment.

[21] Despite the letter from the respondent's attorney, *supra*, containing a refusal to present the accounting records, the same attorney, under cover of a letter dated 2 March 2007, allegedly delivered some accounting records of the respondent at the reception office of the applicant. Although the applicant's acknowledgment of receipt appears on the letter, the applicant denies being in possession of the records and an official stated on behalf of the applicant that no trace of the records can be found. In an affidavit, Magdalene Motila Malatji, Head of the Disciplinary Department of the Law Society of the Northern Provinces (the applicant) says the following:

"6.9 The Law Society has already explained that it is not in possession of the respondent's accounting records. Although the Law Society's acknowledgement of receipt appears on the letter from the respondent's attorneys of record, Mofomme Attorneys, dated 2 March 2007 … the Law Society is in fact not in possession of the accounting records.

6.10 It is the Law Society's practice that when the accounting records of the firm are received, it is recorded in a register kept by the official stationed at the Law Society's reception. The upliftment thereof by the curator's department from the official is also recorded in the register. The delivery of the respondent's abovementioned letter from respondent's attorney is recorded in the register, but not the upliftment thereof. I cannot provide an explanation for this state of affairs and I cannot explain where the accounting records are.

6.11 The Law Society's curator's department investigated the matter and endeavoured to find respondent's accounting records. These attempts were fruitless.

6.12 The Law Society's curator's department was not in possession of a copy of the letter of the respondent's attorneys, dated 2 March 2007, to which the accounting records were allegedly attached. The existence of this letter only came to the Law Society's knowledge after it had been attached to one of the respondent's affidavits filed of record.

6.13 Ms Estelle Veldsman of the Law Society's curator's department directed enquiries at all the personnel in the employ of the department as to the whereabouts of the respondent's accounting records. None of the members of the department had any knowledge of either the existence or the whereabouts of the accounting records.

6.14 After the receipt of accounting records of a firm, the curator's department immediately prepares an inventory of all the documents received. In this instance no such inventory exists.

6.15 The Law Society finds it strange that the respondent, or his attorneys of record, merely left the accounting records at the Law Society's reception. I submit that the respondent or his attorneys of record should have handed the accounting records to the curator in

accordance with the order of the court and that they should not merely have left the accounting records at the Law Society's reception.

6.16 The respondent's attorney of record is Mr Mofomme, whose messenger, who normally delivers documents to the Law Society, is Mr Mofomme's brother. The respondent and his attorney of record should have explained the delivery of the accounting records and the procedures which were followed."

[22] Ms Veldsman filed a verifying affidavit in support of the affidavit by Ms Malatji. There were no verifying affidavits from either the respondent's attorney or his messenger.

[23] An argument advanced on behalf of the respondent was that the applicant's "inability" to "return" the records purportedly delivered on 2 March 2007 places the respondent at a disadvantage and renders him unable to explain the deficits on his trust account, to which reference will be made later. What the respondent fails to mention, is that, on his own version, he was in possession of these records all along and at least until 2 March 2007, more than a year after this court ordered him to surrender his accounting records to the applicant. He fails to explain why, during all that time, he was unable to give reasons for the trust shortages. Trust deficits were acknowledged by the

respondent's own accountants when the respondent finally managed to produce rule 70 accountants reports. These were attached to the respondent's answering affidavit in February 2006, more than a year before he allegedly delivered the records to the applicant. There is no explanation advanced by the respondent for his inability to explain these trust deficits, described by his own auditor, in the intervening period of more than one year.

[24] After the president of the Law Society indicated in his supplementary affidavit, *supra*, that the applicant decided to proceed, as a matter of urgency, particularly in view of the failure of the respondent to cooperate, the Part B portion of the application was enrolled for hearing by this Court on 17 September 2007. On that day, this Court, on default of appearance on behalf of the respondent, granted the Part B relief by striking the respondent's name off the roll of attorneys and incorporating portions of the order granted in terms of Part A on 6 February 2006.

[25] It turned out that the respondent's counsel was delayed in the traffic and therefore absent when the matter was called. The respondent then proceeded with an application for rescission of the order of 17 September 2007. The rescission application was granted on the basis that the respondent, through his counsel being late, was not in wilful default. This Court, in the rescission application, also found that "there is a reasonable prospect that if argument is presented on his

behalf that another court may impose a lesser penalty than the striking off from the roll. No misappropriation was proved …"

It is clear that this Court, when granting the rescission, did not make a definitive finding on the merits of the main application. Neither was it argued before us that we were bound by such a finding, and correctly so.

[26] After the rescission was granted, the respondent, as applicant, launched an urgent application aimed at ordering the Law Society to issue a fidelity fund certificate to enable him to practise for his own account. In the alternative he asked for an order compelling the Law Society to return the accounting records which he allegedly delivered on 2 March 2007 "to enable the applicant to address the aspect of a shortfall that had existed in the trust account".

[27] The Law Society (the present applicant) opposed the application. The application was dismissed with costs on the attorney and client scale. The learned judge, MAKGOBA, J, *inter alia*, said the following:

> "[11] It is quite clear from the above facts that the application to remove the applicant's name from the roll of attorneys has not been finalised. Therefore the court order of 6 February 2006 interdicting the applicant from practising as an attorney (pending finalisation of the striking

application) is still in force. As matters stand now the applicant cannot be heard to be saying that he has a clear right to be issued with a fidelity fund certificate to enable him to practise on his own account.

[12] The Law Society is not bound to issue a fidelity certificate to a practitioner. Section 42 of the Attorneys Act 53 of 1979 indicates a discretion on the part of the Law Society when deciding whether or not a fidelity fund certificate should be issued to a practitioner.

[13] In exercising its discretion the Law Society will have to take into consideration certain factors, for example whether the practitioner is a fit and proper person to remain on the roll of practising attorneys or whether he is in good standing in the records of the Law Society. Surely it cannot be said that the applicant in this case who has a striking application pending against him and has been interdicted from practising is in good standing with the Law Society.

[14] In my view the Law Society's decision not to issue the applicant with a fidelity fund certificate pending the finalisation of the striking application is both reasonable and correct. It will in fact be irresponsible on the part of

> the Law Society to issue the applicant with a fidelity fund certificate in the circumstances."

[28] I find myself in respectful agreement with these sentiments expressed by the learned judge. Nevertheless, the respondent applied for, and was granted, leave to appeal against the judgment of MAKGOBA, J.

[29] The present applicant (the Law Society) proceeded to enrol the Part B portion of the application, for the respondent's name to be struck off the roll, and the application came before us on 23 October 2008.

[30] Having dealt with the, somewhat unusual, background of the case, it is now convenient to turn to the merits.

The Merits

[31] Swart's inspection was directed to the following:

> (i) An overview of the respondent's accounting and supporting records, systems and procedures with the view to establishing the general state thereof and the identification of and commentary on any aspects considered irregular and/or unsatisfactory.

(ii) The determination of the trust positions of the firm on specific and/or selected dates and reporting on any trust deficiencies or other similar irregularities.

(iii) The identification of any other circumstances or irregularities which manifested themselves during the course of the inspection which, in Swart's view, required comment.

(iv) The identification of and reporting on any contraventions of section 78 of the Act and/or rules 68, 69 and 70 of the Rules of the Law Society with specific reference to the respondent's accounting records and his administration of trust monies under his control.

[32] The respondent's accounting records were not available for inspection during Swart's visits on 12 July and 25 August 2004. The respondent explained that his accountant was in the process of writing up the accounting records for the period 1 March 2003 to the date of the inspection. The failure to keep his accounting records at his office is a contravention of rule 68.4.

[33] During Swart's visit on 9 September 2004, the only accounting record presented to Swart for inspection was a trust cashbook which had been written up and balanced as at 31 August 2004 by the respondent's accountant. However, the entries in the cashbook had

not been posted to the trust creditors' ledger. The respondent undertook to ensure that his accounting records were processed up to date and undertook to contact Swart when this had been achieved. As of 30 September 2004 respondent had not contacted Swart in this regard.

[34] Swart was able to inspect the respondent's trust bank account which he conducted at the Pretoria branch of First Rand Bank Limited. Swart was unable to inspect any records relating to the respondent's business bank account as none were available.

Although the firm did use trust receipt books, it was apparent from an inspection thereof that not all deposits were recorded in the receipt books. Many deposits were made directly into the respondent's trust bank account without first recording the deposits in the receipt book.

[35] As pointed out, Swart was presented with the respondent's trust cashbook during his visit on 9 September 2004. This had been written up and balanced to 31 August 2004. However, the trust creditors' ledger had not been written up at all.

[36] The respondent's business accounting records had not been written up at all.

In terms of section 78(4) read with section 78(6)(d) of the Act the concept of accounting records does not only relate to trust accounting records but includes the accounting records of a practitioner's practice.

[37] No fees journals had been kept by the respondent.

[38] Trust transfers had been effected by drawing trust cheques rounded to the nearest R1 000.00. There was no indication of the client or the matter or account from which the funds were transferred from the trust banking account to the business banking account.

[39] In the founding affidavit, the applicant lists the following contraventions emerging from the details described above:

(i) Section 78(4) of the Act which requires a practitioner to keep proper trust accounting records.

(ii) Section 78(4) read with section 78(6) of the Act which requires a practitioner to keep proper business accounting records.

(iii) Section 83(9) of the Act which provides that any practitioner who does not comply with the provisions of sections 78(1), 78(2), 78(2)(A), 78(3) or 78(4) shall be guilty of an offence and on conviction liable to a fine not exceeding R1 000.00.

(iv) Rule 68.1 which requires a practitioner to keep proper accounting records which fully and accurately in accordance with generally accepted accounting practice record the state of affairs and the business of his firm.

(v) Rule 68.4 which provides that a firm shall retain its accounting records save with the prior written consent of the council, or when removed therefrom under other lawful authority, at no place other than its main office.

(vi) Rule 68.5 which requires a practitioner to regularly and promptly update his accounting records to ensure that they are written up within one month and balanced within two months after the date on which the trust creditors' list referred to in rule 69.7 have been extracted.

(vii) Rule 69.7 which requires a practitioner to extract, at intervals of not more than three calendar months, lists of trust creditors.

[40] As to the respondent's trust position, it emerged that the respondent had not prepared lists of trust creditors in terms of rule 69.7.

Based on the information which Swart was able to gather, he made a determination of the trust position in the respondent's firm. The figures he assembled would not be accurate because there may have been

trust creditors which, because of the absence of proper accounting records, Swart was not able or would not be able to record.

[41] Swart determined the trust position on four dates. The alarming information he produced in his report is as follows:

On 30 April 2003 there was a trust deficit of R74 867.17.

On 29 February 2004 there was a trust deficit of R91 508.31.

On 31 July 2004 there was a trust deficit of R299 337.31.

On 31 August 2004 there was a trust deficit of R325 774.34.

[42] These facts provide evidence that the respondent contravened section 78(1) of Act which requires a practitioner to retain trust monies in his trust account on account of the person to whom the trust monies are due. He also contravened rule 69.3.1 in that the total amount in his trust banking account was less than the total amount of the firm's trust creditors. He also contravened rule 69.5 which provides that withdraws from the trust banking account shall only be made to or for or on behalf of a trust creditor.

[43] I turn to rule 70 which provides that a firm shall annually cause an accountant, approved by the applicant's council, to furnish a report on

the state of a practitioner's trust account. This rule 70 accountant's report shall be furnished to the council within six months of the annual closing of the accounting records of the firm concerned.

[44] The respondent was required to submit his rule 70 accountant's report for the year ending 29 February 2004 on or before 31 August 2004. By the time the founding affidavit was signed in February 2005, the respondent had not yet submitted that report.

[45] There was a clear contravention of rule 70. This is an important rule as it provides the mechanism whereby an independent accountant can examine a practitioner's accounting records and provide the Law Society with a report on the state thereof and, particularly, confirmation that there has been no misappropriation of trust monies.

[46] I now turn to a number of complaints lodged with the applicant by individual erstwhile clients of the respondent. Some of these were also canvassed in the Swart report:

(i) <u>The complaint of T P Rasehlo</u>

[47] On 8 October 2002 the applicant received a complaint in the form of an affidavit dated 2 October 2002 from T P Rasehlo, a client of the respondent.

[48] The essence of the complaint is the following:

> Rasehlo was injured in a motor accident in 1998. Thereafter, in April 1998, after having been approached by the respondent, he instructed the respondent to institute a claim on his behalf against the Road Accident Fund ("RAF") for compensation. Rasehlo received no further communication from the respondent in spite of making enquiries. It appears that Rasehlo was touted by respondent as the initial approach had been made by the latter to Rasehlo to assist him with his claim against the RAF.
>
> Rasehlo thereafter contacted the RAF directly only to be informed that the claim had indeed been lodged with the fund and that an amount of R62 000.00 had been paid by the RAF to the respondent on Rasehlo's behalf as long ago as 31 May 1999. When Rasehlo enquired from the respondent why he had not accounted to him for this amount, he was informed that the amount had been overpaid and that the respondent was required to refund this amount to Sanlam. This is a nonsensical explanation. At the date of the signing of the affidavit in October 2002 Rasehlo had received no monies from the respondent.

[49] The Law Society wrote to the respondent on 13 December 2002 requesting an explanation. On 23 January 2003 the respondent replied to the Law Society stating that he was "trying to locate his file, but without success and we are still tracing other vital information to

enable us to respond fully and properly to the complaint". This letter was attached to the Swart report. No further communications were received from the respondent.

[50] On 11 August 2003 the Law Society wrote to Rasehlo enquiring whether he had received a statement of account and/or any payments from the respondent. In response, Rasehlo wrote to the Law Society on 16 March 2004 in which he stated that respondent had "not yet fulfil our agreement (*sic*)". Attached to Rasehlo's letter was a copy of a document headed "undertaking" in terms of which the respondent apparently undertook to pay Rasehlo an amount of R33 000.00 in instalments of R3 500.00 per month with effect from 7 May 2003. A copy of this undertaking is also attached to the Swart report. It is dated 27 March 2003.

[51] The applicant, correctly, points out in the founding affidavit that on receipt on the amount of R62 000.00 from the RAF on 31 May 1999 the respondent should immediately have accounted to Rasehlo for the monies received by him and paid over the amount due to him. The rules enjoin him to do so.

The fact that the respondent did not do so and compounded the problem by offering to pay a portion of the amount in instalments, provides evidence that the respondent was not in a position to account

to Rasehlo for the monies he had received in trust because he had stolen and/or misappropriated these monies.

[52] During Swart's inspection of the respondent's accounting records, he inspected the respondent's file relating to the matter of Rasehlo. The file did not assist in any way in resolving the matter. It appears that the payments made by the respondent to Rasehlo in terms of the undertaking were paid in cash. Due to lack of documentation, Swart was unable to determine the amounts that had been paid.

There was also a "sworn statement" predating the undertaking to pay R33 000.00. In terms of the "sworn statement" Rasehlo purportedly acknowledges receipt of an amount of R5 000.00 from the respondent and confirms that he had at that date received a total amount of R19 000.00. Because this pre-dates the R33 000.00 undertaking, it seems that the respondent acknowledged owing Rasehlo at least R52 000.00 (R19 000.00 plus R33 000.00). There was no record in the respondent's file that he had ever accounted to Rasehlo for the trust monies received by him on Rasehlo's behalf.

[53] Significantly, whilst the undertaking to pay R33 000.00 and the sworn statement about the R19 000.00 are dated late in March 2003, the credit balance on the respondent's trust account on 30 April 2003 was only R5 950.94. Rasehlo had by then not been paid either the R33 000.00 or the R19 000.00. It is therefore clear that the respondent did

not have in his trust account sufficient cash to pay his client, in other words he had stolen, and/or misappropriated trust monies which he should have been holding in his trust account on Rasehlo's behalf.

[54] The facts of this complaint provides evidence that the respondent had committed the following contraventions of the Act: section 78(1) which requires a practitioner to retain trust monies in his trust account on account of the person to whom the trust monies are due, rule 68.7 which requires a firm to account to its client in writing within a reasonable time after the performance or early termination of any mandate, rule 68.8 which requires a firm to pay any amount due to a client within a reasonable time and rule 89 which provides that a practitioner shall be guilty of unprofessional conduct where, as in this case, he had delayed the payment of trust money after due demand and neglected to give proper attention to the affairs of the client (rules 89.7 and 89.15) and failed to answer or appropriately deal with any correspondence or other communication which reasonably requires a reply or response (rule 89.23).

The respondent had also failed to comply with an order, requirement or request of the Law Society as intended by rule 89.25.

(ii) <u>The Client S T Shoba</u>

[55] The respondent received on this client's behalf from the RAF an amount of R366 504.00 on 1 April 2004 and an amount of R66 170.71 on 8 June 2004. The latter payment was in respect of the respondent's taxed party and party bill of cost. The total amount received from the RAF on the client's behalf amounted to R432 674.71. This appears from the Swart report, as this was one of the files examined by Swart.

[56] The respondent paid Shoba two amounts totalling some R149 000.00 in April and June 2004 but did not account to his client fully or in a proper manner or timeously. According to the accounting records a trust credit remained in Shoba's name on 31 July 2004 and also at the end of August 2004 in the amount of R282 974.71.

However, the amount standing to the credit of the respondent's trust banking account on 21 July 2004 was R29 937.40 and on 31 August 2004 R3 500.39. In other words, there was not sufficient cash in the respondent's trust banking account to pay the amount, which according to the trust account in record, was due and owing to Shoba and this could only have occurred if trust monies had been misappropriated as the facts indicate.

[57] These facts also provide evidence of contraventions of section 78(1) of the Act, rule 68.7, rule 68.8 and rule 69.5.

(iii) Client S Madubela

The respondent acted for this client and lodged a claim on his behalf against the RAF for injuries sustained in a motor vehicle collision. On 21 March 2003 the respondent received from the RAF on this client's behalf an amount of R42 000.00 and on 11 April 2003 he received a further amount of R5 818.11.

Swart recorded that the respondent was unable to pay these monies to his client as he did not at the time hold sufficient cash in his trust banking account to permit a payment to be made. At the end of April 2003 the credit on the respondent's trust banking account amounted to only R5 950.94 and at the end of February 2004, the trust credit balance was only R309.80.

[58] Significantly, it was only after receipt of the substantial amount of R43 2674.17, which was paid to the respondent in April and June 2004 in respect of the claim of Shoba, *supra*, that the respondent succumbed to the temptation to use a portion of those monies to pay Madubela an amount of R34 398.82.

The trust amount of R432 674.17 should have been retained by the respondent in his trust account until he had accounted to Shoba for the monies and paid over to him the monies due to him.

The applicant, in the founding affidavit, points out that the respondent was committing the classic contravention of "rolling trust monies" i.e., he used trust funds received on behalf of trust creditor to pay other trust creditors whose trust monies he had earlier stolen or misappropriated. This conduct amounts to theft. See (1) *Incorporated Law Society, Transvaal v Visse and Others*; (2) *Incorporated Law Society, Transvaal v Viljoen,* 1958 4 SA 115 (TPD) 118H.

[59] The information extracted by Swart provides evidence that the respondent had contravened section 78(1) of the Act, rule 68.7, rule 68.8 and rule 69.5.

(iv) Client G M Nthite

[60] A similar scenario to that which has just been sketched was found by Swart when he examined the accounting records relating to the respondent's client, Nthite, on who's behalf the respondent had also lodged a claim for compensation with the RAF.

[61] On 13 February 2004 the respondent had received from the RAF on behalf of Nthite an amount of R16 800.00. At the end of February 2004 there was a credit of only R309.80 in the respondent's trust banking account as opposed to Nthite's trust claim alone in the amount of R16 800.00.

[61] On 2 June 2004 the respondent was able to pay to Nthite an amount of R10 237.47 but only after he had received the amounts of sum R400 000.00 in April and June 2004 on behalf of Shoba. The respondent used the trust funds received on behalf of Shoba to enable him to pay the claim of Nthite, that is, he rolled trust monies as was described above.

[62] This conduct also amounted to contraventions of section 78(1) of the Act and rules 68.7, 68.8 and 69.5.

(v) Client Mokoka

[63] The respondent also acted for this client in a claim against the RAF. On 7 November 2003 the amount of R27 200.00 was paid to the respondent by the RAF on his client's behalf. The respondent failed to account to his client within a reasonable period. On 31 August 2004 Mokoka had a trust claim against the respondent for payment of these amounts. However, on this date there were not sufficient monies in respondent's trust account which only showed a credit balance of R3 500.39. Again there were contraventions of section 78(1) of the Act and rules 68.7, 68.8 and 69.5.

(vi) Unknown clients

[64] Swart ascertained from the respondent's account records that he received amounts of R7 500.00, R6 600.00 and R5 000.00 respectively in March 2004 on behalf of unknown clients. The payments were received from the RAF.

[65] Swart ascertained that the respondent had not accounted for these monies.

[66] As at 31 August 2004 the respondent was not in a position to account for these monies because on that date there was only a credit of R3 500.00,39 in his trust banking account. The evidence clearly indicates that the respondent had stolen and/or misappropriated these monies. There were also clear contraventions of section 78(1) of the Act and rule 68.7, 68.8 and 69.5.

[67] Swart concluded his report by stating that it was apparent during his inspection of the respondent's accounting records that the respondent was not interested in ensuring that his firm's accounting records were kept up to date and were correct. The accounting records that were kept were merely kept as a record of transactions and were not used to control and administer the trust creditors' account. The respondent did not ensure that the correct accounting procedures and controls were adopted by both himself and his staff in order to ensure compliance with the Act and the rules. There was a major risk to the Attorneys'

Fidelity Guarantee Fund in respect of claims that would be instituted as a result of these substantial trust shortages.

[68] The applicant also submitted in the founding affidavit, correctly in my view, that the dishonest actions of certain practitioners, such as the respondent, reinforces the arguments which are raised in certain quarters that claims under the RAF Act should be removed entirely from the hands of the legal profession. These arguments, if implemented, will seriously affect the legal profession and the services which are supplied by the vast majority of honourable legal practitioners to the public throughout the country.

[69] The applicant was also precluded from issuing the respondent with a fidelity fund certificate for the year 2005 because of the respondent's failure to lodge a rule 70 report for the financial year ending 28 February 2004, and the contents of the Swart report.

(vii) Additional complaints received after the filing of the founding affidavit and dealt with in a supplementary affidavit.

[70] I have already referred to the additional complaints listed in a supplementary affidavit deposed to by the president of the applicant. For the sake of brevity I shall deal with these complaints very briefly.

[71] Client S Tholakele instructed the respondent to handle a third party claim on his behalf. On 17 July 2003 the RAF paid the proceeds of the claim in the amount of R9 500.00 to the respondent. The respondent failed to account to Tholakele and to pay him the proceeds of the claim. The applicant submitted that the respondent probably misappropriated Tholakele's funds.

[72] Client Wiseman Bawiso filed a written complaint with the applicant. The respondent handled his claim and received an amount of R8 500.00 from the RAF on 24 July 2003. The respondent failed to account to Bawiso and probably misappropriated his funds.

[73] Client M S Raseroka instructed the respondent to handle her third party claim but he never accounted to her.

[74] Details of these complaints form part of the founding and supplementary papers.

[75] On 28 February 2006, the respondent filed a relatively short answering affidavit.

[76] He stated that he was no longer practising as an attorney and had submitted his "closing down audit certificate" to the applicant. He stated that he had been employed as a magistrate since 8 February 2005 and "still believes that I am a fit and proper person".

[77] As to the visits by Swart, he states that Swart visited him only twice and not three times at Swart had deposed to. Swart was "very accommodative" and understood the explanation given to him and, consequently, did not request books of account for inspection. He said: "the accounting records, although incomplete at the time, were present in my previous offices. But after explaining, Mr Swart did not request to see such records". These allegations were, understandably, comprehensively dealt with in reply. On the overwhelming probabilities, it must be concluded that the remarks made by the respondent are untrue. Swart's very mandate was to inspect the records. He gave a detailed account of what he managed to find and what he managed to inspect.

[78] The respondent also, repeatedly, expresses regret at not having been given an opportunity to appear before a disciplinary committee of the applicant where he would have pleaded guilty and paid the fine and, presumably, in that manner avoided having to face an application such as the present one. This, in my view, exhibits a lack of insight into the gravity of the situation. It was not for the respondent to decide whether or not a disciplinary committee should hear the matter. The applicant was perfectly entitled, in my view, and given the contents of the Swart report, to proceed with this application. These are further examples of the recalcitrant, almost reckless, attitude displayed throughout by the respondent.

[79] The respondent admitted that he failed to contact Swart afterwards, despite having undertaken to do so because "my accountant had informed me that everything was in order and, as a result, I did not contact Mr Swart." Another example of the attitude referred to.

[80] He alleged that Swart never asked him for his business account in record. Again, this is highly improbable, and directly in conflict with the Swart report.

[81] He admitted that he did not use and did not have a transfer journal "but that, with respect, did not make my accounting procedures very different from the generally accepted accounting practice of attorneys".

He conceded that he wrote out cheques from his trust account in order to effect transfer into his business account in round figures of R1 000.00. He said his fees journal would indicate specific creditor's accounts that he was transferring fees from. The Swart report indicates the opposite.

[82] He made the following concession: "I concede that the practice of transferring round figures could have lead to trust shortages but submit that such shortages would not be as a result of trust money misappropriation. I concede that such system of transferring round figures is incorrect and may lead, as in my case, to trust deficit."

[83] He stated in his opposing affidavit that in other cases the trust deficit was caused by requests of clients who demanded cheques that they could cash. As a result, he issued business cheques and transferred money from trust account to business account to cover such amounts.

[84] Another example, in my view, of the respondent's total lack of insight into the gravity of the situation and deplorable attitude is manifested in the following submission he makes in his opposing affidavit: "I submit that while applicant has mentioned several contraventions of its rules, such totality indicates a classical splitting of charges" and "it is my respectful submission, that for purposes of punishment, all these contraventions should be regarded as one" and "I confirm that I would have pleaded guilty to the charge of not updating my accounting records, if I had been given an opportunity to do so."

As appears from these quotes, and this is also an overall impression gained from a general reading of the opposing affidavit, the respondent was unable to rebut the comprehensive charges submitted on behalf of the applicant, but felt that there was "splitting of charges", whatever that may mean in the civil sense, and that the charges could have been dealt with amicably during disciplinary hearings where a plea of guilty would have been tendered so that the nasty business of an application to strike his name off the roll would have been avoided. As I have indicated, this exhibits a total lack of insight into the serious

nature of the proceedings and demonstrates, in my view, that the respondent is not a fit and proper person to practise as an attorney.

[85] The respondent then goes on to produce two rule 70 reports by his auditors. These are both dated 20 February 2006 and represent the periods March 2003 to 29 February 2004 and March 2004 to 25 October 2005. They are both out of time.

They are both qualified and the respondent's auditor says that they are qualified due to a contravention of section 69(3) of the Act in that trust creditors exceeded the funds available in the trust bank accounts and the trust bank account was overdrawn for certain days during the year. In respect of the first report the respondent auditor confirms a trust deficit as at 29 February 2004 in the amount of R124 129.04 and as at 31 August 2003 a trust deficit in the amount of R80 170.98. In the second report a trust deficit as at 28 February 2005 of R1 512.91 is confirmed and as at May 2004 a trust deficit of R142 785.80 appears. It is stated that there was no deficit on 25 October 2005 which is given as the closing date of the practise. This date also flies in the face of the respondent's own evidence that he already started working as a magistrate on 8 February 2005.

[86] The respondent, to his credit, concedes these trust deficits and blames his erstwhile auditor for having mislead him into allegedly informing him that an accounting report had been filed timeously. He gives a

long account of his differences experienced with the erstwhile auditor who was then replaced by another auditor.

[87] As to the complaint of his erstwhile client, Rasehlo, the respondent does not effectively rebut the detailed analysis offered by the applicant, to which I have referred. He says that the client's file had been "misfiled" at some stage. When the client approached him, he told him that he was sending the file to the costs consultants. The cost consultants took their time to finalise the bill of costs. He admits having signed the acknowledgement of debt to which reference has been made. He does not effectively challenge the figures and details submitted by the applicant. He points out that he finally settled the matter with the client. He attaches an affidavit by the client, dated as recently as December 2004, in which the client says that the matter between himself and the respondent had been resolved. The circumstances under which this statement was procured from the client are not detailed.

[88] The respondent concludes his submissions with regard to Mr Rasehlo with the following: "I wish to respectfully submit that the Rules that applicant refers to, are only applicable when a client is available and a statement of account is required without a bill of costs. I further submit that I could only account to client, Mr. Rasehlo, from the time he became available and, therefore, cannot be accused of not accounting to client within a reasonable time or delay in payment of trust moneys

or not giving proper attention to the affairs of my client." Again, this, in my view, demonstrates a total lack of insight as to the professional duties of an attorney.

[89] With regard to the case of Mr Shoba, the respondent says that Mr. Shoba has never complained and was satisfied with the manner in which he had finalised this client's claim. He does not, in any way, counter the convincing allegations on behalf of the applicant, through the Swart report, that he failed to timeously account to Shoba and used part of Shoba's money to meet the demands of other trust creditors. He gives no other details, neither does he provide copies of relevant source documents or the like.

[90] With regard to Mrs Madubela and Mr Nthite he simply says that they never complained and "their matters were resolved exactly like in the matter of Mr Shoba. It is unfortunate that applicant did not give me an opportunity to explain before it brought this application." He states that he paid these clients but furnishes no details or documentation. He also makes the following significant statement:

> "In this two matters, I respectfully submit that the amounts were even far lesser and smaller than in the Shoba matter and should not have been used as examples of the so-called 'rolled trust funds'."

[91] This is the closest the respondent came to rebutting the clear and compelling allegations by the applicant, *supra,* of the rolling of trust funds which, as I have illustrated, amounts to theft.

As the applicant explains in reply, the respondent fails to explain the fact that he was only able to pay the proceeds of Madubela's third party matter to her after receipt of Shoba's money in the amount of R432 674,17 in his trust banking account. He also fails to explain the fact that he used Shoba's money to pay Madubela. As it is submitted in the reply, correctly in my view, it is clear that the respondent rolled trust monies. He fails to explain or prove otherwise. He should have had sufficient trust funds available in his trust banking accounts at all times in order to meet the demands of all his trust creditors. The respondent does not specifically deny the contraventions of the Act and the rules referred to in the founding affidavit.

In reply, the applicant makes similar, compelling, submissions with regard to Nthite's claim.

[92] As to client Mokoka, the respondent simply states that he acted for this client on the instructions of attorney Jake Masetla. He says that after finalisation of the matter he had sufficient funds in his business account and paid attorney Masetla when they met at Garankuwa Court. He alleges that he actually gave Mr Masetla a business cheque book because he had another book with him. Afterwards he

transferred the funds of Mokoka from trust into his business account to replace the cheque he had given to attorney Masetla.

No verifying affidavit from Masetha is attached, neither does the respondent furnish copies of source documents such as, for example, the bank statements and the cheque that was allegedly handed over. He does not explain on what date he handed a cheque to Masetla or on what date he allegedly transferred the funds from his trust banking account. It has already been pointed out that on 31 August 2004, there was only an amount of R3 500.39 available in the respondent's trust banking account. Accordingly, that fact that there were insufficient funds in the trust account is not disputed. The contraventions alleged, with reference to the Act and the rules, are not denied.

[93] As to the unknown clients identified by Swart and dealt with, *supra*, the respondent admits that his ledger accounts were not complete. He blames Swart for not having asked him for an explanation. He says, for example, "these were contributions towards my fees for matters I had settled earlier and accounted to such clients."

[94] Again the respondent offers no details, neither does he attach supporting documentation.

In the well known case of *Prokureursorde van Transvaal v Kleynhans* 1995 1 SA 839 (T) which is often quoted in these matters, the learned judge said the following at 853G-H:

> "Uit die aard van die dissiplinêre verrigtinge vloei voort dat van 'n respondent verwag word om mee te werk en die nodige toeligting te verskaf waar nodig ten einde die volle feite voor die hof te plaas sodat 'n korrekte en regverdige beoordeling van die geval kan plaasvind. Blote breë ontkennings, ontwykings en obstruksionisme hoort nie tuis by dissiplinêre verrigtinge nie."

Referring to the *Kleynhans* case Harms ADP, in a recent, as yet unreported, SCA judgment of Malan and another v The Law Society of the Northern Provinces, case 568/2007 says the following in paragraph [12]:

> "The application of the 'rule' in cases such as this, requires a consideration of the fact that it is a *sui generis* procedure, and that an attorney is not entitled to approach the matter as if it were a criminal case and rely on denial upon denial and, instead of meeting the allegations, to deflect them and, as part of the culture of blame, always blame others."

The "rule" referred to is the well known rule laid down in *Plascon-Evans Paints (Ltd) v Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) 634I – 635D.

These words of the learned judge of appeal are also applicable to the instant case for another reason, namely that the present respondent, as has been pointed out, repeatedly blames others such as his auditor and the costs consultants for transgressions of his own.

[95] As to the applicant's blanket submission, towards the end of the founding affidavit, summing up the transgressions and submitting that the respondent's conduct poses a threat to the Fidelity Guarantee Fund and the profession as a whole, the respondent simply repeats his allegation that he had accounted to and paid all his clients and that the fidelity fund was not at risk. He also states that he is a "fit and proper person as it was indicated by my arrangement with applicant to wind up my practice and liquidate my trust account balance and I have not put the profession in disrepute". This appears to be a reference to discussions he had and arrangements he had made with the curator, Mr Van Staden, who had been appointed by this court in terms of the order of 6 February 2006. The respondent repeatedly refers to his arrangement to Mr Van Staden without offering any substantial submissions as to how such arrangements would exonerate him from his transgressions. If the applicant had been satisfied with the

"arrangements" allegedly made with Mr Van Staden, one would assume that this application would not have been proceeded with.

[96] As to the fact that the applicant was precluded from issuing a fidelity fund certificate, the respondent again submits that he stopped practising in December 2004, whilst this date is at odds with the date of October 2005 suggested by the auditors, *supra*.

[97] As to the applicant's compelling summary of all the contraventions perpetrated by the respondent with regard to the Act and the rules, the respondent says the following: "I have noted all the rules that applicant alleges that is contravened. As stated in previous paragraphs, I have not contravened some of the rules and only if the applicant had brought me before a disciplinary committee, it would have been easy to establish which rules had I contravened, if any.

I submit that, even if I had been found guilty by applicant's disciplinary committee for contravention would not have been to the effect that I am not a fit and proper person to practise as an attorney. I would, maybe, have been fined."

As previously pointed out, this, in my view, illustrates a clear lack of insight on the part of the respondent as to the gravity of his transgressions which were clearly proved in the founding papers by the applicant's submissions, which submissions remained largely

uncontested by the respondent. It is also another example of his reckless attitude.

In my view, this is a further demonstration of the fact that the respondent is not a fit and proper person to practise as an attorney. This conclusion is fortified by a submission by the respondent, in his answering affidavit, that the appointment of a curator *bonis* (Mr Van Staden) as foreshadowed in the order of 6 February 2006 is "not required" because "I have no client files nor trust monies in my possession."

[98] As to the complaints of three more clients, *supra,* namely Tholakele, Wiseman Bawiso and Mrs Raseroka, *supra,* which came to hand later and were raised in a supplementary affidavit by the president of the applicant, the respondent simply says that their complaints were based on the fact that they could not trace him after he had closed his practice. He again makes the statement that "I paid them immediately when they contacted me telephonically in the ordinary applicant as per course of business and I was not aware of their complaints." Again he offers no details and neither does he produce supporting affidavits or documentation.

It is inherently improbable that the clients would have complained if they had been fully paid. As to the third client, Mrs Raseroka, he says that there were no proper instructions and no claim was lodged. In the

reply, the applicant, correctly in my view, points out that Tholakele and Bawiso do not base their claims on the fact that the respondent could not be traced after he had closed his practice. The complaint is that he failed to account to them and pay them the proceeds of the claims. Details of the proceeds have already been dealt with, *supra.*

[99] As to Mrs Raseroka, the applicant, in reply, points out that her complaint was directed at the fact that she instructed the respondent to act for her and that she received no progress reports. If the respondent did not have proper and complete instructions, he should have obtained same from Mrs Raseroka. No explanation in this regard was forthcoming from the respondent.

[100] As to the respondent's failure to file an answering affidavit before the proceedings of February 2006, he says the following:

> "I further submit that while applicant had been up to date with what was transpiring with my practice in winding up, I never thought that an answering affidavit was necessary as such winding up would be finalised by a closing down certificate.
>
> I apologise to the above Honourable Court for such oversight, and also, for not contacting applicants' attorneys of record to find out whether the filing of an answering affidavit was still necessary."

As pointed out by the applicant in reply, this explanation is nonsensical because the notice of intention to oppose had already been served almost a year earlier, in March 2005. In my view, this is another example of the respondent's lack of insight.

[101] The seemingly never ending stream of complaints by former clients of the respondent was perpetuated in later paragraphs in the applicant's replying affidavit under the heading "further complaints". According to the applicant there were four further complaints which were received after the proceedings had reached an advanced stage: GM Matlala complained that he had instructed the respondent to act on his behalf in a claim against his employer. He paid the respondent an amount of R3 919.83 but the respondent failed to appear in court on his behalf. L Kgasoe complained that he had instructed the respondent to act on his behalf and paid him an amount of R4 000.00. The respondent failed to handle his instruction and avoided his telephone calls. A Mashele complained that she had instructed the respondent during February 2003 to handle a third party claim on her behalf. The respondent failed to handle her instruction properly and to report progress. She received nothing in respect of proceeds of the claim. L S Mahlangu complained that she had instructed respondent during July 2003 to act on her behalf and paid him a deposit of R5 000.00. Although the respondent did not proceed with the matter, he failed to refund the amount of R5 000.00.

[102] Although the respondent did not deal with these complaints in an affidavit, he replied to the applicant's allegations in a letter dated 20 July 2007. He says he had no record of the Matlala instructions. As to Kgasoe he says that he fully accounted to this client who had since passed away. He also stated, simply, that he had accounted to Ms Mashele as would appear in her file "delivered to the Law Society on 2 March 2007", possession of which the Law Society denies, *supra*. He also states that in the case of Mahlangu he had been instructed by Lesaka Legal Costs, and that he fully accounted when Lesaka terminated its mandate.

[103] In a further supplementary affidavit the president of the Law Society denies that the respondent had accounted to Kgasoe. The respondent furnishes no details whatsoever. The same submission is made by the president of the Law Society with regard to Mashele and Mahlangu. As to Matlala, the applicant points out that the respondent fails to explain what steps he took to obtain the necessary information in order to reply to the complaint.

[104] At the end of this further supplementary affidavit, the president of the Law Society submits that it is clear that the respondent had made himself guilty of unprofessional, dishonourable and unworthy conduct and that his name should be struck from the roll of attorneys.

[105] From the above, rather cumbersome, summary of the facts, it was shown on the probabilities, in my view, that the respondent has been guilty of multiple contraventions of the Act and the rules.

I have also come to the conclusion, and I hold accordingly, that the applicant has proved on a balance of probabilities that the respondent misappropriated trust monies on several occasions and that he committed theft when rolling the trust monies by paying the one creditor with the money of another.

In my view, it has been conclusively proved by the applicant that the respondent is not a fit and proper person to continue to practise as an attorney, as intended by the provisions of section 22 of the Act, *supra*.

Brief remarks about the Legal Position

[106] The question whether an attorney is a fit and proper person to practise as such lies, in terms of section 22(1)(d) of the Act, *supra*, in the discretion of the Court – see *Law Society of the Cape of Good Hope v C* 1986 1 SA 616 (A); *Jasat v Natal Law Society* 2000 3 SA 44 (SCA).

[107] The appropriate sanction, namely a suspension from practice or striking from the roll, also lies within the discretion of the court – see *A v Law Society of the Cape of Good Hope* 1989 1 SA 849 (A) 851A-F; *Jasat v Natal Law Society*, *supra*.

[108] The Court also has inherent jurisdiction to determine the fitness of attorneys to practise, over and above the provisions of the Act – see *Prokureursorde van Transvaal v Kleynhans*, *supra* at 851E-F; *Law Society of the Cape of Good Hope v C*, *supra* at 638C-639F.

[109] An application of this nature is in itself a disciplinary enquiry and *sui generis*, and not a *lis* between the Law Society and the attorney. The Law Society, as *custos morum* of the profession, places the facts before the Court for consideration – see *Kleynhans supra* at 851G-H; *Cirota and Another v Law Society, Transvaal* 1979 1 SA 172 (A) 187H.

[110] The facts on which the Court exercises its discretion are to be established on a balance of probabilities.

See *Kleynhans*, *supra* at 853I-J; *Law Society, Transvaal v Matthews* 1989 4 SA 389 (T) 393I-J.

[111] The opinion or conclusion of the Law Society that the practitioner is no longer a fit and proper person to practise as an attorney carries great weight with the Court, although the Court is not bound by it. See *Kaplan v Incorporate Law Society, Transvaal* 1981 2 SA 762 (T) 781H.

[112] It has been repeatedly stated by the Courts that the failure to keep proper accounting records is a serious contravention and that an

attorney who fails to comply with this requirement is liable to be struck off the roll or to suspended from practice – see *Matthews*, *supra* at 395D-F.

[113] In *Matthews,*, *supra* at 394A-E the following is said about the duty of an attorney in regard to trust money:

> "Section 78(1) of the Attorneys Act obliges an attorney to maintain a separate trust account and to deposit therein money held or received by him on account of any person. Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. It is imperative that trust money in the possession of an attorney should be available to his client the instant it becomes payable. Trust money is generally payable before and not after demand … An attorney's duty in regard to the preservation of trust money is a fundamental, positive and unqualified duty. Thus neither negligence nor wilfulness is an element of a breach of such duty: *Incorporated Law Society, Transvaal v Behrman* 1977 1 SA 904 (T) 905H. It is significant that in terms of section 83(13) of the Attorneys Act a practitioner who contravenes the provisions relating to his trust account and investment of trust

money will be guilty of unprofessional conduct and be liable to be struck off the roll or suspended from practice."

[114] In his diligent address on behalf of the respondent, Mr Joubert, correctly, conceded that his client had made himself guilty of conduct and/or failures justifying a penalty to be imposed. However, it was submitted on behalf of the respondent that he is still a fit and proper person to remain on the roll and that an appropriate penalty would be a "suspended period of suspension from practice on condition that if the respondent should decide to commence active practice as an attorney then as from the time of commencement of such practice he should be debarred from practising in solo practice for a period of one year".

[115] Mr Joubert argued, that although criticism can be levelled against the respondent for the way in which he managed his trust and business banking accounts, there was no dishonesty involved in his conduct. In support of this submission, Mr Joubert referred to the fact that, according to the rule 70 audit reports submitted by the respondent, *supra*, at the time of final closure of the trust account on 25 October 2005 there was no trust deficit. With these submissions I cannot agree. Regular and substantial trust deficits were conclusively proved in the Swart report. Regular and substantial trust deficits were confirmed in the qualified rule 70 reports presented by the respondent's own auditors. The fact that the figures mooted by the auditors differed from those mentioned in the Swart report, is

irrelevant, so is the fact that the deficit may have been extinguished by the time the accounts were closed. The rolling of trust money by the respondent, with reference to the Shoba funds, was, in my view, clearly proved on a balance of probabilities. This amounts to theft. The evidence presented by the applicant is, for practical purposes, uncontested. There is strong evidence, from a host of erstwhile clients, that the respondent, on the probabilities, misappropriated their trust monies as well. Their complaints were met by bare denials, and no evidence or explanations were offered in rebuttal. The overall picture, and the only reasonable inference flowing therefrom, is one of dishonesty and misappropriation. All this was coupled with an accounting system that was totally flawed and inadequate as illustrated in the Swart report. As illustrated, the respondent, on a number of occasions, displayed a lack of insight into the gravity of the situation and his true responsibilities as an attorney. In my view it was conclusively proved that the respondent is not a fit and proper person to practise as a member of the attorney's profession.

[116] In support of his argument that the respondent should be suspended from practice, rather than struck off the roll of attorneys, Mr Joubert relied on the case of *Summerley v Law Society, Northern Provinces* 2006 5 SA 613 (SCA).

[117] In my view, that judgment is distinguishable and the basis that it was held that the appellant was not guilty of dishonesty. From the following

passage, at 622A-D, it appears that the Law Society also conceded that a finding of dishonesty may not be warranted:

> "What weighs heavily in the appellant's favour is the consideration that I have already referred to, namely that he was not guilty of dishonesty. The society's contention was that, though a finding of dishonesty may not be warranted, the appellant's misconduct displayed a complete lack of insight into an attorney's obligations with regard to his trust account. I agree. What I do not agree with, however, is the inference sought to be drawn by the society that his lack of insight must be attributed to a reckless disregard for its rules aimed at the protection of trust funds. On the appellant's version, which cannot be rejected, his lack of insight resulted from a dearth of knowledge and experience. Though these answers will rarely be acceptable from an attorney such as the appellant, who must be approaching middle age and who has been practising for more than ten years, his situation appears to be quite exceptional. He had no experience of note before he left the attorney's profession for about eighteen years and he has hardly had any exposure to trust transactions since his return. Because he always practised on his own, he never benefited from the guidance of more experienced colleagues and, because he was always struggling to survive, he was unable to employ knowledgeable assistance."

For the reasons I have mentioned, these remarks do not apply to the present respondent.

[118] In *Summerley*, at 615B-F, the learned judge of appeal reaffirmed the fact that an application such as the present involves a threefold enquiry. The first enquiry is aimed at determining whether the Law Society has established the offending conduct upon which it relies on a balance of probabilities. I have already found in favour of the Law Society in this regard. The second question is whether, in the light of the misconduct thus established, the attorney concerned is a fit and proper person to continue to practise as an attorney. I have found that the respondent is not such a person. The third enquiry requires the court to exercise a discretion. It must be decided whether the person who has been found not to be a fit and proper person to practise as an attorney deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice. I have held, on the probabilities, that the respondent was proved to have been guilty of dishonesty in misappropriating trust monies and “rolling” trust funds by utilising the money of one client to pay the other.

I find it convenient to quote from the recent judgment, *supra*, of *Malan and Another v The Law Society of the Northern Provinces* at paras [10] and [11]:

"[10] Obviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal [exceptional circumstances were found in *Summerley* and in *Law Society, Cape of Good Hope v Peter* [2006] ZASCA 37 and the court was able in the formulation of its order in those cases to cater for the problem by requiring that the particular attorney had to satisfy the court in a future application that he or she should be permitted to practise unconditionally]. Where dishonesty has not been established the position is as set out above, namely that a court has to exercise a discretion within the parameters of the facts of the case without any pre-ordained limitations.

[11] 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 Transvaal v Tloubatla* [1999] 4 All SA 59 (T). To the extent that the judgment in *Law Society of the Cape of Good Hope v King* 1995 2 SA 887 (C) 892G-894C

propagates an 'enlightened approach', requiring courts to deal with misconduct which does not involve dishonesty with (in my words) kid gloves, I disagree. In order to stem an erosion of professional ethical values a 'conservative approach' is more appropriate [*Incorporated Law Society, Transvaal v Goldberg* 1964 4 SA 301 (T) 304A-F]."

[119] As to the suspension option, the following words of the learned judge of appeal, in para [8] are informative:

"[8] It is seldom, if ever, that a mere suspension from practice for a given period in itself will transform a person who is unfit to practise into one who is fit to practise. Accordingly, as was noted in *A v Law Society of the Cape of Good Hope* 1989 1 SA 849 (A) 852E-G, it is implicit in the Act that any order of suspension must be conditional upon the cause of unfitness being removed. For example, if an attorney is found to be unfit of continuing to practise because of an inability to keep proper books, the conditions of suspension must be such as to deal with the inability. Otherwise the unfit person will return to practice after the period of suspension with the same inability or disability. In other words, the fact that a period of suspension of say five years would be a

> sufficient penalty for the misconduct does not mean that the order of suspension should be five years. It could be more to cater for rehabilitation or, if the court is not satisfied that the suspension will rehabilitate the attorney, the court ought to strike him from the roll. An attorney, who is the subject of the striking off application and who wishes a court to consider this lesser option, ought to place the court in a position of formulating appropriate conditions of suspension."

In the present case, no such appropriate conditions of suspension were advanced. In any event, even if such a submission had been made, it would not have availed the respondent, given the serious nature of his conduct which I have found to have been proved.

[120] For all these reasons, I have come to the conclusion that my discretion should be exercised in favour of an order striking the respondent off the roll of attorneys rather than suspending him from practice.

The Order

[121] It is ordered:

1. That the name of the respondent be struck off the roll of attorneys of this Court;

2. That the relief set out in prayers 3 up to and including 12 of the order of this court of 6 February 2006 is incorporated in this order;

3. That the respondent is hereby directed:

3.1 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;

3.2 To pay the reasonable fees and expenses of the curator;

3.3 To pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;

3.4 To pay the costs of this application on the scale as between attorney and client.

W R C PRINSLOO
JUDGE OF THE HIGH COURT

I agree

T M MAKGOKA
ACTING JUDGE OF THE HIGH COURT

5273/2005/sg

Heard on:	23 October 2008
For the Applicant:	A T Lamey
Instructed by:	Messrs Rooth Wessels Motla Conradie Incorporated, Pretoria
For the Respondent:	S Joubert
Instructed by:	Musenwa Attorneys, Pretoria
Date of Judgment:	05/02/2009