IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 3039/2014

In the matter of:

LAW SOCIETY OF THE FREE STATE Applicant

and

WERNER LE ROUX First Respondent
BERNARDUS JACOBUS VIVIERS Second Respondent
STELLA SMITH Third Respondent
GOODRICK & FRANKLIN ATTORNEYS INC Fourth Respondent
(Registration Number: 2003/031198/21)

CORAM: MOLEMELA, JP, DAFFUE, J et MIA, AJ

JUDGMENT BY: MOLEMELA, JP

DELIVERED ON: 30 NOVEMBER 2015

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[1] *Introduction*

This is an application brought by the Law Society of the Free State ("Law Society") for an order removing the name of the first respondent from the roll of attorneys and granting other ancillary relief. Against the second and third respondents the relief sought by the Law Society is that they be warned, alternatively that they be suspended or "appropriately sentenced" but not struck off the roll.

[2] *Background facts*

The first respondent, namely Mr Werner Le Roux was admitted as an attorney by this court on 13 October 1987. The second respondent Mr Bernardus Jacobus Viviers was admitted as an attorney and conveyancer by this court on 10 December 1998 and as a Notary Public on 8 July 2004. The third respondent, namely Ms Stella Smith was admitted as an attorney on 9 January 1997 and as a conveyancer on 7 January 1999. They were all directors at the firm called Goodrick and Franklin Inc, which is cited as the fourth respondent ("the firm").

[3] In its application, the Law Society stated that the offending conduct which prompted it to approach this court for relief as follows:

> "There was a substantial trust deficit in the respondents' books; contravention of rules 16 and 16A; respondents' misappropriation of trust funds; trust deficits consistently appeared in the respondents' bookkeeping over a period of time; respondents failed to submit a rule 16B audit report timeously; the firm's rule 16 audit report for the period ending February 2011 (1 March 2010 to 28 February 2011) is qualified; the latest audit report is also qualified; the respondents arguably conducted an illegal investment scheme alternatively an illegal investment practice; the respondents failed to keep proper accounting records in respect of their practice and contravened several provisions of the Attorneys Act (section 78) and the Law Society Rules (Rule 16) relating to bookkeeping by the attorneys."

[4] Another ground relied upon by the Law Society is that the first, second and third respondents are guilty of unprofessional, dishonourable and unworthy conduct. In addition to above, the following contraventions were raised in respect of the first respondent: that he failed to co-operate fully with it (the Law Society) during its investigation and made conflicting statements/affidavits and was, at the time of the launching of the application, practising without a Fidelity Fund Certificate.

[5] The offending conduct sketched in the founding affidavit deposed to by the former president of the Law Society is supported by a report emanating from an investigation into the accounting and financial records of the firm, which uncovered several contraventions of certain provisions of the Rules of the Law Society ("the Rules") and the Attorneys Act 53 of 1979 ("the Attorneys Act"). These included the existence of a trust deficit over a substantial period of time, misappropriation of trust funds, conducting an illegal investment scheme and failure to keep proper accounting records in contravention of the Attorneys Act and the Rules.

[6] On 2 September 2011, the firm's auditor, namely Kotie Kruger Chartered Accountants, presented a qualified audit report to the Law Society. In that report the auditors *inter alia* mentioned that as at 30 November 2010 the trust deficit amounted to R441 846.17 The auditors further stated that on the 28th February 2011 there was a trust deficit in the amount of R917 652.27, which was partially occasioned by trust debits, and that payments clearing the deficits were made on 1 March 2011 and 1 May

2011, respectively. The auditors further mentioned that the remaining deficit was occasioned by irregular transfers from the trust account to the business account. The auditors further reported that a trust creditor's investment was transferred to a file opened in the name of the first respondent in accordance with an oral loan agreement between the trust creditor and the first respondent. The invested amount was then used to cover the deficit on 1 May 2011.

[7] The qualified audit report prompted the Law Society to instruct an independent firm of Chartered Accountants namely Messrs Newtons ("Newtons") to investigate the matter further. Newtons compiled a report which confirmed that the deficit as on 28 February 2011 was an amount of R917 652.27. In their report, Newtons *inter alia* reported that they had scrutinized the trust records and transfer batches and had found that they could not match amounts transferred with the transfer prints.

[8] A senior chartered accountant of Newtons, who was reputed to have a wide knowledge of attorneys' accounting records and experience in auditing of practicing attorneys books, *inter alia* opined that the first respondent "was apparently aware of the misappropriation of trust funds and entered into loan agreements before actual amounts could have been obtained from the accounting records."

[9] It is common cause that the Law Society provided all the respondents with all the findings of the Newton report and requested each of them to submit a written explanation to the Law Society.

[10] *The litigation history*

The Law Society brought an application against all the directors of the firm (Goodrick and Franklin). It prayed for the first respondent's striking off and for the second and third respondents to be warned, alternatively to be suspended from practice. It asserted in its papers that it had proven the misconduct against the respondents and had justified the relief it was seeking. It also asserted that the second and third respondents were less culpable than the first respondent, hence its prayer for a lesser penalty against them. It specifically stated that the second and third respondents should not be struck from the roll of attorneys. In his affidavit, the first respondent averred that the management and control of the firm vested in all three directors and that it would therefore be unfair if a harsher sanction were to be imposed on him when all three respondents were equally liable and had joint responsibility. In his explanatory affidavit filed with the Law Society second respondent vehemently denied that the financial management of the firm was vested in all three of them (the directors) and maintained that the first respondent abrogated to himself the responsibility of managing the firm's financial affairs. Despite the trite principle that an attorney against whom an application is brought by the Law Society is expected to respond meaningfully and furnish a proper explanation of financial discrepancies[1], the second respondent initially did not oppose the present application and thus filed no affidavit. The third respondent opposed the application but merely filed a confirmatory affidavit in which she confirmed the first

[1] Hepple v The Law Society of the Northern Provinces 2014 (3) SA 408 at para [9]

respondent's averments insofar as they related to her. The affidavit that she had filed with the Law Society before the launching of the application was sketchy and had no details as to how the firm was managed and how the trust deficit could have arisen.

[11] It bears emphasising that when a Law Society brings an application based on the provisions of section 22 of the Attorneys Act, it does so *custos morum,* as the guardian of morals of the attorneys' profession. It merely places facts for consideration by the court in the exercise of its disciplinary function over attorneys as officers of the court so as to enable it to exercise its discretion as to the appropriateness of a sanction to be imposed in the event the commission of the transgressions is established[2]. It is trite that partners in a firm of attorneys and directors in an incorporated company of attorneys are jointly responsible to keep proper books of accounts in accordance with the Attorneys Act 53 of 1979 and the Rules of the Law Society. Each director in an incorporated company is jointly and personally liable for the acts and omissions of the company. The fact that one of the directors of a corporate practice is responsible for the bookkeeping of the practice does not mean that the other directors are relieved of their legal responsibility in respect of the trust account.[3] Furthermore, non-involvement of a director with the financial management of the company is no defence at all. Compliance with the Act and Rules is the duty imposed on all attorneys

[2] Hassim v Incorporated Law Society of Natal 1977 (2) SA 757 (A) at 767C-G.
[3] Hepple and Others v The Law Society of the Northern Provinces above at para [14].

whether acting for own account, in partnership or as a director of a corporate company.[4]

[12] Having read the papers and listened to arguments presented on behalf of the Law Society and the first respondent, the court considered the seriousness of the charges and that they could warrant the imposition of the same sanction on all the respondents on the basis that they were all directors of the firm and jointly liable. The court took the view that the second respondent's decision not to oppose the matter and third respondent's failure to file a detailed answering affidavit may have been prompted by the less harsh sanction sought against them. The court thus considered that it would not be fair for it to, on the basis of the transgressions proven against them, impose harsher sanctions without first giving them an opportunity to respond to the allegations.

[13] It was against that background that this court decided on 6 February 2015 to give them an opportunity of presenting explanations in the form of affidavits. The court accordingly postponed the matter and granted them leave to file answering affidavits and supplementary heads of argument. In the interests of fairness, the Law Society was granted leave to file a supplementary replying affidavit and supplementary heads of argument if it so required. The second respondent filed an answering affidavit and heads of argument, while the first and third respondents filed supplementary affidavits. The Law Society opted not to file a supplementary replying affidavit and instead

[4] Hepple and Others v The Law Society of the Northern Provinces above at para [21].

filed supplementary heads of argument. The matter was subsequently enrolled for a re-hearing before three judges.

[14] *The applicable law*

The respondents are charged with various transgressions which have already been set out earlier in the judgment. It is necessary to consider the relevant provisions of the Attorneys Act[5] and the Rules that the respondents are alleged to have contravened, as well as the section of the Attorneys Act that forms the basis of the relief sought against them.

[15] Rule 16A.3 provides as follows:

> "Trust balances not to exceed trust monies and no trust account to have a debit balance."
>
> A firm shall ensure that
>
> 16A.3.1 the total amount of money in its trust banking account in its trust investment account …
>
> 16A3.2 'that no account of any trust creditor is in debit';…
>
> 16A5 'Withdrawal from trust banking account'.

[16] Rule 16A.5 provides-

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[5] Section 78(1) – 78(4) of the Attorneys Act provides as follows:

"78 Trust Accounts

(1) Any practising practitioner shall open and keep a separate trust banking account at a banking institution in the Republic and shall deposit therein the money held or received by him on account of any person.

(2) ….

(3) ….

(4) Any practising practitioner shall keep proper accounting records containing particulars and information of any money received, held or paid by him for or on account of any person, of any money invested by him in a trust savings or other interest-bearing account referred to in subsection (2) or (2A) and of any interest on money so invested which is paid over or credited to him."

"A firm shall ensure that withdrawals from its banking account are made only –

16A5.1 'as transfers to its business banking account, provided that such transfers shall be made only in respect of money due to the firm.'"

[17] The Law Society's power to apply for the striking of an attorney from the roll is embodied in section 22 of the Attorneys Act. In terms of s 22(1)(d), an attorney may, at the instance of 'the law society concerned, be struck from the roll or suspended from practice by the court . . . – if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney'. It is trite that when a Law Society brings an application of the nature contemplated in that section it performs a public duty[6].

[18] The Supreme Court of Appeal, in the case of **Botha v Law Society of the Northern Provinces**[7] re-iterated that section 22 (1) (d) contemplates a three-stage enquiry; firstly, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities. Second the court must consider whether or not the person against whom the application is brought is a fit and proper person to continue to practise as an attorney. Thirdly, the court must inquire whether in all the circumstances the attorney is to be removed from the roll of attorneys or whether an order of suspension would suffice. The court also stated that in the adjudication of applications

[6] Incorporated Law Society of Natal v JJ & FM Hillier 1913 (34) NLR 237 at 250-251; Incorporated Law Society v Taute 1931 TPD 12 at 17; Solomon v Law Society of the Cape of Good Hope 1934 (AD) 401 at 408-409.

[7] 2009 (3) SA 329 (SCA) para 4.

brought by the Law Society against errant practitioners, a court exercises its supervisory function over legal practitioners and is entitled to call for evidence to enable it to do so properly.

[19] As a general rule striking-off is reserved for attorneys who have acted dishonestly, whilst transgressions not involving dishonesty are usually visited with a lesser penalty of suspension from practice[8]. In **Malan and Another v Law Society of Northern Provinces,**[9] Harms JA stated as follows in para [10]:

> "Obviously if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal … Where dishonesty has not been established the position is … that a court has to exercise a discretion within the parameters of the facts of the case without any preordained limitations."

[20] In **Hepple and Others v The Law Society of the Northern Provinces,**[10] the Supreme Court of Appeal confirmed that the proceedings in applications to strike attorneys from the roll are not ordinary civil proceedings but that they are proceedings of a disciplinary nature and are *sui generis.* The court confirmed the duty resting on an attorney in these kinds of proceedings in the following *dictum*:

> "It follows, therefore, that where allegations and evidence are presented against an attorney they cannot be met with mere denials by

[8] Summerlev v Law Society, Northern Provinces 2006 (5) SA 613 SCA at para [21].
[9] 2009 (1) SA 216 (SCA).

[10] 2014 (3) All SA 408 (SCA) at para [9].

> the attorney concerned. If allegations are made by the Law Society and underlying documents are provided which form the basis of the allegations, they cannot simply be brushed aside; the attorneys are expected to respond meaningfully to them and to furnish a proper explanation of the financial discrepancies as failure to do so may count against them."

I Whether the alleged offending conduct has been established on a preponderance of probabilities

[21] *Analysis of transgressions and explanations advanced by the respondents*

There are two transgressions that the Law Society brought against the respondents but in respect of which it did not, in my view, present sufficient facts to establish them. The first relates to a complaint brought by a certain Ms Borotho against the first respondent pertaining to the first respondent's alleged failure to carry out instructions and general delays in carrying out the complainant's mandate. The first respondent denied all the allegations pertaining to this complaint. The second one relates to the allegation that the respondents conducted an illegal investment scheme alternatively an illegal investment practice, thus contravening the Attorneys Act. The afore-mentioned transgressions were not proven on a balance of probabilities and warrant no further mention.

[22] With regards to the remainder of the charges, it must be pointed out from the outset that the contravention of various provisions of the Attorneys' Act and the Rules of the Law Society is not in dispute. All the directors claimed not to have deliberately contravened these provisions. It is also not disputed that the

firm's trust account reflected a trust deficit in the total amount of R917 652.27 on 28 February 2011, that the audit report was submitted late and that it was qualified. However, there is a dispute about whether the shortfall arose as a result of dishonesty. There is also a dispute about the director that has to shoulder the blame for misappropriation of trust funds as each respondent points a finger at the other. The first respondent claims that the management of the firm's financial affairs was his and the second respondent's joint responsibility, except for the period during and after his long absence as a result of hospitalisation and recuperation from surgical operations; he claims that during the latter period, the second respondent assumed sole responsibility of the firm's financial affairs. The third respondent obliquely supports this averment. The second respondent on the other hand claims that the first respondent was at all material times the director that was responsible for the management of the firm's affairs. In the end, the various disputes of facts were decided in accordance with the principles laid down in the seminal judgment of **Plascon Evans v van Riebeeck Paints** [11]. The commission of the transgressions was established largely on the basis of undisputed evidence. Some factual disputes were raised but had no impact on the undisputed facts once the untenable aspects had been rejected.

(i) *Failure to keep proper accounting records*

[23] Rule 16.7 expressly provides that a firm making a transfer from its trust banking account to the business account shall ensure that the amount transferred does not exceed the amount due to it, yet the

[11] Plascon Evans Paints v van Riebeeck Paints 1984(3) SA 623 (A) at 634H-635C;

firm chose to continue transferring huge sums of money over a period of more than a year without verifying whether the client ledgers reflected a credit balance, resulting in the increase of the deficit. The first, second and third respondent had a shared responsibility to keep proper books and records of their firm in accordance with the Attorneys Act read with the rules and regulations of the Law Society. Although Rule 16.5 stipulates that a firm should regularly and promptly update its accounting records, it appeared from the Newtons report that the firm's accounting was in disarray as the postings were three months in arrears, computer-generated amounts did not tally with the amounts transferred and funds were apparently transferred "to cover amounts needed in business".

[24] The first respondent sought to rely on a malfunctioning computer programme as one of the reasons for the firm's failure to keep proper books of account. Even if it were to be accepted that they encountered problems with the new program, it is difficult to understand why the respondents would not have taken any steps to address the problem from the time of installation of the program in November 2009, to the revelation of the deficit in August 2011. The books of account revealed a continuing pattern of transfers being made from the trust to the business account despite the existence of trust debits. It is not in dispute that in May 2010, the trust shortage amounted to R99 899.98. In August 2010 it amounted to R26 310.62. In November 2010 it escalated to R414 846.17. By the end of the financial year on 28 February 2011, it had skyrocketed to the sum of R917 652.27. It is therefore mind-boggling how any of the three respondents could have been

oblivious to the purported problems, especially considering that the firm had an in-house bookkeeper.

[25] If one accepts the first respondent's version that the malfunctioning program was brought to his attention by the firm's book-keeper who was a full time employee of the firm the question that immediately comes to mind is why the respondents did not take any steps to bring these problems to the attention of their accountant or to the Law Society, and why they failed to sort them out for a period of more than a year instead of recklessly transferring large amounts without verifying the availability of funds from the client's ledgers. It is evident that the malfunctioning program cannot be the reason for the entire deficit. It is also clear from all the facts of this case that the substantial trust deficit could not have been as a result of simple accounting errors. In any event, the first respondent blames other factors like the recession and his long illness for the deficit. The reasons advanced by the first respondent as an explanation of the shortfall are simply untenable and fall to be rejected. I am satisfied that the commission of this transgression has been established by the Law Society.

(ii) Trust deficit

[26] Numerous affidavits were filed by the first respondent. He admits that the audit was done on 24 August 2011, that a qualified audit report was presented to the Law Society on 31 August 2011, and that when he returned to Bloemfontein after a long period of absence due to surgical operations that he had undergone in Cape

Town, he was advised of a shortfall of R917 652.45 in the trust account. He elaborated as follows on this aspect:-

> "Only thereafter I returned to Bloemfontein and it was during my sick leave at home when I was informed that a trust shortage of an unknown amount is anticipated for the 2011 financial year. I was at the same time informed that my co-directors feel that in view of my long absences from the firm and as I was also apparently the only director with security that I must accept liability for a loan to extinguish the trust shortage. I could not immediately think of a way to obtain the loan until Mr Viviers, my co-director, pointed out to me that my old friend, Mr B M Z, paid in a substantial amount of money into the firm. I asked Mr Viviers to please approach Mr Z for a loan. Mr Z consented to the loan and a written loan agreement was later presented by Mr Viviers for signing. It was for an amount of R850 000.00. I cannot recall when exactly did I sign the aforesaid acknowledgment of debt, it could have been on, before or after 28 February 2011."

[27] Many explanations were offered as a cause of the shortfall. The first respondent asserted that the firm had started using a new accounting program during November 2009 and information had to be transferred from the old program to the new program. According to him, the process "took months and created chaos." He further stated as follows: "As a direct result of the trust shortage it is unfortunately necessarily so that trust cheques were issued without sufficient funds available because of the system being so many months in arrears, this was not done knowingly." In an affidavit deposed to at a later stage, he attributed the shortage to the fact that the firm was, in his absence, managed by inexperienced directors. He again mentioned that at that stage the firm had to do without the income normally generated by him.

[28] The following concessions made by the first respondent are of significance: "I humbly submit that it was unfortunately a direct result of the shortage that trust cheques were issued without sufficient funds therefor. I have, however, explained here above that due to the program problem the system was months in arrears and therefore cheques were issued under the wrong belief that there were funds available whilst in fact there were not. At no stage were trust cheques issued with the certainty that a shortage indeed exist. I humbly submit that the shortage occurred as a result of basically 2 reasons, namely the fact that I was for months absent from the firm and not able to generate fees and on the other hand the recession. We have in the meantime been able to overcome these problems in the sense that I am now again full time back with the firm and furthermore the firm has succeeded in cutting its expenses as well as increasing its income to overcome any shortage."

[29] It is evident from the above that even though various reasons were advanced for the shortfall, the existence of the shortfall was common cause as well as the duration thereof. This contravention was therefore sufficiently established against all the respondents.

(iii) Failure to submit an audit report timeously and later submission of a qualified audit report (Rule 16B certificate)

[30] It is not in dispute that the audit report for the year ending on 28 February 2011 was qualified. The audit report in respect of the year ending 28 February 2012 was also qualified. It is common cause that the firm submitted the Rule 16B certificate late. The first respondent shifted some of the blame for the firm's failure to submit the rule 16B certificate to his accountants. He fails to

appreciate that the responsibility to see to it that accounting records are timeously audited and submitted to the Law Society, lies with an attorney, not with the appointed accountant.

[31] Rule 16B.3 provides that "A firm shall ensure that the report to be furnished by an accountant in terms of Rule 16B.4 is so furnished within the required time or on the required date…" It was thus incumbent upon all the directors of the firm to have ensured that the firm's appointed accountant or auditor complied with the firm's mandate. None of the respondents advanced a plausible explanation for the firm's failure to timeously furnish the audit report. I am satisfied that the Law Society sufficiently established this transgression. Contrary to what some practitioners may believe, failure to provide the Law Society with an annual audit report is not a petty transgression. It is often the first tell-tale sign of more serious underlying problems. Not only does practising without a fidelity fund certificate prejudice the public but it actually constitutes a criminal offence[12]. It is clear that practising without being in possession of a fidelity fund certificate is a serious breach of an attorney's duty.

[32] Directors of law firms are obliged to present an unqualified trust audit report to the Law Society annually. It is common cause that the audit report that was presented on behalf of the firm in respect of the year ending February 2011 was qualified. This transgression has thus been established. In my view, a Law Society that has

[12] Section 83(10) of the Attorneys Act provides that any person who directly or indirectly purports to act as a practitioner in his own account or in partnership without being in possession of a fidelity fund certificate shall be guilty of an offence.

been furnished with a qualified audit report must simply not issue a fidelity fund certificate pending the Law Society's investigation, for this entitles the attorney to continue receiving money from members of the public which may increase the Fidelity Fund's loss if the investigation reveals impropriety on the part of such attorney. Rather, the Law Society, with all its resources, should expedite the investigation so that the root cause of the problem can be identified quickly.

[33] As it is turns out in this matter, the firm had a substantial trust shortage of close to a million Rand, yet the first respondent seems to consider the Law Society's issuance of the fidelity fund certificate, albeit qualified, as a sign of how insignificant the transgression was.

(iv) Conflicting statements made by the first respondent

[34] As strange as this may sound, the first respondent disputes having given conflicting statements notwithstanding the fact that he was confronted with specific averments he made in various affidavits which were contradictory. Various accounts have been given by the respondents regarding how this deficit came about. In his affidavit deposed to in May 2013 and submitted to the Law Society as part of his written representations the first respondent stated as follows:

> "At this point I wish to explain about my friend, Mr Z. He was a high ranking official in the old Department of Roads of the Provincial Administration. After gross irregularities with tenders, a political witch-hunt ensued in the said department during the course of 2010. Mr Z

> assured me that he had nothing to do with any of the tender irregularities and that despite that, he was seriously investigated and some of the guilty people are not being investigated at all. Eventually he decided to resign from the post. *To be on the safe side he also decided to rid himself of all assets and requested me to take transfer of his townhouse known as 10 Monte Video as well as a sum of money, the amount of which he was not sure of*… After I gave Mr Viviers the background of the situation, he did the transfer of the property onto *my* name. Mr Z also paid in a R1 million as well as the transfer fees and costs as requested by Mr Viviers. Mr Z is fully aware that the house can now be returned to him *but has not yet instructed us to do so*."

[35] This version is quite different to what he asserted in his second affidavit submitted to the Law Society, where he stated that "As far as the Z transaction is concerned, I confirm that I instructed Mr Viviers to handle the transfer. Because of the unique nature thereof, **I had to give Mr Viviers full background of the transfer**…." (my emphasis). This also varies markedly from what he later asserted in the answering affidavit he filed in his sequestration application, where he stated as follows:- "This property still belongs to Mr Z. During the writer's long sickbed absences from the firm and due to unclear instructions by Mr Z it was accidentally transferred by the conveyancer from Mr Z to me instead…..I made it clear in my opposing affidavit that the property was registered in my name because of wrong instructions given by Mr Z to the conveyance. As Mr Z gave wrong instructions he obviously must pay for the transfer of the property to one of his trusts."

[36] It is evident from the latter affidavit that the first respondent tried hard to salvage the townhouse that Mr Z had transferred into his name. In an affidavit he deposed to in the sequestration proceedings, he stated that the property in question had actually been transferred to him in error. He stated that the property was

supposed to have been registered in the name of a trust but was erroneously transferred into his name. The improbability of his assertion that the firm had not yet transferred the property to the trust due to the fact that it was waiting for Z to pay transfer costs is proven by the fact that Z was already a trust creditor of the firm who had even lent money to the first respondent. He simply could not have waited for Mr Z's payment in respect of transfer costs, when Mr Z had, on his own version, already given him all his money and even lent him an amount close to R1 000 000.00 There is no reason why the property would have remained in the first respondent's name for another two years before the error was rectified. It is in any event highly unlikely that the firm could have expected him to pay for the rectification of an error that the firm itself had committed.

[37] It is clear from the first respondent's own version that the money received from Mr Z was not linked to any specific matter that he had mandated the firm to do for him. It is more likely that the money was intended to be hidden away on his (Mr Z's) behalf in the firm's account so as to mislead authorities about Mr Z's financial position lest he be linked to tender fraud and thus making the amounts susceptible to forfeiture to the state. Notwithstanding his assertion that he assured Mr Z that he could not hide his assets anyway, the first respondent's complicity in such shady dealings constituted highly unprofessional conduct.

[38] A simple comparison of these statements, both made under oath, makes it evident that the first respondent gave conflicting versions to this court on the specific aspect of how Z's property ended up

being registered in his name. In trying to explain the discrepancy, he said that he had believed the second respondent when the latter informed him that Mr Z wanted his townhouse transferred into his (first respondent's) name.

[39] The first respondent claims that it was during a later thorough consultation with Mr Z that he learnt that Mr Z's mandate was for the townhouse to be registered in the name of a trust that was to be established on behalf of his family. He seems to have forgotten that in an affidavit he had previously deposed to, he asserted that the consultation pertaining to the transfer of the townhouse into his name took place between Mr Z and him *personally* and not between Mr Z and the second respondent. There could therefore not have been any misunderstanding about Mr Z's mandate to him. Furthermore, he had personally signed the Deed of Sale in which he (first respondent), and not the trust, was described as the buyer of the property in question. He would therefore have known that the property was being transferred to him in his personal capacity and not to the trust. Considering that he is a practising attorney of long standing, I find the assertion that he signed the Deed of Sale in question and the supporting transfer documents without reading them extremely improbable.

[40] Realising that he had contradicted himself on the issue pertaining to the transfer of the property into his name, he, in his supplementary affidavit, tried to explain the discrepancy as follows:-

"Wat betref die inhoud van paragrawe 29.12 tot 29.15 vestig ek die Hof se aandag daarop dat my weergawes bloot verskil in die sin dat ek aanvank[l]ik

onder die indruk verkeer dat Mnr [Z] opdrag gegee het aan 2de respondent om die eiendom oor te dra na my in plaas van die trust en na my gedetailleerde konsultasie met hom van oordeel was dat daar ‘n misverstand tussen hulle onstaan het en dat as gevolg van die vermelde misverstand die eiendom na my oorgedra is. In my aanvanklike eedsverklarings aan die Applikant was ek oortuig dat die tweede respondent se weergawe korrek is, naamlik dathy opdrag ontvang het om die eiendom oor te dra na my. My gedetailleerde gesprek met Mnr [Z] het eers plaasgevind lank na die laaste eedsverklaring aan die Applikant [Prokureursorde] verstrek is.”

This attempt at justifying the discrepancy was an effort in futility because he had expressly stated in his first affidavit that the discussion about the transfer of Z’s assets, including the townhouse, into his name was between Z and him, which means that the instruction was given directly to him. The versions remain irreconcilable and no amount of explaining will change this fact.

[41] With regards to a payment of an amount of R111 857.94 from the trust account, which was debited on the first respondent’s WLR 891 file, and paid to the firm Hill Mc Hardy and Herbst, the first respondent tendered the following explanation in his supplementary affidavit:-

“Daar is een debiet van 21 November 2011 vir ‘n betaling aan Mnre Hill McHardy & Herbst vir R111 857.94 wat besonderde vermeding verdien. Hierdie debiet hoort glad nie op my naam nie. Boedels, ongeag wie aangestel was as ekseketeur / eksekutrise, is behartig deur ene Christa Reinders. Sy het aanvanklik onder die beheer gestaan van 2de respondent en later 3de respondent. Hoe dit ookal sy, sy het in die betrokke boedel versuim om sekere dokumente te lewer aan Mnre Hill McHardy & Herbst en het hulle ‘n aansoek teen 4de Respondent geloods vir die lewering daarvan. Hulle was suksesvol daarmee en is ‘n kostebevel van R111 857.94 verleen teen die 4de Respondent. Dit is dus du[i]delik dat die vermelde bedrag nie op die 891

Miscellaneous lêer tuishoort nie. Die bewering dat ek na Augustus 2011 sou voortgegaan het om gelde vir “eie gewin en voordeel” te onttrek het, is derhalwe ‘n infame leuen. Die agbare hof sal merk dat die boekhouster slegs fooie geskryf het op die betrokke rekening. Laastens dien daarop gelet te word dat die rekening afgesluit is met ‘n kredietsaldo van R47749.36.”

[42] An affidavit filed by the second respondent and deposed to by an attorney from the firm Hill McHardy and Herbst exposed the first respondent’s above mentioned assertion to be one of his many attempts of leading the court down the garden path. In his affidavit Mr Verwey attached supporting documents and explained that the payment in question was in fact in respect of a compensation award made by the Commission for Conciliation Mediation and Arbitration against the first respondent and two other entities arising out of an unfair dismissal dispute that had been successfully instituted against them by their former employee. The second respondent has confirmed that this payment indeed had nothing to do with an estate matter. The first respondent has not refuted this averment. It is therefore clear that he gave this court an untruthful account of events. It is consequently also clear that the trust deficit from file 891 WLR is much more than the amount of R31 741.67 which the first respondent was prepared to acknowledge.

[43] Another untruthful account he gave under oath pertains to some payments made from the file known as the WLR 891 Miscellaneous file. It is common cause that the file in question is the first respondent’s file. The first respondent admitted that the file was at some stage used by him for his personal business. He,

however, asserted that it was later used for both his personal business as well as various other matters pertaining to the firm. As proof that the file with reference number WLR 891 miscellaneous was not his personal account he mentioned that numerous transactions which “could not be easily fitted under any other heading” were posted to that file.

[44] First of all, one cannot understand why any payments into or from the trust account could not be noted under any other ledger except the one associated with the first respondent. Two cheques bearing no client reference and totalling a whopping R342 000.00 were paid from that ledger. Furthermore, it has been shown, through the affidavit of an independent third party that a large payment has been made by the first respondent in respect of a compensation award made by the Commission for Conciliation Mediation and Arbitration against an entity that the first respondent was associated with. Clearly, his assertion that the second respondent authorised such a payment was untenable. The Law Society correctly pointed out that the first respondent made conflicting statements. Courts take a very dim view of a deponent that misleads the court. Worse still, if the deponent in question is an attorney, for an attorney is an officer of the court and has a responsibility to disclose true facts to a court. An attorney who has no qualms in presenting an untruthful account of events to a court under oath has no integrity and is simply not fit and proper to practice as one. If deceit had to be graded according to degrees that would count amongst the worst forms of deceit. I am satisfied that the Law Society has sufficiently established that the first respondent gave conflicting statements.

(v) Unprofessional Conduct

[45] The first respondent sees absolutely nothing wrong with the fact that money deposited into his trust account ended up being lent to him for purposes of extinguishing a trust account shortfall. He seems to think that there was nothing wrong with Mr Z's account being debited simply because he (Z) happened to be his friend. The fact of the matter is that in the process of extinguishing the deficit via this loan, various Law Society rules were breached, especially rule 16A.5, which provides that payments from trust accounts must be made only to a trust creditor. The firm was not Mr Z's creditor and there was thus no justification for the loan amount being debited in Z's trust ledger and as a cross reference, being credited into the firm's trust account (in the first respondent's WLR miscellaneous client ledger). This was clearly a transaction that was meant to mislead the accountant and the Law Society.

[46] Furthermore, sight must not be lost of the fact that by his own admission, the first respondent agreed to accept transfer of Z's cash and fixed property to assist him to evade an investigation being made by a government department in respect of tender fraud. Being an attorney and thus aware of the provisions of the law pertaining to forfeiture of assets that were gained from illegal activities, he agreed to be a party to Mr Z's disposition of his assets. In order to facilitate this, he signed a Deed of Sale that was intended to disguise the transaction as a legitimate sale agreement, when it was not. By so doing, he rendered himself guilty of unprofessional conduct.

[47] The first respondent's statement to the effect that he warned Mr Z that a claim could still be made on the assets he had disposed of does not mitigate the gravity of that misconduct. As a legal practitioner, he would have known that the risk in assuming ownership of someone else's property was that the assets transferred, being assets registered in his name, would form part of his insolvent estate in the event of his sequestration. As fate would have it, that is exactly what happened. He was sequestrated and Z unfortunately suffered a huge loss, for which he cannot be compensated by the Fidelity Fund since he brazenly stated that he was aware that the loan amount would not be subject to the protection of the Fidelity Fund.

[48] The first respondent blames the firm's accountant for not timeously informing him that a deficit had arisen. This criticism is unfair given the fact that the firm had an internal bookkeeper who in all probability detected the deficit and notified him about it. This explains why the exact amount of the deficit was borrowed from Z and paid into the account months before the auditor commenced with the audit.

[49] He also blames his co-directors for the manner in which they managed the firm's affairs during his illness. Surprisingly, some of the blame was imputed to the recession insofar as it resulted in the firm receiving a reduced income. He also blamed the Law Society for the manner in which it went about making its enquiries from the directors and equally blamed Newtons for the manner in which it had compiled its report.

[50] The first respondent also attributes his firm's loss of income and its removal from banks' panels on the Law Society's protracted investigations and its refusal to issue the firm with a "letter of good standing", which according to him, eventually led to the third respondent's resignation. He does not seem to realise that the investigations were necessary given the qualified audit report and the reasons advanced by the firm's accountant. While fixated on imputing blame to others, he chooses to pay no regard whatsoever to the undisputed averments about how he deceived this same director (the third respondent) by secretly issuing trust cheques to the firm's employees in order to earn extra income for himself and the second respondent and, in the process, deceiving SARS about his real income. He does not take responsibility for his actions. He tries to justify it by shifting the blame.

[51] The following remarks by Harms ADP in **Malan v The Law Society of the Northern Provinces**[13] are apposite:-

> "Furthermore, instead of dealing with the merits of the allegations, the appellants conducted a paper war and they attacked the Society and its officers, they attacked the Fidelity Fund and they attacked the attorneys who had to take over the files- in short their approach on the papers was obstructionist. …These factors are 'aggravating' and not extenuating because they manifest character defects, a lack of integrity, a lack of judgment and a lack of insight".

In a later judgment[14], the same judge observed that it had become a common occurrence for persons accused of a

[13] 2009 (1) SA 216 (SCA) paras [27] –[28].
[14] Law Society of Northern Provinces v Mogami 2009 ZASCA 107 at para [26], delivered on 22 September 2015.

wrongdoing to accuse the accuser and seek to break down the institution involved instead of properly confronting the allegations. He pointed out that courts cannot countenance that strategy. I echo the same sentiments in respect of the first respondent's attitude.

[52] (vi) *Misappropriation of trust funds*

It bears mentioning that a file which, according to the firm's auditor, seemed to have processed a number of questionable transactions is a file opened by the respondent, which was referred to as the 891 WLR Miscellaneous accounts file. The firm's auditor reported as follows:

> "According to the bookkeeper, account of Mr W le Roux is used to receive payments from the collection files which he brought in his personal capacity. …Client trust account balances are manipulated by using journal entries to conceal debit balances by transferring amount to another trust account. Trust cheques are issued without sufficient funds available therefore trust monies are used to finance clients."

[53] It is evident from the auditor's report that a number of trust cheques that were issued to the first respondent were debited from the first respondent's file WLR 891. The client ledger in respect of the same file reveals that the trust cheques alone, issued to the first respondent over a period of nine months, amount to a total sum of R513 000.00. No payments from that file were made to either the second or the third respondents. Whether the payments made to the first respondent were the first respondent's income from his collection matters or not is inconsequential, for Rule 16 clearly stipulates how an attorney's

fees are to be paid. An attorney's fees are not paid to him with a trust cheque; they have to be transferred into the attorney's business account. Once that has happened, the attorney's remuneration (drawings) can then be paid from the firm's business account.

[54] The first respondent made much of the fact that even though there were trust debits, there were no trust cheques that were dishonoured by the bank. In mitigation, he emphasized that no trust creditors were actually prejudiced as "no person suffered a loss as a result of the shortage on trust account". He completely misses the point and seems oblivious to the potential prejudice that the trust creditors were exposed to. He also seems ignorant of the fact that Rule 16A.3.2 expressly provides that a firm shall ensure that no account of any trust creditor is in a debit. This demonstrates his complete lack of insight into an attorney's obligations with regard to a trust account and the rationale behind such obligations or his disregard thereof completely.

[55] The first respondent also seems to think that the fact that he repaid the shortfall somehow exonerates him. For him, the fact that he borrowed a large sum of money from a client, that he involved himself in a simulated transaction and that he was declared insolvent before he had repaid even a quarter of the amount seems to be of no significance.

[56] Although the first respondent vehemently denied manipulating balances to conceal debit balances, the payment of Z's money into that account and how the first respondent subsequently dealt

with it thereafter serve as proof that he did in fact tried to conceal the firm's debit balance.

[57] Pursuant to the investigations made by Newtons, which revealed that about R917 000.00 had been debited from the account of Z, the Law Society contacted Z and requested him to explain the circumstances under which the money was transferred to the first respondent. In response to the Law Society's enquiries Z informed the Law Society that he had lent the money in question to the first respondent. He stated as follows:

> "The loan was a once off loan made in good faith and was motivated by my very old friendship with Mr Le Roux and nothing else. The loan was not made to Mr Le Roux in his official capacity as director but was *a private loan to him*. I am aware that the loan as such does not enjoy the protection of the Attorneys Fidelity Fund. I did not give the money with the instructions or intention that it be invested. As already pointed out, I gave the money as a loan to Mr Le Roux in his personal capacity and for that reason alone. It is therefore irrelevant, as far as I am concerned, whether Goodrick & Franklin Inc. has an investment practice and whether or not they complied with the rules applicable to investment practices." (my emphasis).

[58] It is clear from Z's affidavit that the loan was being advanced to the first respondent and not the firm. It is also clear from the loan agreement that the first respondent signed a loan agreement which described him, and not the firm, as the debtor. It is common cause that the trust deficit of R917 652.26 was extinguished with the money that the first respondent borrowed from Z. It is also clear from the ledger of the file 891 WLR Miscellaneous that the

bulk of the payments made from that file were made to the first respondent personally and not to the other directors. Although a former employee was not a trust creditor, she was paid with trust cheques. These payments were also processed from the 891 WLR Miscellaneous file.

[59] As stated before, the deficit occurred mainly in the ledger of a file that was under the first respondent's control, namely the 891 WLR Miscellaneous file. Dubious transactions took place in that account. The first respondent was responsible for all files under his control and the transactions pertaining to them. A significant number of trust cheques were issued *to the first respondent* with the relevant debits being reflected in his file's ledger. The first respondent thus allowed payments to be made to him from the trust account which payments should have been made from the business account. The trust cheques issued to him constituted a contravention of Rule 16A of the Law Society Rules. Significantly, the amount that was used to distinguish the deficit was credited in this very file's ledger. The loan agreement in respect of the amount that was used to extinguish the deficit was entered into between the lender and the first respondent alone. Having signed the loan agreement in question, he, on his own version, later undertook to pay the amount to the lender in instalments of R24 000.00 per month. The activities from this file conclusively show that first respondent misappropriated substantial amounts of trust funds using this particular file to facilitate such misappropriation.

[60] Apart from the above, a number of questionable activities are discernible from the firm's books of account. These should have deeply troubled all the directors. As stated before, trust cheques for huge sums of money were issued to the first respondent. It is common cause that all the directors had access to the firm's banking accounts and had the authority to do electronic transfers. Obviously, one look at the firm's account would have reflected these payments and would have raised any of the two directors' eyebrows. Furthermore, there is a former employee of the firm, namely Ms Cronje, who remained on the firm's payroll till 2012 despite having resigned in 2007 already. At some point she was paid with trust cheques. These payments, too, should also have the second and the third respondents' eyebrows.

[61] Furthermore, Mr Z deposited an amount of R995 000.00 in cash on 2 December 2010. The next day he transferred a further R5000.00 directly into the firm's bank account. On 21 December 2010 he deposited a further R50 000.00 in cash. There is evidence that the amount deposited at the bank had an unexplained shortfall of R3 000.00. On 1 September 2010, a separate amount of R1 000 000.00 was deposited into the WLR without a narration, save for referring to the entry as a "deposit".

[62] Each one of the three respondents seems to have had something to do with the Z file. As stated before, the first respondent borrowed the money from him and signed the loan agreement. He also took transfer of some of his assets. The second respondent is the conveyancer that attended to the transfer of Z's property. Notwithstanding a deed of sale that provided that the transfer

would be effected against the payment of the purchase price, he, being a qualified conveyancer, went on to finalise the transfer even though no purchase price had been paid by the first respondent. This is one of the aspects that were queried by Newtons. The second respondent on this aspect vaguely stated that "na die oordrag was daar ongeveer R1000 000.00 beskikbaar vir uitbetaling aan Mnr Z. Hy het my dan opdrag gegeee om dit te belê, wat ek gedoen het. Die lêer is daarna op versoek van Le Roux na hom oorgeplaas, alhoewel die lêerverwysing nie verander is nie. Ek het daarna nie enigsins op die lêer gewerk nie."

[63] Furthermore, although the second and third respondents vehemently denied having had a hand in the firm's financial management, they did not deny that there were numerous occasions during which the first respondent was away from the firm for long periods of time on account of his illness and surgical operations. According to the third respondent, during such periods the firm was under the second respondent's financial management. The second respondent denied this and maintained that the bookkeeper (Mrs Robarts) continued to effect payments and transfers even in the first respondent's absence. She would apparently do this on the first respondent's instructions. It is not disputed that all the directors of the firm were authorised to do electronic transfers. It turns out that the second respondent did attend to some electronic transfers. It is now common cause that when trust cheques were issued to personnel for purposes of cashing them in order to top up the first and second respondent's remuneration, it was the second respondent who issued such cheques.

[64] In the financial year in which the deficit arose, i.e. 1 March 2010 to 28 February 2011, the first respondent was absent for about fifty eight days. All things considered, I find it highly unlikely that both the second and third respondents would choose to effectively leave the financial management of the firm to a bookkeeper for such a long period despite their awareness of the first respondent's absence. When all the evidence is taken into account, it would seem that while the second and third respondents may have been more involved in the financial management and the bookkeeping of files that were under their control, they did appraise themselves of the firm's financial affairs and thus had a general overview of the financial position of the firm. This explains why the third respondent, being suspicious of the second respondent's financial mismanagement of the business account, went to the extent of laying criminal charges against him in 2009.

[65] According to the second respondent, the third respondent is the one that later authorised the electronic transfer of Z's investment into first respondent's file. The third respondent has not disputed this averment. We now know that the same investment is the one that was later used to extinguish the firm's trust deficit. Having considered all the afore-going evidence, I conclude that all three respondents had an involvement of varying degrees in the financial management of the firm's financial affairs. They must all carry the can for the misappropriation of the firm's trust funds. This,

however, is not to say that all acted dishonestly. I will return later to this aspect.

[66] What remains clear from all the circumstances that have been sketched is that the first to third respondents are guilty of all forms of misconduct that prompted the Law Society to bring this application. This takes me to the second leg of the enquiry: whether the first, second and third respondents are persons that are fit to continue practising as attorneys.

II Are the respondents fit and proper to continue practising as attorneys?

[67] It has been held in a plethora of cases that misappropriation of trust funds constitutes serious misconduct that justifies a conclusion that the perpetrator is not fit and proper to continue practising as an attorney. The transgressions that the respondents have been found guilty of have already been dealt with in detail in earlier parts of the judgment and need not be repeated here. I am satisfied that all the directors of the fourth respondent firm are not fit and proper to continue carrying on an attorney's practice. This is especially so given the fact that they have all been shown to have made themselves guilty of misappropriation of funds.

[68] I must hasten to add that even if I were to find that the first respondent was solely responsible for the management of the firm's financial affairs and was on that score solely responsible for misappropriation of funds, the second and third respondent would

still not be exonerated from a finding that they are not fit and proper to practice as an attorney, given the gravity of their misconduct. In my view, the fact that one of many directors is tasked with the financial management of the firm's affairs does not in itself entitle the other directors to be ignorant about the financial position of the firm.

[69] It bears emphasis that all the respondents were grossly negligent with regards to compliance with the Law Society's Rules as well as provisions of the Attorneys Act pertaining to the proper keeping of a firm's books of account. It was these lapses that facilitated the existence of large trust deficits over a period of more than a year. This put members of the public at risk. Their transgressions, cumulatively viewed, justify a conclusion that the first, second and third respondents are not fit and proper for an attorney's office.

III IS STRIKING OFF THE APPROPRIATE SANCTION?

[70] I now turn to the third leg of the enquiry, namely whether the three respondents should be removed from the roll of attorneys or whether an order suspending them from practice or any other sanction would be an appropriate sanction. It is trite that a removal from the roll does not automatically follow a finding that the attorney in question is not fit and proper to practise as an attorney. The court has a discretion to consider the appropriate sanction.

[71] In the case of **Summerley v Law Society of the Northern Provinces**[15] the Supreme Court of Appeal stated that before imposing the severe penalty of striking off, the Court should be satisfied that the lesser stricture of suspension from practice will not achieve the objectives of the Court's supervisory powers over the conduct of attorneys. The Court found that in all the circumstances of that case the attorney, who had been found to be unfit to practise as an attorney, did not deserve the ultimate penalty of striking off. The court took into account that his mismanagement of his trust account involved no dishonest misappropriation of trust money for himself. The Court ordered that he be suspended from practice for a period of a year and that he be restricted from practising for his own account. I agree with the principle laid down in that case. At the end of the day, every case has to be decided on its own facts.

[72] The role played by the respective respondents in the commission of the various forms of misconduct has a bearing on the sanction that has to be imposed. It is on the basis of this principle that each director's conduct warrants scrutiny. As stated before, misappropriation of trust funds is a serious offence. This is more so the case if it was carried out with dishonesty. An attorney that dishonestly appropriates trust funds to himself or for his own benefit is not fit and proper to continue practising as an attorney and deserves the ultimate sanction of a strike-off. I have already alluded to the fact that the first, second and third respondents are all guilty of misappropriation of trust funds. The respective roles

[15] Summerley v Law Society Northern Provinces at para [19]

each respondent played in the misappropriation of trust funds and other contraventions will now be considered.

[73] With regards to the first respondent, trust cheques were issued to him and he obviously personally benefitted from this. Apart from the trust cheques that he issued to himself, he also settled his own personal liability when he paid R111 857.94 for compensation from the firm's trust account. He used his file, namely 891 WLR to facilitate this payment. He thus deliberately manipulated trust funds to pay for his own personal liability. The misappropriation was clearly motivated by self-interest and dishonesty. To put it bluntly, he stole trust funds. All this evidence tips the probabilities overwhelmingly in favour of a conclusion that the first respondent knowingly misappropriated trust funds for his personal benefit. His denials are simply untenable. I am satisfied that the Law Society has sufficiently established that the first respondent's misconduct justifies an order striking him off the roll of attorneys.

[74] With regards to the second and the third respondent, no trust cheques were issued to any of them. The second respondent's explanation that the trust cheques that were issued to other personnel were obtained from fees that had already been earned but not transferred to the business account was not disputed. His conduct was reprehensible but did not, without more, constitute a theft of trust monies. It cannot be categorised as a misappropriation of trust funds that was committed with dishonesty.

[75] The second and third respondents asserted that they learnt about the trust deficit after the completion of the audit report. It behoved them to thereafter take remedial action to see to it that a similar situation would not eventuate, especially since they knew that co-directors are jointly liable for the liabilities of the firm. Despite being aware of the substantial deficit and why it had resulted, they simply did not take steps to actively involve themselves in the management of the firm's financial affairs but simply focussed on financial affairs of the specific departments that they had always been in charge of. It was simply business as usual. As things turned out, further contraventions of the Rules occurred, albeit of a lesser magnitude, resulting in the issuance of yet another qualified auditors' report.

[76] As co-directors of the company the first, second and third respondents had a joint responsibility to ensure the proper keeping of accounting records and compliance with relevant legal prescripts. Having become aware of such a substantial deficit, one would have expected them to be more vigilant, but they shirked their responsibility and adopted a supine attitude.

[77] Having learnt about the trust deficit the second and third respondents went back to their silos and assumed that the first respondent's promise to see to it that the deficit did not ensue again was enough. Once they had learnt about the deficit and the mismanagement, they could no longer claim to be in darkness about the financial affairs of the firm. They needed to have taken active steps to take effective control of financial affairs and the bookkeeping of the firm's books. Where necessary, they should

have tried to obtain proper advice with regards to putting control measures in place. Their resignation as directors of the firm, which took place after yet another qualified report was furnished, was rather belated.

[78] In determining an appropriate sanction for the first respondent, it must be noted that he has been found guilty of the same transgressions as the second and third respondents but has, in addition, been found guilty of the more serious misconduct of misappropriation of funds where he was shown to have acted with dishonesty. The statements he made in an attempt to exonerate himself exposes his serious lack of insight into what an attorney's obligations pertaining to a trust account entail. The manner in which he ran the practice is simply shocking. He was generally reckless.

[79] The first respondent blew hot and cold in explaining the wrongdoing that happened at his firm and refused to accept responsibility even in respect of irregularities which were identified from the ledger of the file that was under his personal control. He tried to justify all the wrongdoing at every turn. He tried to shift the blame to the second respondent, attacked his chosen accountant for not having been more helpful and for not conducting the audit timeously, criticised the Law Society for inordinate delays and for refusal to issue him with a letter of good standing. He also accused the Law Society of not having held a formal disciplinary hearing, this despite the fact that he deposed to two affidavits and submitted them to the Law Society. He was then invited to make oral or written representations. In this court

he has filed three affidavits. Each affidavit introduced an additional explanation in respect of the same thing. One thing for sure is that he has been given enough opportunity to present his side of the story.

[80] The first respondent makes false statements without flinching and takes no responsibility for his actions. This court takes a dim view of an officer of the court who has no qualms in being untruthful to a court, for it demonstrates a lack of two important qualities that are the very essence of an attorney's profession: honesty and integrity. The attorney's profession is indeed "an honourable profession, which demands complete honesty and integrity from its members. In consequence, dishonesty is generally regarded as excluding the lesser stricture of suspension from practice, while the same can usually not be said of contraventions of a different kind."[16]

[81] His misconduct is therefore of a far more serious nature than that of the second and third respondents. He generally acted recklessly. He undoubtedly deserves a harsher sentence than the second and third respondents. Members of the public must be protected from attorneys of his ilk. The first respondent's failure to be accountable and his lack of honesty are seriously aggravating and have a bearing on the sanction. Having considered all the circumstances of the case, I have no doubt that the only appropriate sanction for the first respondent is for his name to be struck from the roll of attorneys.

[16] Summerley v Law Society of the Northern Provinces (supra) at para 21

[82] Unlike the first respondent, the second and third respondents both played open cards and admitted their errors. I am persuaded that in as far as their misconduct is concerned, there is justification for a lesser sanction than a striking off[17]. I have taken into account that the second respondent acted 'in cahoots' with the first respondent when they both abrogated additional remuneration to themselves through devious means in order to deceive third respondent about their drawings. They issued trust cheques to the firm's employees, had the cheques cashed and then received the money as their additional remuneration. In doing so, even though the cheques were issued only from the ledgers where sufficient fees had been earned but had not been transferred to the business account, the first and second respondents contravened the Law Society rules that enjoin them to keep trust monies and business monies apart, that provide that fees earned must first be transferred to the business account before they can be paid to the directors as drawings and that proscribe the issuance of trust cheques to persons that are not the firm's trust creditors.

[83] The second respondent's involvement in devious ways of receiving additional remuneration by making improper payments from the trust account to personnel of the firm is a serious aggravating factor. What serves as mitigation on this point is the undisputed evidence that these cheques were all issued in instances where fees had already been earned but not been transferred to the business account so as to meet these

[17] Summerley v Law Society of the Northern Provinces at para [25]

payments. This misconduct can therefore not be categorised as a dishonest misappropriation of trust funds and does not warrant a striking off. The second and third respondent's transgressions, cumulatively considered, are of such a nature as to warrant their suspension from practice. Their co-operation with the investigations and their honesty and frankness with regards to their own omissions counts as a mitigating factor and calls for their suspension from practice to be conditionally suspended. However, considering that the second respondent's conduct was more reprehensible than that of the third respondent, he deserves a slightly harsher sanction than the third respondent.

[84] Wherefore the following order is made in respect of the first respondent:-

1. The First Respondent's name is struck off the roll of attorneys of the Free State High Court, Republic of South Africa.
2. (1) First Respondent is ordered to surrender and deliver to the Registrar of this Court his certificate of enrolment as an attorney.
   (2) Should First Respondent fail to comply with the provisions of the preceding sub-paragraph of this order within 2 (two) weeks from date thereof, the Sheriff of the district in which such certificate of enrolment is found, is empowered and directed to take possession thereof and deliver same to the Registrar of the Free State High Court, Bloemfontein, Republic of South Africa.

3. Fourth Respondent is ordered to deliver books of account, records, files and documents containing particulars and information relevant to:
   3.1 any moneys received, held or paid by the Fourth Respondent for or on account of any person;
   3.2 any moneys invested by the Fourth Respondent in terms of Section 78(2) and/or Section 78(2)(A) of Act 53 of 1979 (“the Act”);
   3.3 any interest in moneys so invested, which was paid over or credited to the Fourth Respondent;
   3.4 any estate of a deceased person, or any insolvent estate, or any estate placed under Curatorship which the Fourth Respondent is administering on behalf of the Executor, Trustee or Curator of such estate; and
   3.5 the Fourth Respondent’s practice

   to the Curator appointed in terms of paragraph 9 hereof, provided that as far as such books of account, records, filed and documents are concerned, the Fourth Respondent shall be entitled to have access to them, but always subject to the supervision of such Curator or a nominee of such Curator.
4. Should the Fourth Respondent fail to comply with the provisions of the preceding paragraph of this order within 1 (one) week after service thereof upon him, or after a return by a person entrusted with the service thereof that he has been unable to effect service thereof on the Fourth Respondent, as the case may be, the Sheriff of the district in

which such books of account, records, files and documents are, is empowered to take possession thereof and deliver them to such Curator.

5. Such Curator shall be entitled to hand over to the persons entitled thereto all such records, files and documents as soon as he has satisfied himself that the fees and disbursements in connection therewith have been paid or satisfactorily secured or that same are no longer required by the Curator.
6. A written undertaking by a person to whom the records, files and documents referred to in paragraph 5 above are handed, to pay such amount as may be due to the Fourth Respondent, either on taxation or by agreement, shall be deemed to be satisfactory security for the purpose of the preceding paragraph hereof, provided that such written undertaking incorporates a *domicilium citandi* of such person.
7. Such Curator is empowered to require that any such file, the contents of which he may consider to be relevant to a claim, or possible or anticipated claim, against him and/or the Fourth Respondent and/or the Fourth respondent's clients, and/or the Attorneys' Fidelity Fund (herein referred to as "the Fund") in respect of money and/or other property entrusted to the First Respondent, be re-delivered to such Curator.
8. The Fourth Respondent is interdicted and prohibited from operating on its trust account(s) as defined in paragraph 9 hereof.
9. The Chief Executive Officer, failing which, the Executive Officer of the Applicant, is appointed as Curator to administer and control the trust account(s) of the Fourth Respondent, comprising of the separate banking accounts opened and

kept by the Fourth Respondent at a bank in terms of Section 78(1) of the said Act and/or any separate savings or interest-bearing accounts as contemplated by Section 78(2) and/or Section 78(2)(A) of the said Act, in which moneys from such trust banking accounts have been invested by virtue of the provisions of the said sub-section or in which moneys in any manner have been deposited or credited (the said accounts being herein referred to as “The trust account(s)”) with the following powers and duties:

9.1 Subject to the approval of the Board of Control of the Fund to sign and endorse cheques and/or withdrawal forms and generally to operate upon the Trust account(s), but only to such extent and/or for such purpose as may be necessary to bring to completion current transactions in which the Fourth Respondent was acting at the date of this order.

9.2 Subject to the approval and control of the Board of Control of the Fund to recover and receive and, if necessary in the interest of persons having lawful claims against the Trust account(s) and/or against the Fourth Respondent in respect of moneys held, received and/or invested by the Fourth Respondent in terms of the aforesaid Sections (hereinafter referred to as “Trust moneys”), to take legal proceedings which may be necessary in respect of incomplete transactions in which the Fourth Respondent may have been involved and which may have been wrongfully and unlawfully paid from the Trust account(s) and to receive such

moneys and to pay same to the creditor of the Trust account(s).

9.3 To ascertain from the Fourth Respondent's book of account the names of all persons on whose account Fourth Respondent appears to hold or to have received Trust moneys (hereinafter referred to as "the Trust Creditors") and to call upon Fourth Respondent to furnish him within 30 (thirty) days from the date of this order, or such further period as he may agree to in writing, with the names, addressed of and amounts due to all Trust Creditors.

9.4 To call upon such Trust Creditors to furnish such proof, information and affidavits as he may require to enable him, acting in consultation with and subject to the requirements of the Board of Control of the Fund, to determine whether any such Trust Creditor has a claim in respect of moneys in the Trust account(s) and if so, the amount of such claim.

9.5 To admit or reject, in whole or in part, subject to the approval of the Board of Control of the Fund, the claims of any such creditors, without prejudice to such Trust Creditors' right of access to the Civil Courts.

9.6 Having determined the amounts which he considers are lawfully due to Trust Creditors, to pay such claims in full, but subject always to the approval of the Board of Control of the Fund.

9.7 In the event of there being any surplus in the Trust account(s) after payment of the admitted claims of all Trust Creditors in full, to utilize such surplus to settle or

reduce, as the case may be, firstly, any claim of the Fund in terms of Section 78(3) of the said Act in respect of any interest therein referred to and secondly, without prejudice to the rights of creditors of the First Respondent, the costs, fees and expenses referred to in this order, or such portion thereof as has not already been separately paid by the First Respondent to the Applicant and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the Board of Control of the Fund, to the Fourth Respondent if it is solvent, or, if the Fourth Respondent is insolvent, to the liquidator of its insolvent estate.

9.8 In the event of there being insufficient trust moneys in the Trust account(s) to pay the claims of Trust Creditors reflected in the books of account of the Fourth Respondent in full –

9.8.1 subject to the approval of the Board of Control of the Fund to close the Trust account(s) and pay the credit balances to the Fund and to require the credit balances to be placed to the credit of a special Trust suspense account in the name of the Fourth Respondent's in the Fund's books;

9.8.2 to refer the claims of all Trust Creditors to the Board of Control of the Fund to be dealt with in terms of the provisions of the said Act, and

9.8.3 to authorise the Board of Control of the Fund to credit the credit balances referred to in sub-paragraph 9.8.1 above to its "Paid Claims

Account" when the Fund has paid, in terms of Section 26 of the said Act admitted claims of the Trust Creditors in excess of such credit balances, provided that, notwithstanding the afore-going, the said Board shall be entitled in its discretion, to transfer to its "Paid Claims Account" the amount or amounts of any claim or claims as and when admitted and paid by it.

9.9 Subject to the approval of the Chairman of the Board of Control of the Fund to appoint nominees or representatives and/or consult with and/or engage to the services of attorneys and/or counsel and/or accountants and/or other persons, where considered necessary, to assist such Curator in the execution of the duties of the Curator, and

9.10 To render from time to time, as Curator, returns to the Board of Control of the Fund, showing how the Trust account(s) have been deal with, until such time as the said Board notifies him that he may regard his duties as terminated.

10. The Fourth Respondent is hereby directed

10.1 to pay the fees and expenses of the Curator, such fees to be assessed at the rate of R710,00 per hour, including travelling time;

10.2 to pay the reasonable fees and expenses charged by any persons consulted and/or engaged by the Curator as aforesaid;

10.3 within 1 (one) year of him being requested to do so by the Curator, or within such longer period as the Curator may agree to in writing, to satisfy the Curator, by means of the submission of taxed bills of costs, or otherwise, of the amount of the fees and disbursements due to the First Respondent in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the Curator without prejudice, however, to such rights, if any, as he may have against the Trust Creditors concerned for payment or recovery thereof.

[85] (i) The second respondent is suspended from practice for one year and the suspension is suspended for three years on condition that the second respondent does not render himself guilty of unprofessional conduct.

(ii) In addition, the second respondent is precluded from practising as an attorney for his own account, either as a sole practitioner or in partnership or in association or as a director of a private company for a period of two years from the date of this order. This means that for this two year period the second respondent may practice as an attorney only in the capacity as a professional assistant.

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

[86] The third respondent is suspended from practice for one year, and the suspension is suspended for three years on condition that the third respondent does not render herself guilty of unprofessional conduct.

[87] All the respondents are jointly and severally ordered to pay the costs of the application, including the costs previously reserved, on the attorney and client scale.

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M.B. MOLEMELA, JP

I concur.

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J.P. DAFFUE,J

I concur.

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S. MIA, AJ

On behalf of the applicant: Adv. D. M. Grewar
Instructed by:
Azar & Havenga Inc.
BLOEMFONTEIN

On behalf of the 1st, 3rd and 4th respondents: Adv. H. van Eeden SC
Instructed by:
Steenkamp, De Villiers & Coetzee
BLOEMFONTEIN

On behalf of the 2nd respondent:	Adv. C. D. Pienaar Instructed by: Honey Attorneys BLOEMFONTEIN