468/98

REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 468/96 (CPD)

In the matter between:

RAMESH VASSEN Appellant

and

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE Respondent

CORAM: EKSTEEN, OLIVIER, ZULMAN, PLEWMAN, JJA et MELUNSKY, AJA

DATE OF HEARING: 15 May 1998

DATE OF DELIVERY: 28 May 1998

JUDGMENT

EKSTEEN, JA:

The appellant's name was struck off the roll of attorneys by the full bench of the Cape Provincial Division at the instance of the respondent Society. Certain further ancillary orders were also made against appellant and he was ordered to pay the costs of that application on a scale as between an attorney and client. With the leave of the Court a quo appellant now appeals against that order.

In its application to the Court a quo respondent alleged that the appellant had been admitted and enrolled as an attorney in 1975, and that from that time he had practised - at first in partnership and since 1985 for his own account - until he ceased practising in April 1995. At the time the application was brought appellant was employed by the Department of Foreign Affairs in Pretoria.

Respondent then went on to allege that appellant's audit certificate for the year ending 28 February 1993 showed a number of

irregularities, in breach of the Society's rules, in respect of his trust account and his other books of account, and that there was a shortfall of R32 038.81 in his trust banking account. On respondent drawing these facts to appellant's attention, appellant replied admitting all the alleged contraventions of the Society's rules and undertaking to remedy them. He also indicated that he had introduced a control system so as to ensure that they did not recur in future. Despite this assurance, however, the next audit certificate for the year ending 28 February 1994 showed a shortfall of R5 924.68 in the trust account. This was rectified on 2 February 1995. After appellant had ceased practising on 29 April 1995 respondent resolved to conduct an inspection of appellant's books of account. This inspection revealed that since 1993 appellant had drawn various cheques on his trust account to meet personal commitments. Some 18 instances of underbanking of trust monies were revealed, so

that a nett shortfall of R7 929.31 in the trust account was reflected at the time appellant ceased practising.

Perhaps the most serious matter which came to light as a result of this inspection was that concerning the Estate Late G.F. Rix. From the papers before us, including appellant's explanatory letters to the respondent and his replying affidavits, it appears that the late G.F. Rix was a client of appellant. Appellant drew Rix's will in which his daughter was his sole heir, and appellant was nominated as executor. Rix, it would appear, was divorced from his wife and she had subsequently married one Van As. On Rix's death it was discovered that he had an insurance policy in which his former wife, Mrs van As, was named as the beneficiary. Appellant wrote several letters to the insurance company trying to persuade them to pay the proceeds of the policy to him as executor so that he could let the money devolve on

Rix's daughter. The company replied that the proceeds would be paid to Mrs van As as she had been appointed the beneficiary when the policy had been taken out, and that they could not substitute Rix's daughter as beneficiary. Eventually on 17 June 1994 the insurance company sent appellant a cheque for R61 763.55 being the proceeds due to Mrs van As under the policy. Appellant thereupon paid the cheque into his trust account and then, due to his "urgent financial requirements", proceeded to use that money for his own personal purposes. His explanation for this was that he regarded the monies taken by him as a loan by Mrs van As to him, and that he had every intention of repaying it to her as soon as the estate had been finalised. He conceded that he had not consulted Mrs van As about this nor had he informed her of what the was doing. Later on, in his replying affidavit appellant says that

> "at the time when the various withdrawals were made I *bona fide* but mistakenly believed that I, in my capacity as executor, was empowered in terms of the will of the deceased to invest the proceeds of the relevant policy by borrowing same in my personal capacity at a market-related rate of interest.
> I reiterate ... that I truly regarded this as a loan to myself by the estate, which could be repaid as soon as the estate is wound up."

This he says despite the fact that the insurance company had explicitly told him that the proceeds of the policy did not form part of the deceased's estate but accrued directly to Mrs van As. Moreover on receipt of the money appellant deposited it, not into the estate account, but into his trust account. He also did not bring the amount up in the first and final liquidation and distribution account in the estate, nor is any reference made in the accounts to the socalled "loan." His excuse, therefore, that he thought that in his capacity as executor in Rix's estate he was empowered to invest Mrs van As' money by "borrowing" it for his own personal use is simply not acceptable, and cannot be true.

Respondent also charged appellant with having misappropriated R9 260.41 from the estate of one C. Allies. This amount could not be accounted for in appellant's books. Appellant replied that he had performed a "vast amount of work" in respect of this estate and had not yet deducted his fees against the estate. He undertook to do so " in the near future". The Court a quo was unable to make any finding on the allegations, in view of appellant's failure to keep proper books. I do not, therefore, propose to refer to this incident again, but rather to leave it out of account as the Court a quo did.

The Court a quo dealt with respondent's application in terms of Section 22 of the Attorneys Act 53 of 1979 ("the Act"). The relevant provisions of that section read as follows:

> "22(1) Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from

practice by the court within the jurisdiction of which he practises -

.....

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

....."

The appellant's primary attack on the order made by the Court a quo was that the section was intended to discipline only practising attorneys, and in view of the fact that appellant had ceased to practise as an attorney "the Court a quo had acted beyond the powers vested in it by section 22(1)(d) of the Act in that the appellant was a non-practising attorney at the relevant time". Section 22(1)(d), it was argued, was designed to prevent a recalcitrant attorney from continuing to practise, and found no application to one who had already ceased to practice.

In my view such a proposition need only to be stated to be

rejected. The section seems to be designed to allow a Court, in its discretion, to strike off or suspend any attorney who is not a fit and proper person to remain on the roll, i.e. one who has failed to display that degree of honesty, reliability and integrity one looks for in an attorney. Such a person should not be allowed to remain on the roll of attorneys so as to be entitled to practice in the future, as he may have done in the past. Indeed it seems to me that anyone who has been admitted and enrolled as an attorney but has not yet commenced practising may be subject to being struck off the roll in terms of this section where he has committed such a misdemeanour as to show that he is not a fit and proper person to remain on the roll. The Act itself seems to contemplate such an eventuality if one has regard to the provisions of sections 57(1), 71(1) and 72 (and more particularly section 72(6).)

In exercising its function in terms of the section the Court a quo was called upon to exercise a discretion as to whether the appellant was a fit and proper person to continue to practice as an attorney, and secondly whether the appellant's transgressions should be visited with an order striking him off the roll or whether an order suspending him from practice for a stated period would suffice. (Reyneke v. Wetsgenootskap van die Kaap die Goeie Hoop 1994(1) SA 359 (A) at 369 C-E). In an appeal against the exercise by the Court a quo of its discretion, this Court has a limited power to interfere. It can only do so on certain well recognized grounds viz. where the Court a quo exercised its discretion capriciously, or upon a wrong principle, or where it has not brought its unbiased judgment to bear on the question or where it has not acted for substantial reasons. (Reyneke's case (supra) at 369 E-F *Ex parte* Neethling and Others 1951(4) SA 331 (A) at 335 D-E,

Beyers v. Pretoria Balieraad 1966(2) SA 593 (A) at 605 G).

The Court a quo found that in the case of Estate Rix appellant fully appreciated that the money received from the insurance company did not form part of the estate. His action of endorsing the cheque as "executor" paying it into his trust account and then using the money for his own personal benefit therefore amounted to theft. Appellant's denial that he acted dishonestly or that he had any intention to steal the money was rejected. The fact that the money stolen was repaid does not detract from the seriousness of his offence.

The Court was fully justified in coming to this conclusion and it was not contended before us that they had erred in this respect. By the same token the use by him of other trust monies for his own personal purposes also amounted to the theft of such monies, and neither his expressed intention of repaying the amounts taken, nor the fact that the

account was subsequently brought back into order, in any way detracts from this conclusion. Appellant also conceded that all the alleged contraventions of the Society's rules laid to his charge in respect of his bookkeeping were justified. In the light of all this the Court a quo in the exercise of its discretion came to the conclusion that appellant was not a fit and proper person to be allowed to continue to practice as an attorney and that he should be struck off the roll.

Mr Donen, who appeared in this Court on behalf of the appellant, submitted that the appellant had throughout his practice been a "human rights lawyer", a "peoples lawyer", who looked after the needs and interests of his clients irrespective of their ability to pay fees. All this, he submitted, ought to have been taken into account and given due weight by the Court a quo in the exercise of its discretion.

From its judgment it appears that the Court a quo was aware of

and accepted it as being common cause that appellant had served the community with dedication and diligence to the best of his ability; that he attempted to look after the needs and interests of his clients regardless of their ability to pay fees; that he was a bad businessman who practised with his heart and not with his mind; and that he had suffered considerable financial loss by not being paid for the "political" and criminal work he had done. These features mentioned at the outset of the judgment were not again referred to when the Court came to discuss the considerations prompting it to exercise its discretion to strike the appellant off the roll. This, Mr Donen submitted, indicated that the Court had failed to take them into account in the final resort. He pointed, furthermore, to the remark of Farlam J in delivering the judgment of the full bench a quo (towards the end of that judgment) that

"A factor which in my view weighs heavily against an order for

> his suspension rather than the removal of his name from the roll, is the fact that he persisted in this Court in what is patently a dishonest denial on oath that in respect of the van As transaction he was not guilty of theft."

This, Mr Donen submitted, shows that the Court simply branded the appellant a thief, and then ignored all his commendable service to the community in striking him off the roll.

In this regard it must be borne in mind that the profession of an attorney, as of any other officer of the Court, is an honourable profession which demands complete honesty, reliability and integrity from its members; and it is the duty of the respondent Society to ensure, as far as it is able, that its members measure up to the high standards demanded of them. A client who entrusts his affairs to an attorney must be able to rest assured that that attorney is an honourable man who can be trusted to manage his affairs meticulously and honestly. When

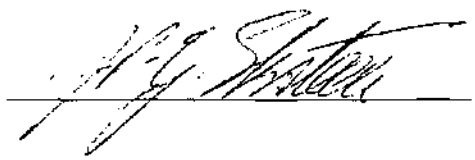
money is entrusted to an attorney or when money comes to an attorney to be held in trust, the general public is entitled to expect that that money will not be used for any other purpose than that for which it is being held, and that it will be available to be paid to the persons on whose behalf it is held whenever it is required. Here once again the respondent Society has been created to ensure that the reputation of this honourable profession is upheld by all its members so that all members of the public may continue to have every confidence and trust in the profession as a whole. The fact that an attorney may be regarded as a pillar of society who serves the community in civic or political spheres, or works indefatigably for the upliftment of the poor and defenceless members of society, cannot in respect of his profession, be seen as a substitute for that honesty, reliability and integrity which one is entitled to expect of an attorney. One does not entrust money to a person

because of his good deeds in the community, but because he is an attorney who can be trusted and on whom one can rely. However commendable appellant's community service may have been it can never be seen as an excuse for his failure to live up to those qualities which should characterise an attorney. The theft of money held by him in trust, and his persistence in trying to rationalise his conduct and to deny that he acted dishonestly or that he brought his profession into disrepute by his actions, reflects adversely on his character and is, in my view, indeed a weighty consideration militating against any lesser stricture than his removal from the roll. (Cf Reyneke's case (supra) at 370 A-B).

In the light of all these considerations I am not persuaded that the Court a quo acted on any wrong principle or for reasons that were not substantial. I am therefore not prepared to say that it exercised the

discretion which it had improperly.

The appeal is accordingly dismissed with costs.



J P G EKSTEEN JA

OLIVIER, JA)
ZULMAN, JA)
PLEWMAN, JA) Concur
MELUNSKY, AJA)