THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 507/2013

In the matter between:

THOMAS WALTER ROTHWELL HEPPLE **FIRST APPELLANT**

CHRISTIAAN HENDRIK EARLE **SECOND APPELLANT**

HEPPLE ATTORNEYS INCORPORATED **THIRD APPELLANT**

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES **RESPONDENT**

Neutral citation: *Hepple v Law Society of the Northern Provinces* (507/2013) [2014] ZASCA 75 (29 May 2014)

Coram: Mthiyane DP, Ponnan, Saldulker JJA, Hancke and Mathopo AJJA

Heard: **12 May 2014**
Delivered: **29 May 2014**

Summary: Attorneys ─ Misconduct ─ Misappropriating trust funds ─ Attorneys in an incorporated practice carrying on investment activities ─ paying interest to investors out of trust funds ─ resulting in trust deficits ─ Manipulating bank reconciliation statements to conceal trust deficits ─ Misconduct justifying removal of both from the roll ─ Obligation to keep proper books of account resting on both ─ Approach to striking off restated.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Wright AJ and Makhubele AJ sitting as court of first instance):

1 The appeal is dismissed.

2 The costs are to be paid jointly and severally by the appellants and are to be taxed by the first and second appellants on the scale as between attorney and client.

JUDGMENT

Mthiyane DP (Ponnan, Saldulker JJA, Hancke and Mathopo AJJA concurring):

[1] This is an appeal against an order of the North Gauteng High Court (Wright AJ and Makhubele AJ), removing the names of the first and second appellants from the roll of attorneys and granting other ancillary relief. The ancillary relief included an order prohibiting the appellants from handling or operating trust accounts and the appointing of a *curator* to administer and control the appellants's trust accounts, to protect the interests of their trust creditors. The appeal is with the leave of the high court.

[2] The first appellant, Mr Thomas Walter Hepple (Hepple), was admitted as an attorney by the Free State High Court on 19 February 1998 and enrolled as an attorney in Gauteng on 17 November 1999. His

co-director, the second appellant, Mr Christiaan Hendrik Earle (Earle), was admitted by the Free State High Court on 30 October 1980 and was enrolled as an attorney in Gauteng on 23 February 2006. They both practised in Centurion, Pretoria in an incorporated practice under the name: Hepple Attorneys Incorporated, the third appellant (the firm). There were two other directors of the firm, Mr Gerhard Barnard and Mr Micheal Johnson both of whom are not the subject of the application for removal from the roll of attorneys.

[3] In terms of s 22(1)*(d)* of the Attorneys Act 53 of 1979 (the Act), an attorney may 'on the 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─

. . .

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

[4] The nature of the enquiry we are concerned with in this case, namely a determination of the question whether the attorneys concerned are not fit and proper persons to continue to practise and how a court should exercise its discretion in that regard, including the issue of the appropriate sanction as provided in s 22(1)*(d)* of the Act, was reiterated by Brand JA in *Summerley v Law Society, Northern Provinces*[1] as follows:

'It has now become settled law that the application of s 22(1)*(d)* involves a threefold enquiry (see eg *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) in para [10] at 51C-I and *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) in para [2] at 13I-14B). The first enquiry is aimed at determining whether the law society has

[1] *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) at 615B-F.

established the offending conduct upon which it relies, on a balance of probabilities. The second question is whether, in the light of the misconduct thus established, the attorney concerned is not a "fit and proper person to continue to practise as an attorney". Although this has not always been the position, s 22(1) *(d)* now expressly provides that the determination of the second issue requires an exercise of its discretion by the Court (see eg *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 851C-E). As was pointed out by Scott JA in *Jasat* (at 51E-F), the exercise of the discretion at the second stage "involves, in reality, a weighing up of the conduct complained of against the conduct expected of an attorney, and, to this extent, a value judgment" (see also, eg, *Budricks (supra)* at 14A). The third enquiry again requires the Court to exercise discretion. At this stage the Court must decide, in the exercise of its discretion, whether the person who has been found not to be a fit and proper person to practise as an attorney deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice.'

[5] The offending conduct which prompted the respondent, the Law Society for the Northern Provinces (the law society) to bring the application to remove Hepple and Earle from the roll of attorneys is sketched in the founding affidavit deposed to by its President, Mr Stephens Anthony Thobane (Thobane), and supported by three reports of an investigation into the accounting and financial records of the firm. These uncovered a number of irregularities amounting to contraventions of the certain provisions of the Act and the Rules of the law society (the Rules). These included the existence of substantial trust deficits in their books of account; misappropriation of trust funds; failure to account to the law society for interest generated from the trust banking accounts as required by s 78(3) of the Act,[2] failure to keep copies of bank reconciliation statements; manipulation of bank reconciliation statements

[2] '78 Trust Accounts. . .
(3) The interest if any, on money deposited in terms of subsection (1) and the interest on money invested in terms of subsection (2) shall be paid over to the fund by the practitioner concerned at the prescribed time and in the manner prescribed.'

to conceal trust deficits; failure to submit (or submit timeously) the Rule 70 auditor's report for the period ending 30 June 2009 to the society; obtaining a qualified Rule 70 auditor's report; conducting an investment practice in which interest was paid to investors out of the trust account, thus creating a trust deficit over many years; failure to keep proper accounting records in contravention of the Act and the Rules.

[6] The investigation was conducted by Mr Vincent John Faris (Faris) a senior accountant and auditor who is described in the papers as someone with a wide knowledge of attorneys' accounting records and who has many years' experience in auditing the accounting records of practising attorneys. He is considered to be an expert in the field.

[7] Faris' investigation was initially directed at the period July 2009 until the end of May 2010. But what he uncovered in his initial investigation led him to expand its scope to include an examination of the trust positions and the firm's accounting activities to as far back as 2005. That exercise yielded a number of disturbing irregularities and contraventions of the Act and the Rules. They are documented in three reports, dated 5 July 2010, 31 January 2011 and 11 April 2011, which Faris submitted to the law society. The first two reports deal with and include his actual investigation, the interviews he had with Hepple and Earle and other relevant persons, his findings and conclusions. The third report deals with the responses by Hepple and Earle to his findings and conclusions.

[8] The investigation uncovered the following:

(a) Interest on the overdraft as well as other charges levied on the business banking account were debited to the trust account. The firm kept

two trust accounts at the First National Bank; there was a main trust bank account and a second bank account which was used to accumulate the trust bank account interest and charges transferred from the main trust bank account. On scrutinising the business bank account Faris discovered that interest on the overdraft (which should have been for the firm's business account) was debited to the trust account. The effect thereof was that the amounts due to the law society were not accounted for at all or within the time and in a manner prescribed by s 78(3) of the Act. The trust liability resulting from the omission to pay interest in the trust bank account to the law society amounted to (at the time of the first report) R82 985.10. Mr van der Westhuizen, the firm's bookkeeper undertook to get the firm to reimburse the trust bank account by the end of June 2010. The failure on the part of the firm to pay these amounts resulted in continuing trust deficits over the period July 2005 through to May 2010.

(b) The accounting records indicated the existence of a trust suspense account of R19 375.05 in debit but the amount was treated by the firm as trust funds available. There was however no evidence to support the existence of funds and this amount was therefore treated by Faris as an additional deficit.

(c) The firm conducted an investment practice whereby funds were borrowed from investors. Further, the investments made did not generate the necessary cash flow to repay the capital and the trust account was used irregularly to make interest payments. These investment activities had been ongoing for a number of years and at the year end irregular withdrawals were reimbursed into the trust account to conceal the true positions from the auditors. Interest to investors was paid out of the Trust account. According to a schedule drawn by Faris a total of R268 479.64 was paid to investors between 24 July 2009 to 3 June 2010. The payment was made from the Trust account thus creating a deficit in the trust

account in that amount. It is important to note that the carrying on of an investment practice is not proscribed, but strict rules are laid down in Rule 77A of the Rules relating to the conduct of an investment practice.[3] The disturbing aspect of the investment activities concerned in this case is the lack of candour on the part of Hepple and Earle in respect of transactions in which they were involved. In the high court mention is made of a summary of an account headed 'Consolidated Summary of Urban Blue Print Property Holdings (Pty) Ltd'. The court noted that this was a client of the firm. The account shows a receipt of R1, 5 million and trust interest accrued of just over R6 000. It also shows payments and debits almost extinguishing the total, leaving the account in credit in an amount of just over R9 000. The account also shows payments to Earle of R20 275 and R20 000 to Hepple, who are both described as clients. Nowhere are these transactions explained in the papers. During argument in the appeal before us Mr Davis, for Hepple, submitted that this payment was authorised by the client. There is no further explanation of what this payment was for. There are further similar examples of activities which also involved the deposit of certain amounts to the firm and payments made to the point where the funds were depleted. I do not however consider it necessary to deal with all of them.

(d) The investigation also uncovered discrepancies in the firm's bank reconciliation. It was discovered that cashbook balances were substantially in excess of the bank statement balances. Faris noted that under normal circumstances this would indicate the existence of outstanding deposits, that is, deposits made into the bank account and as such captured into the accounting system but not yet reflected on the bank

[3] Under Rule77A.1.1 of the rules of the Law Society, a firm shall for the purpose or the rule be deemed to be carrying on the business of an investment practice if it invest funds on behalf of a client or clients or if it controls or manages, whether directly or indirectly, such investment by the collection of interest or capital redemption payments on behalf of investment clients.

statement. Faris found these excesses questionable as it would be expected that there would be outstanding cheques, which are cheques not yet presented to the bank for payment, as opposed to outstanding deposits. When questioned about this discrepancy the firm's bookkeeper, Mr van der Westhuizen, was unable to offer any explanation but undertook to look into the matter and revert to Faris in due course. Subsequently Mr van der Westhuizen furnished Faris with bank reconciliation statements for the years ended June 2007 through to 2010. He told Faris that the bank reconciliation statements had not been prepared or had not properly been prepared and that he had been obliged to re-perform the bank reconciliation statements from August 2005 to June 2006, and then from July 2006 up to the date of his appointment at the firm in 2007. From the documents furnished it was clear that bank reconciliation statements were manipulated at year end to conceal the existence of trust deficits. The manipulation was not limited to the year ended June 2010 but had occurred from as far back as June 2007. Faris concluded that the firm was aware of the position and that the bank reconciliation statements were manipulated in such a way as to conceal the existence of trust deficits. Faris furnished the law society with a summary of trust bank reconciliations from July 2006 to June 2010. In each of these years, with the exception of the period March 2009 to June 2009, there was a discrepancy between the trust bank balance and the accounting records of the firm indicating the existence of trust deficits.

(e) Faris also investigated two complaints against the firm: one by a firm of attorneys Hatting Basson Archary & Ndzabandzaba Inc. on behalf of MBM Technical Services (Pty) Ltd and the other by a Mr van Rooyen. In regard to the first complaint the firm had received R1, 5 million from a firm, Quantum Business Development Limited. The money had been paid into the firm's Trust account. The transaction involved a loan agreement

between Quantum and a private company Urban Blueprint Property Holdings (Pty) Ltd (Urban). In terms of the agreement between the two corporate entities, Earle was given certain powers by the trust Mandate agreement between the parties. The deponent for the law society Thobane, says that payments were in fact made, according to Earle, with the full knowledge and approval of all the relevant parties. Faris provided a consolidated summary of how the funds were appropriated and concluded that if Earle's explanations are to be accepted, 'there will be no impact on the firm's trust positions'. Faris does not appear to have taken this complaint any further.

(f) As to the complaint relating to Van Rooyen, Faris noted in his report dated 5 July 2010 that R50 000 was paid to Van Rooyen from the Urban account. I have not been able to find anything either from the founding affidavit filed by the law society or from any of the reports submitted by Faris to suggest that this payment had any impact on the firm's trust position. In any event Earle gave a full explanation, in particular that Mr Van Rooyen was not his client; he was not holding any trust funds for Van Rooyen and had no mandate from his client to make any further payment to Van Rooyen, other than the amount of R50 000 already paid to him. The two complaints had nothing to do with Hepple. The complaint involved matters which were handled by Earle.

(g) According to Thobane's affidavit Earle had informed Faris of a trust deficit of R400 000 as at July 2009 and that he was in the process of arranging finance to reimburse the trust banking account. The shortfall is also admitted by Earle in his answering affidavit (he has described it as a 'replying affidavit') but Hepple does not deal with the allegation at all in his responding affidavit (which is also described as a 'Replying affidavit').

(h) There were other irregularities relating to payments from the trust accounts, some of which came to light in the discussions Faris had with Ms Deverani Moonsamy, an erstwhile employee of the firm.

[9] In considering whether a case has been made out against an attorney sought to be struck from the roll it is necessary to bear in mind that the evidence presented by the law society is not to be treated as though one was dealing with 'a criminal case' or 'an ordinary civil case'. The proceedings in applications to strike the name of attorneys from the roll are not ordinary civil proceedings. They are proceedings of a disciplinary nature and are *sui generis*.[4] It follows therefore that where allegations and evidence are presented against an attorney they cannot be met with mere denials by 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 their failure to do so may count against them. In this regard the remarks of Harms ADP in *Malan v The Law Society of the Northern Provinces*[5] are apposite:

'If one turns to the bookkeeping charges, the position is simply that there is no allegation of a realisation of the seriousness of the offences. They are brushed off on the basis *that the society failed to prove a trust shortage* that the bookkeeper had erred, that they did not know the rules, that their auditors had erred, or simply by not dealing with the pertinent allegations. 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

[4] *Cirota & another v Law Society Transvaal* 1979 (1) SA 172 (A) at 173A.
[5] *Malan & another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 27-28.

character defects, a lack of integrity, a lack of judgment and a lack of insight.' (My emphasis.)

[10] In my view the offending conduct on the part of Hepple and Earle was clearly established if one has regard to the cumulative evidence of the contraventions of the Act and the law society rules catalogued above. Hepple and Earle do not deny that interest on the trust bank overdraft and other bank charges were being debited against the trust banking account each month and that they failed to account properly to the law society for the trust interest and bank charges which gave rise to a trust deficit of R82 484.90, as at the time of investigation. The explanation that this was as a result of an error by the bank is far from convincing, even though it is backed by a letter to the bank by van der Westhuizen requesting the bank to stop the practice.

[11] There was also the existence of a suspense trust account which showed a continuous trust debit of R19 375.05, which Hepple and Earle had to rectify by reimbursing the trust account. The trust deficit had continued for some time. The trust deficit was not denied by Earle. He, however, tried to explain it away by reference to a change that was introduced to the firm's accounting system. He explained that the suspense account was created when the firm changed from what he referred to as the 'AJS system' of accounting to the 'Legal Suite System'. He pointed out that all the AJS files were created on the suspense account and were then transferred to the legal suite system. When this was done there was a balance left. The attorneys were not aware until the first audit was done after the exercise. They say everybody accepted that it was an administrative fault and that it reflected a credit not a debit. According to them Faris was the first person to point out that it reflected a trust debit.

Although Hepple and Earle were still not convinced that this was the case they, however, reimbursed the 'shortage'.

[12] There is also the question of the late submission of Rule 70 auditor's report for the period 30 June 2009 and the fact that it was qualified. The first qualification related to interest on the overdraft and the other bank charges on the business bank account which were debited to the firm's trust banking account. The second qualification related to the interest on the s 78(2)(A) trust investments. Faris also noted that the Rule 78 auditor's report should have been submitted on or before 31 December 2009. It was only submitted on 8 February 2010. The late submission of the report was in contravention by the attorneys of the provisions of Rule 70.3.[6] Neither of the two attorneys dealt with this complaint satisfactorily. Earle says that he had dealt with it in his previous response. Hepple on the other hand says he thought that Rule 70 dealt with investment practices. This transgression, too, was sufficiently established by the law society.

[13] Of greatest concern is the transgression relating to the investment practice. In this regard Hepple and Earle were engaged in investment activities outside the firm, whereby funds were borrowed from investors. The investments made had not generated the necessary cash flow to repay the capital and consequently the trust funds were used irregularly to make interest payments. I have already alluded to the fact that a summary of the schedule prepared by Faris showed that a total amount of R268 479.64 in interest to investors was paid from the trust account between 24 July 2009

[6] '70.3 Firm's duty to ensure report issued
A firm shall ensure that the report to be furnished by an accountant in terms of Rule 70.4 is so furnished within or at the required time; provided that the council may in its discretion and on such conditions as it may stipulate, on written application by a firm relating to a particular report, condone a failure by that firm to comply with this requirement.'

and 3 June 2010. The said payment resulted in a trust deficit which would have endured for at least a year. Earle admitted that the firm borrowed money from investors. He however claimed that he was in charge of this and that this was done at that stage without the knowledge of the other directors. He alleged that the other shortages were caused by bona fide administrative mistakes and that they were also reimbursed. He also did not deny Faris's statement during the interview on 15 September 2010 that the trust account had been in deficit in the sum of approximately R400 000 since July 2009. He also did not deny that at the first investigation he had not disclosed the existence of this trust deficit. Earle also stated that all the shortages arising from interest payments from the trust account had been reimbursed in full out of his own pockets. He took the blame and sought to absolve the other directors. He also indicated that he no longer wished to practice as an attorney.

[14] In his defence Hepple sought to fall in line with Earle's response of attempting to absolve the other directors. He stated that at a meeting of directors held on 8 December 2008 it was resolved that he was to be released from all administrative duties and that the said duties would be shared amongst the other directors, though in fact it appears that from that date it was Earle who took on the sole responsibility of the financial management of the firm. But that of course does not mean that the other directors of the corporate practice were relieved of their legal responsibility in respect of the trust account. It was decided that Hepple would from then on focus on commercial civil litigation to generate income for the practice which was at that stage undergoing a downturn. According to Hepple the investment practice should have ceased in 2008 and he denied any knowledge of the interest or other payments that gave rise to the trust deficits.

[15] He denied any involvement with the investment practice. He did not offer any explanation about the transactions which gave rise to Faris' suspicion. The high court found that Hepple benefited financially from the investment practice in that, at an absolute minimum, on at least one occasion he received a payment of R20 000. I have already alluded to the fact that other than a statement from the bar by Mr Davis that the payment was authorised by a client, nowhere in the papers is there an explanation concerning this transaction. Instead he blames Earle, and, to a greater extent Moonsamy, for some of the firm's woes. He accused Moonsamy of having stolen R900 000 from the firm (over the period September 2007 to August 2010) by making fraudulent transfers out of the trust and business accounts.

[16] Hepple' s response that the financial administration of the firm was left entirely to Earle from as far back as December 2008 even though it is backed up by minutes of a director's meeting held on 8 December 2008 raises more questions than answers. Faris noted that this created the impression that the directors did meet from time to time, however irregular that may have been, and nowhere in his response is any reference made to any other directors' meetings held subsequent to that meeting. Faris further noted in this regard that one would have expected that, given the size of the practice and the nature of its activities, meetings would have been held and that the financial performance and the state of the trust account would have been placed on the agenda for discussion, more so if separate management functions had been allocated to each of the directors.

[17] There is yet a further reason why his version is difficult to sustain. Faris refers to a meeting he had with Hepple at which Hepple told Faris

that all the directors were fully informed of all business activities. This was in response to an allegation by the other directors Barnard and Johnson that they had not been informed of some of the activities of the firm. If this was the case then there is no reason why any financial problems concerning the trust accounts would not have been placed on the agenda for discussion.

[18] Earle is in an even worse position than Hepple. He accepts full responsibility for the overall state of the accounting records, the fact that bank reconciliation statements were manipulated and the existence of the deficits. Significantly both Hepple and Earle do not offer any comment on the findings by Faris that irregular interest payments and the manipulation of the bank reconciliation statements were not restricted to the year ended 30 June 2010 and that they date back to previous years, which would include the period between 2005 to 2008, when Hepple was still involved with the financial management of the firm.

[19] In my view one is dealing here, not with trust deficits arising from simple accounting errors. The books of account of the two attorneys reveal a continuous pattern of concealing trust deficits which demonstrates an element of deceit, inimical to the honour associated with the profession of an attorney. The attorney's' profession demands of its members 'complete honesty, reliability and integrity'.[7]

[20] In the appeal before us Earle admitted his wrong-doing but pleaded for a lesser sanction. Not so with Hepple. He maintained that he was not involved in the financial shenanigans of Earle and gives two reasons therefor. First, in terms of a resolution taken by the board in December

[7] *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538G.

2008 he alleges that he was relieved of the financial management of the firm. Secondly, he claims that when he discovered that Earle was conducting an investment practice, he had asked him to stop.

[21] As to the first point, there is the difficulty that he is unable to explain the trust deficits that had occurred from 2005 to 2008, whilst he was involved with the financial management of the firm. Moreover, that he was not involved with the financial management of the firm, is no defence at all. The duty to comply with the provisions of the Act and the Rules is imposed upon every practising attorney, whether practising in partnership or not, and no attorney can therefore be heard to say that under an arrangement between him and his partner, the latter was not responsible for the keeping of the books and control and administration of the trust account, and that he was therefore not negligent is his failure to ensure compliance with the provisions of the Act and the Rules.[8] As to the second point ─ knowing that his co-director had engaged in serious misconduct Hepple simply asked him to stop. One would have thought that such a discovery would have caused him to be more vigilant and not to simply continue with his unquestioning behaviour.

[22] In the high court Earle also accepted some responsibility. He admitted being responsible for the trust account deficits. The high court however rejected his statement that the other directors knew nothing about his conduct as unconvincing especially insofar as Hepple was concerned. The high court held that if Earle knew more than Hepple of the unlawful activities being perpetrated it was not very much more and was certainly insufficient to attract a different sanction. I do not consider

[8] *Incorporated Law Society (O.F.S.) v V* 1960 (3) SA 887 (O) at 891G-H; *Incorporated Law Society, Transvaal v K & others* 1959 (2) SA 387 (T); *Incorporated Law Society, Transvaal v Visser* 1958 (4) SA 115 (T); *Incorporated Law Society, Cape v Koch* 1985 (4) SA 379 (C).

that the high court misdirected itself in its assessment of the evidence in relation to the question whether the offending conduct had been established on a balance of probabilities against Earle and Hepple. I am satisfied that there was overwhelming evidence based on the investigation by Faris to justify the conclusion that the offending conduct had been established on a balance of probabilities.

[23] I turn to the question whether in the light of misconduct ─ which I have found to have been established in respect of both Hepple and Earle ─ they are therefore not fit and proper persons to continue to practise as attorneys. In the high court this question was answered in favour of the law society and against the two attorneys. In so doing the court exercised a 'discretion' in the strict sense, which this court would only be entitled to interfere with if we are convinced that the high court 'failed to bring an unbiased judgement to bear one the issue; did not act for substantial reasons; exercised its discretion capriciously, or exercised its discretion upon a wrong principle or as a result of a material misdirection.'[9]

[24] The high court found that both attorneys were not fit to continue to practise as attorneys. It found that Earle's conduct was dishonest and at the minimum potentially prejudicial to trust creditors. It held that the law society had succeeded in showing on a balance of probabilities that Hepple was as involved in the wrong-doing as Earle. It found that Hepple's moral culpability was not any less than Earle's. The high court said that, even assuming that he was presently practising as an attorney employed at a firm other than Hepple Attorneys Incorporated and was not handling trust money, it was not satisfied that he could be trusted to practise at all as an attorney. The overwhelming body of evidence to

[9] See *Malan* (above) para 13.

which I have alluded above is supportive of the conclusion reached by the high court. The court also noted that the fact that Earle has decided not to practise any longer was not a factor to be weighed in his favour when deciding whether or not to strike his name from the roll. I agree. There is no basis whatsoever to interfere with that conclusion.

[25] This brings me to the third leg of the enquiry, namely whether Hepple and Earle should be removed from the roll of attorneys or whether an order suspending them from practise would be an appropriate sanction. It is never easy to impose the ultimate sanction on an attorney as it has the effect of terminating his or her means of livelihood, with adverse consequences to himself/herself and his/her family. Before imposing such a sanction a court should be satisfied that the lesser stricture of suspension from practise will not achieve the court's supervisory powers over the conduct of attorneys. These objectives have been described as twofold: first, to discipline and punish errand attorneys and, secondly, to protect the public, particularly where Trust funds are involved.[10]

[26] The high court meticulously considered the guidance offered in *Summerley*[11] as to the imposition of sanction. The court noted that Hepple nowhere accepts responsibility for the wrongdoing perpetrated at this firm. He failed to deal convincingly with the serious allegations which called for a detailed and convincing response. There was nothing before the high court to indicate that in the future he would act as the court, the law society and the public at large are entitled to expect of him. There was no evidence to suggest that he had seen the error of his ways and taken steps to tread a more careful path. The court was not satisfied that

[10] See *Summerley* at para 19.
[11] Para 19 et seq.

he is capable of dealing responsibly with trust money. The court also alluded to the vague and wholly unacceptable way in which Hepple dealt with the allegations and relied for this proposition on the decision of this court in *Botha v Law Society, Northern Provinces*.[12]

[27] As to Earle the court noted that he had accepted some responsibility for trust deficits. It rejected his statement that other directors knew nothing and found it unconvincing particularly insofar as Hepple was concerned. It found that Earle knew more about the unlawful activities being perpetrated but concluded that it was not very much more and was certainly insufficient to attract a different sanction. The court said that the conduct of Hepple and Earle was such as to leave a mere suspension from practice as an unsatisfactory sanction.

[28] The court found Earle's conduct to be dishonest and at a minimum potentially prejudicial to trust creditors. Hepple was, the court found, as involved in the wrongdoing as Earle. Hepple's moral culpability is no less. Hepple is currently practising ─ not on his own account ─ but as an employee at another firm of attorneys and is not handling trust money. In the light of his involvement in the misconduct as described above the high court considered that he cannot at all be allowed to continue to practise as an attorney. He and Earle failed to take the court into their confidence. It has been said that a court of appeal has limited powers to interfere with the decision of a court of first instance.

[29] In *Malan*[13] it was said: 'if the court finds dishonesty the circumstances must be exceptional before a court will order a suspension

[12] 2009 (1) SA 227 (SCA) para 10.
[13] para 10; See also *Malan* (supra) at 221 D-F.

instead of a removal.' Neither counsel drew our attention to any factors in this case which constitute exceptional circumstances, such as those for example which Brand JA found in *Summerley*.

[30] In the result the following order is made.

1. The appeal is dismissed with costs.
2. The costs are to be paid jointly and severally by the appellants and are to be taxed by the first and second appellants on the scale as between attorney and client.

K K Mthiyane
Deputy President

Appearances

For Appellant:	N Davis SC (with him C van der Merwe) Instructed by: Van Zyl's Attorneys, Pretoria Bezuidenhouts Incorporated, Bloemfontein
For Respondent:	J Leotlela Instructed by: Rooth & Wessels Attorneys, Pretoria Phatshoane Henney Attorneys, Bloemfontein