IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 2788/2019P

LEGAL PRACTICE COUNCIL
(KWAZULU-NATAL PROVINCIAL OFFICE) Applicant

and

PETER JOSEPH SIVALINGAM NAICKER First Respondent
FIRST RAND BANK LIMITED Second Respondent

ORDER

The following order is granted:

1. The first respondent is suspended from practice as a legal practitioner for a period of two years as from the date of this judgment.
2. The first respondent is interdicted and restrained from practising and/or holding himself out as a legal practitioner during the period of suspension.
3. Paras 1.1, 1,2 and 1.3 of the rule nisi issued on 18 October 2019 are discharged
4. Paras1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12 and 1.13 of the rule nisi issued on 18 October 2019 are confirmed.

JUDGMENT

BEZUIDENHOUT AJ (with Henriques J concurring):

[1] The applicant seeks, inter alia, an order that the first respondent be struck off the roll of legal practitioners of this court.

[2] The Legal Practice Act 28 of 2014 (which was assented to on 20 September 2014) came fully into operation on 1 November 2018.

[3] The complaint against the first respondent that forms the basis of this application was however lodged during November 2017, and the proceedings against the first respondent were commenced with on 26 October 2018. It is therefore common cause that the Attorneys Act 53 of 1979 (the Act) is applicable. The relevant provision of the Act, namely section 22(1) 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 or she practises—

. . .

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

[4] Our courts have consistently applied and it has become settled law, that the application of section 22(1)*(d)* involves a threefold enquiry:

(a) Firstly, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual enquiry.

(b) Secondly, it must consider whether the person concerned 'in the discretion of the court' is not a fit and proper person to continue practice. This involves a weighing up of

the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment.

(c) Thirdly, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys, or whether an order of suspension from practice will suffice.

(See *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) para 10, *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) para 2 and *Malan and another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 4.)

[5] The Supreme Court of Appeal has also stressed that the profession of an attorney is an honourable one and as such 'demands complete honesty, reliability and integrity from its members'. (*Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538G.)

[6] It is common cause that the first respondent misappropriated and/or mishandled the sum of R1 000 000, which was paid into his trust account in respect of the purchase of an immovable property.

[7] The complainant, Mrs Velliamma Naidoo, represented by attorneys Hancock and Associates, was the executor of the Estate Late R Reddy, and the seller of a property described as Erf 240 Stonebridge, Registration Division FU, Province of KwaZulu-Natal (the property).

[8] The property was sold to a Mr P Gokul for an amount of R1 000 000, and the parties were referred to the first respondent to attend to the transfer of the property as conveyancer. In terms of the sale agreement, the price was payable as a deposit of R500 000 into the first respondent's trust bank account and the balance of R500 000 was payable by way of cash or a bank guarantee. Despite what was agreed, an amount of R23 000 in respect of the transfer costs was paid on 13 February 2017. An amount of R480 000 was paid on 13 March 2017 and the remaining amount of R520 000 was paid on 3 April 2017. All these payments were made into first respondent's trust account.

[9] The agreement of sale also made provision for all monies to be held in a special savings interest bearing account and the interest was to be for the benefit of the purchaser, Mr Gokul.

[10] The first respondent did not retain the money in his trust account, and did not transfer the money into a separate interest bearing account. Instead, the first respondent made the following unauthorised payments, all for the benefit of one Ms Priscilla Moodley:

(a) On 20 March 2017, an amount of R448 915.64 was paid to P Moodley;
(b) On 6 April 2017, an amount of R66 845.50 was paid to a Ms J Moodley;
(c) On 10 April 2017, an amount of R150 000 was paid to Eskom;
(d) On 10 April 2017, an amount of R66 845.50 was paid to S Alwar;
(e) On 13 April 2017, a further amount of R100 000 was paid to P Moodley;
(g) On 13 April 2017, an amount of R50 000 was paid to D Sheloyan; and
(h) On 13 April 2017 an amount of R66 845.50 was paid to V Naidu.

[11] The property was transferred into the purchaser's name on 12 September 2017. This is when first respondent's actions became interesting, for want of a better word. On the same day, the first respondent addressed a letter to the complainant's attorney, advising that the transfer had been registered and requesting their banking details. The complainant was of course now entitled to payment of the R1 000 000.

[12] Some two weeks later, the first respondent had still not made payment of the purchase price, this despite having received payment in full by 3 April 2017.

[13] The complainant's attorney addressed a letter to the first respondent on 26 September 2017 noting, inter alia, that transfer of the purchase price had not yet been received and requesting to be furnished on an urgent basis with proof of payment of the purchase price as well as an explanation as to who was responsible for the interest owing to its client from date of registration until date of payment of the purchase price.

[14] The first respondent replied in a letter dated 29 September 2017, informing the complainant's attorney that he had received the purchase price in two amounts, being R480 000 on 13 March 2017 and R520 000 on 6 April 2017. He then wrote the following:

'Our conveyancer had left employment and unfortunately notice was not given for the withdrawal of those funds into our trust account. We have attended to same which should be in our trust account shortly but assure you that all interest would be paid to your client from the date of transfer to date of final payment.'

[15] The first respondent was clearly lying and knew why the transfer of the purchase price had not and could not take place at that time. He also knew that the money had not been kept in a special savings interest bearing account.

[16] On 3 October 2017, the complainant's attorney addressed another letter to the first respondent, noting that a transfer in the amount of R100 000 had been made into its trust account, despite the fact that the sum that should have been transferred was the amount of R1 000 000, as well as interest accruing from the date of transfer to date of payment.

[17] Proof of payment of the balance of the sum owing was demanded, payable by close of business on the same day, together with an explanation for the first respondent's conduct. A comment was also made that '[t]his is the most irregular manner of payment for a transfer that we have experienced.'

[18] On 6 October 2017 only, the first respondent replied and wrote the following:

'We advise the funds would be released to our offices next week and same would be made available to yourselves.'

[19] Not surprisingly, the complainant's attorney replied on the same day and pointed various aspects out to the first respondent, inter alia, that the purchase price was paid in full by 6 April 2017, and also wrote the following:

'3. We have addressed numerous correspondences which will be attached to our letter to the Law Society requesting a full explanation as to why there is such a delay in the payment of

the purchase price (which should effectively have been held in trust by yourselves) to our client since transfer occurred on the 12th of September 2017.

4. All of your responses have been vague and evasive and have failed to provide any reason for such delay. . . .'

[20] On 9 October 2017, the first respondent replied and wrote the following:

'We apologise for the delay and wish to advise that due to staff and administrative problems this matter was not dealt with timeously.

We sincerely apologise for the delay and assure you that by the end of this week the payment would be made including the interest.'

[21] On 11 October 2017, the first respondent wrote to the complainant's attorney and said the following:

'Please note that on the 2nd of October 2017 the amount of R100 000.00 was paid into your account and we have made payment of a further R300 000.00 on even date.

As our daily limit is R300 000.00, further payment would be made to you by Friday the 13th of October 2017.'

[22] Not surprisingly, the complainant's attorney was not happy with the state of affairs and sent a letter to the first respondent, indicating its displeasure and that it was in the process of submitting a complaint to the applicant.

[23] Despite the first respondent's daily limit of R300 000, as per the letter dated 11 October 2017, the first respondent proceeded to make two further payments on the 12th of October, one for R400 000 and one for R200 000.

[24] The applicant, after receiving the complaint (of mishandling of trust funds) appointed two attorneys as members of an inspection committee who subsequently interviewed the first respondent on 26 January 2018, conducted certain inspections and thereafter submitted a report to applicant.

[25] The members of the inspection committee indicated in their report that the first respondent admitted that he mishandled trust funds and that he claimed a personal

financial crisis as he had to repay a loan to Ms Priscilla Moodley. The first respondent was apparently also 'for the most part, forthcoming with information and answers in the interview'. He admitted that it was improper for him to register the transfer of the property into the seller's name where he no longer held the purchase price in his trust account.

[26] When questioned by the inspection committee, the first respondent indicated that a few years prior to this incident, Ms Priscilla Moodley loaned him R1,5 million which he used for renovations of his home. Ms Moodley called on the first respondent to repay the loan in early 2017. He did not disclose any further particulars about the loan. The first respondent found himself in a 'personal financial crisis' and approached the purchaser, Mr Gokul, for a loan.

[27] The inspection committee was provided with a consent dated 17 March 2017 and signed by Mr Gokul, which formed part of the inspection report and accordingly also the application papers. It read as follows:

'

CONSENT

I, the undersigned, Prakash Gokul, confirm that the purchase price including the costs paid in respect of the transfer on 13 March 2017 further amounts to be paid for the purchase price may be utilised by you as requested subject to the condition that those funds are to be replaced prior to transfer as I need the transfer to be able to take place as soon as possible as I need the property for business purposes. I further confirm that the interest that is due could be made to me as soon possible.'

There is no indication that Mr Gokul was independently represented or advised before signing this consent.

[28] It is clear that the first respondent also did not comply with what was contained in this co-called consent from Mr Gokul.

[29] It is also clear that the first respondent at no stage obtained the consent of the complainant, the seller, to use the funds of the purchaser. When dealing with this aspect in his answering affidavit, he simply stated that the seller and the purchaser were

friends and ‘in communication with one another’. There is no indication that the first respondent showed any appreciation for the seriousness of this particular aspect.

[30] The inspection committee also dealt with first respondent’s response to the complainant’s attorney and said the following in paragraph 2.3.19 of their report: ‘He admits that his correspondence to the seller was inadequate but he was in a “quandary”’.
The first respondent clearly had no appreciation for the fact that he blatantly lied to the complainant’s attorney.

[31] The inspection committee also conducted an inspection of the first respondent’s bank statements and other supporting documents. Although they referred to certain suspicious payments, the applicant chose not to conduct a full audit or further investigations into the first respondent’s accounts and these issues are left at that.

[32] In his written heads of argument, counsel for the first respondent Mr Blomkamp SC, submitted that it emerged from the report of the inspection committee that:
(a) The first respondent cooperated fully with the committee;
(b) He was found to be ‘forthcoming with information and answers during the interview’. (The words ‘for the most part’ which preceded the quote in the report were left out).
(c) He admitted that he mishandled the trust funds in question.
(d) He admitted that it was improper for him to do what he did.
(e) He admitted that he ought not to have used the funds in the way he did and that he regretted his decision to do so.
(f) He apologised for his actions.

[33] Counsel for the applicant, Mr Chetty, submitted that the first respondent had no choice but to be forthright and to co-operate with the inspection committee in light of the overwhelming evidence against him. He also made mention of the fact that the first respondent had lied to the complainant’s attorney regarding the issue of the payment of the purchase price when he knew he had used the money at that stage.

[34] Counsel for the first respondent submitted that we should have no regard to the correspondence between the first respondent and the complainant's attorney as it came before the inspectors' report and furthermore that the applicant's 'case' is only based on this particular transfer. The correspondence between the attorneys referred to herein above of course formed part of the inspectors' report attached to the founding affidavit and was therefore properly before us.

[35] On what basis counsel for the first respondent contends that we should ignore the lies contained in the correspondence emanating from the first respondent is unclear as it is clearly highly relevant to the issues we have to decide.

[36] As far as the first respondent's claim that he was forthcoming with information and answers is concerned, it bears mentioning that the inspection committee commented that the first respondent chose not to expand on what he meant when he claimed to have a 'personal crisis' other than to say that he had to repay an old luxurious debt. He responded as follows in his answering affidavit:

'I merely explained to them that I owed an amount to Priscilla Moodley and that it had become necessary for me to repay the debt. I also explained that fees owed to my practice were outstanding and they were slow in being paid. That was the nature of my personal financial crisis, and I respectfully admit that it needed no further elaboration.'

[37] In the matter of *KwaZulu-Natal Law Society v Khumalo* (KZP) unreported case number 3611/2012 (28 February 2014), the respondent, who had only been in practice for two and a half years, stole R17 083 from his employers. In his opposing affidavit, he expressed sincere remorse and was at pains to set out in detail the financial difficulties he experienced which lead him to commit theft. Ploos van Amstel J said the following at para 18:

'In this case the respondent too demonstrated that he was not a fit and proper person to practise as an attorney. He succumbed to the pressure under which he was and behaved in a dishonest manner. I am however not persuaded on the evidence before us that he is inherently dishonest. I think his contrition is genuine and I do not believe that he is likely to offend again. I think a proper exercise of our discretion calls for a suspension, rather than the removal of his

name from the roll. I think it likely that when he has served the period of suspension he will once again be fit to practice.'

[38] The first respondent's lack of elaboration makes it difficult to really assess the nature of his actions, and importantly whether he is inherently dishonest or whether 'he succumbed to the pressure' of his so-called personal financial crisis.

[39] Another issue of concern is the first respondent's and perhaps even the inspection committee's lack of understanding of the seriousness of the first respondent's actions. The complaint was initially described as one of 'mishandling of trust funds'. The first respondent himself stated in para 14 of his answering affidavit that: 'There was not at any stage an intention to permanently deprive the complainant of her money.'

[40] The inspection committee did however conclude, inter alia, that the first respondent's actions appeared to have been deliberate, contrived and done with the intention to conceal the misappropriation of trust funds.

[41] In supplementary heads of argument, counsel for the applicant referred us to the decision of *Incorporated Law Society v Coetzer* 1932 OPD 155 where the court stated that when a person takes trust monies, knowing them to be trust monies, and converts them to its own use, it is theft. The first respondent in our view clearly misappropriated trust funds.

[42] Although, the first respondent had repaid all outstanding monies to the complainant, we agree with counsel for the applicant's submission that such payments do not mean that a wrong has been corrected. The first respondent has furthermore done very little to explain and appropriately deal with the blatant lies contained in the correspondence to the complainant's attorney. The first respondent's dishonesty in this regard becomes important when considering an appropriate sanction (see *Summerley*, supra). As mentioned before, he told the inspection committee that he was in a 'quandary' when corresponding with the complainant's attorney.

[43] Having regard to the three-stage inquiry referred to in *Jasat, supra,* and others it is clear that the first stage, namely whether the offending conduct has been established on a preponderance of probabilities does not warrant much attention as first respondent has admitted his wrongdoing from the outset.

[44] As far as the second inquiry is concerned, we are of the view that having considered all the facts, and in weighing up the conduct of the first respondent against the type of conduct we expect of legal practitioners, it is in our view clear that the first respondent is not a fit and proper person to continue practicing.

[45] When dealing with the third and last enquiry, namely whether, bearing in mind all the circumstances, the first respondent should be removed from the roll or whether an order of suspension would suffice, it is important to consider all the aggravating and mitigating factors placed before us. We were referred to various authorities and also wish to express our gratitude for the supplementary bundle containing unreported judgments which were delivered subsequent to the hearing of this matter.

[46] Counsel for the first respondent urged us to take the following mitigating factors into account:

(a) The first respondent's conduct occurred because of a personal financial crisis that arose in his life.

(b) Prior to the complaint in question, he had an unsullied record and there have never been any other complaints against him.

(c) He expressed remorse on several occasions for what he did and he is genuinely contrite and regrets what occurred.

(d) He made a frank and full disclosure to the inspection committee.

(e) He has given his undertaking that he will conduct himself properly if permitted to continue practising as an attorney.

(f) He has learnt a lesson from the experience and is unlikely to ever repeat such conduct.

(g) He has suffered considerably as a result of what he did. His practice came to a standstill and employees left. It has affected his family life and financial situation.

[47] It is common cause that the first respondent practised for his own account under the name and style of P Naicker Inc, which company was provisionally liquidated on 7 June 2019, and finally liquidated on 11 July 2019. This prompted the applicant to bring an urgent application for the first respondent's suspension, pending the finalisation of the current application to have his name struck off the roll of legal practitioners. The rule nisi issued on 19 July 2019 in that regard was confirmed on 18 October 2019.

[48] The aggravating factors, as submitted by counsel for the applicant were, inter alia:

(a) The first respondent was sufficiently experienced, having been admitted on 6 August 2007, and should have known better.

(b) The first respondent should have approached the seller but purposely avoided doing so because he knew she would not be happy with what he wanted to do.

(c) The first respondent should have known that one cannot pass transfer and register the property without having the funds in one's trust account.

(d) The first respondent lied to the complainant's attorney in the correspondence between them.

[49] Counsel for the first respondent referred us to the decision of *Cape Law Society v Parker* 2000 (1) SA 582 (C), where the attorney was suspended for two years following various unauthorised withdrawals and loans to family members. He repaid the money before the Law Society commenced with investigations. The following was said by King JP at 588C-E:

'The misappropriations took place in circumstances where there was no real risk of loss to clients. This is not to say that respondent's conduct has not fallen far short of the high standard required of attorneys. Nevertheless, in the circumstances there is in our view sufficient justification for the Court to depart from what would ordinarily have been its approach, namely a striking-off. Mr *Rose Innes* has suggested a suspension of respondent from practice, the suspension itself being suspended conditional upon respondent not operating a trust account. In our view, however, a more serious punishment is called for. Not only must the error of his ways be brought home meaningfully to respondent, but also must it be shown clearly to the community that attorneys who depart from the high standards of professional behaviour

required of them will not go unpunished; only in this way will the confidence of the public in the attorneys' profession be maintained.'

[50] We were also referred to the unreported judgment of *KwaZulu-Natal Law Society v Khumalo*, supra, where, as mentioned above, a young practitioner stole the sum of R17 083 from his employers. Ploos van Amstel J said the following at para 13:

'The Law Society has not challenged the respondent's remorse or bona fides. I have a sense that he is genuinely remorseful, that he has learnt a painful lesson and that he is not likely to offend again. He appears to be a young man with potential to make a success of a practice as an attorney. The question is whether he should nevertheless be removed from the roll on the basis that he had committed theft. A high degree of honesty and integrity is expected from attorneys. The interests of the public are paramount because they are vulnerable to exploitation when they entrust their affairs to an attorney. Attorneys are officers of the court and a vital cog in the judicial machinery. If dishonest attorneys are allowed to practice the administration of justice will be brought into disrepute. It does not follow however that every attorney who has stumbled and did something dishonest should be removed from the roll. The aim is to prevent people who are not fit to practice from doing so. But when an attorney who has suffered a moral lapse can recover from it and become a fit and proper person again we must allow him that opportunity and make it possible for him to return to practice as a productive member of society.'

The practitioner had been under an interim suspension since 12 June 2012. He was handed a further suspension of one year, with judgment being handed down on 28 February 2014.

[51] We were then referred to the decision of *Law Society of the Cape of Good Hope v Schoeman* [2014] ZAWCHC 110 where the attorney was suspended for a period of 12 months after transferring funds totalling R1 327 000 to his own account which he utilised for gambling. The funds would be transferred back shortly thereafter. Despite remarking that misappropriation of trust funds constitutes the worst sin that an attorney can commit, irrespective of intention, Ndila J said the following at para 15:

'The respondent's conduct must be assessed having in mind the uncontested depressive emotional circumstances resulting from his failed relationship with Ms Joubert. In my view, this lends credence to his version that he was punishing Ms Joubert, who was responsible for the books of the practice. This view is supported by the report by his psychiatrist that he was

suffering from depression and PTSD. If one accepts that the respondent's conduct was influenced by his prevailing family circumstances, it follows that it cannot be said that his character is so inherently flawed that if he is at some stage allowed to return to practice, he is likely to repeat the conduct. He states that he has practiced as an attorney for 21 years and no disciplinary proceedings were ever held against him by the applicant. His expression of contrition and unequivocal acknowledgement that his conduct fell short of the high standards expected of an attorney, to some degree show that he fully comprehends the extent of the magnitude of his transgressions. I am alive to the fact that the amount misappropriated by the respondent is a huge amount, and that it has all been repaid. I consider these factors exceptional enough to ward off the strictest sanction of striking him off the roll of attorneys. In my view a suspension from practising as an attorney for a period of time will suffice.'

[52] Counsel for the first respondent submitted that bearing in mind the particular facts of the present matter, a suspension would be an appropriate sanction.

[53] Counsel for the applicant at the outset argued for the first respondent to be struck off the roll of attorneys as the facts of the matter were aggravating enough to warrant the most serious of sanctions. He submitted in closing that the facts of the cases referred to by counsel for first respondent differed from those in the present matter.

[54] In the matter of *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA it was held that although the general rule was to remove the names of attorneys guilty of misappropriation of trust funds, where mitigating factors were present, the courts could and did deviate from the general rule and suspended the delinquent attorney. The court ordered a suspension but attached various conditions to it, in circumstances where the attorney was very young and inexperienced and used funds in her trust account to pay for her practice expenses.

[55] Bearing all the aforesaid in mind, the particular facts of the matter (both aggravating and mitigating), the court's role to discipline and punish errant attorneys and in exercising our discretion in coming to a value judgment, we are of the view that a suspension for a period of two years would be a suitable sanction. Although the first respondent's character has not been shown to be inherently flawed, his conduct has

fallen short of the high standards expected of a legal practitioner. A period of suspension will be sufficient to emphasize that point.

[56] Accordingly the following order will issue:

1. The first respondent is suspended from practice as a legal practitioner for a period of two years as from the date of this judgment.
2. The first respondent is interdicted and restrained from practising and/or holding himself out as a legal practitioner during the period of suspension.
3. Paras 1.1, 1,2 and 1.3 of the rule nisi issued on 18 October 2019 are discharged.
4. Paras1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12 and 1.13 of the rule nisi issued on 18 October 2019 are confirmed.

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BEZUIDENHOUT, AJ

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HENRIQUES, J

Matter heard on: 21 August 2020

Judgment delivered on: 06 November 2020

APPEARANCES

Counsel for Applicant:	Mr Chetty
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Counsel for First respondent:	Mr Blomkamp SC
Instructed by:	Peter Naicker Incorporated Suite 911, Salmon Grove, Durban