REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION: PRETORIA)

CASE NO:65714/12

12/8/2014

(1) REPORTABLE
(2) OF INTEREST TO OTHER JUDGES
(3) REVISED.

12 August 2014
DATE

SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES — APPLICANT

and

JAN HENDRIK COETZEE — 1ST RESPONDENT

CHRISTOFELL JOHANNES NORTJE — 2ND RESPONDENT

COETZEE NORTJE INC — 3RD RESPONDENT

JUDGMENT

NKOSI AJ (with KHUMALO J concurring)

1. INTRODUCTION

The Law Society of the Northern Provinces (hereinafter referred to as "the Law Society") seeks an order for the striking of the names of Jan Hendrik Coetzee and Christoffel Johannes Nortje (hereinafter referred to jointly as "the Respondents" or "the first and Second Respondents" where appropriate) from the roll of practicing attorneys of this Honourable Court, alternatively, that the First and Second Respondents be suspended in their practice as attorneys on such terms and conditions as this Honourable Court may deem appropriate.

POINT IN LIMINE

Counsel for the 2nd Respondent came with a specific instruction for leave to appeal against an earlier ruling refusing an application to separate the Applicant's Motion for the suspension and/ or removal as attorneys from the roll of both Respondents. The application for leave to appeal was not properly set down and this was the reason why it was dismissed. 2nd Respondent's counsel asked to be excused as he had no further instructions to proceed in the main application properly served before us.

The court had no option but to proceed in the absence of the 2nd Respondent who was well aware of the proceedings and failed or chose neither to be represented nor to represent himself to state his case alternatively, to simply exercise his right to be heard. The court had no option but to proceed, more especially that 1st Respondent was ready to proceed as scheduled.

2. RESPONDENTS

2.1 The First Respondent was admitted as an attorney of this honourable Court on 19 August 1997 and his name still appears on the roll. The First respondent at all relevant times practised until recently as an attorney of this Honourable Court under the style of Coetzee Nortje Inc. at First Floor, New Road Office Park, No.5 New Road, Erand Gardens, Midrand, Gauteng. He has since stopped practising for his own account and is now a professional assistant at another firm.

2.2 The Second Respondent was admitted in the above honourable court as an attorney on 27 August 1996, a conveyancer on the 18 February 1997 and a notary on 7 October 1997. His name still appears on the respective rolls. He is currently practising, alternatively until recently practiced in this Honourable Court as admitted in the respective rolls under the style of Coetzee Nortje Inc, at First Floor, New Road Office Park, No.5 New Road, Erand Gardens, Midrand, Gauteng.

3. PURPOSE OF APPLICATION

3.1 The basis for this application is stated in paragraph 7 of the founding affidavit. It was argued herein that the Respondents' conduct constitutes such a deviation from the standards of professional conduct that are set out in the rules governing the attorneys profession that the First and Second Respondents are not fit and proper persons to continue to practice as attorneys. Also that the facts presented would justify the Honourable Court in ordering that the names of the respondents be struck from the roll of attorneys, alternatively, that the First and Second Respondents be suspended in their practice as attorneys on such terms and conditions at this Honourable Court may deem appropriate.

3.2 The Law Society has outlined its functions, the general principles concerning an attorney and his profession in the founding affidavit.

4. THE DISCRETION OF THE COURT

4.1 It was submitted that it is trite law that applications such as this one, are *sui generis* and of a disciplinary nature. There is no *lis* between the Law Society and the Respondents. The Law Society, as *curatos morum* of the profession, places facts before the Court for consideration.

4.2 The question whether an attorney is a fit and proper person in terms of section 22(1) (d) of the Act is not dependent upon a factual finding, but lies in the discretion of the Court.

4.3 In exercising its discretion, the Court is faced with a three stage inquiry:

(a) The first inquiry is for the Court to decide whether or not the alleged offending conduct has been established on the preponderance of probabilities;

(b) The second inquiry is whether, as a stated in section 22(1) (d) of the Act, the practitioner concerned *" in the discretion of the court"* is not a fit and proper person to continue to practice. This entails a value judgment;

(c) The third inquiry is whether in all the circumstances, the practitioner in question is to be removed from the roll of attorneys or whether an order suspending him/her from practice for a specified period will suffice. Ultimately this is a question of degree.

4.4 The court's discretion must be based upon the facts placed before it and facts in question must be proven upon a balance of probabilities.

4.5 The facts upon which the Court's discretion is based should be considered in their totality. The Court must not consider each issue in isolation.

4.6 From the nature of disciplinary proceedings it follows that a respondent is expected to co-operate and provide where necessary information to place the

full facts before the court to enable the court to make a correct decision. Broad denials and obstructionism have no place in disciplinary proceedings.

4.7 The opinion or conclusion of the applicant (Law Society) that a practitioner is no longer a fit and proper person to practise as an attorney carries great weight with the court, although the court is not bound by it.

4.8 In this matter it was argued that there is good reason for the above Honourable Court to exercise its discretion in favour of the Applicant and grant the order sought.

5. OFFENCES COMMITTED BY RESPONDENT

The Respondents have made themselves guilty of the following offences:

5.1 The Respondents failed to account to clients.

5.2 The Respondents delayed the payment to trust funds.

5.3 The Respondents' accounting records reflect debit balances.

5.4 The Respondents failed to keep proper accounting records.

5.5 The Respondents acted on behalf of clients in property transactions in circumstances where there was a conflict of interest.

5.6 The Respondents made payments from trust to, amongst others, companies of which they were directors and shareholders in circumstances where no trust funds were available.

5.7 The Respondents failed to properly attend to a matter on behalf of a client.

5.8 The Law Society received serious complaints against the first and Second Respondents.

6. LAW SOCIETY'S INVESTIGATION

6.1 After the Law Society had received a copy of an application for the liquidation of the third respondent (hereinafter referred to as the Firm) it instructed a legal official in the employ of the Law Society's Monitoring Unit, Ms Magda Geringer ("Geringer"), to investigate the circumstances surrounding the application for liquidation and to report to the Council of the Law Society.

6.2 Geringer executed her instructions and reported to the Law Society in writing on 14 August 2012.

APPLICATION FOR LIQUIDATION

6.3 Regarding the liquidation application Geringer established that the liquidators of South African Property Guarantee Exchange (Pty) Ltd (SAPGE) brought an application for the liquidation of the Firm, the 3rd Respondent.

6.4 According to the First Respondent the firm would only be liable for payment if Urban Worx Development CC and Urban Worx Holdings (Pty) Ltd, on whose behalf the money was received, were unable to repay the debt.

6.5 Geringer inspected the ledger account of Urban Worx and found that monies received in this ledger account were paid out to Early Works, a property development company of which the Second Respondent was a member and is a subsidiary company of Urban Worx. It is now common cause that the 3rd Respondent was liquidated on 9 November 2012.

7. COMPLAINT AGAINST THE FIRM

7.1 Jooste Heswick Inc. submitted a complaint to the Law Society on behalf of Mr W Nortje (Nortje). It is common cause that the the firm attended to the registration of a property bought by Nortje from Ravenswood Development (Pty) Ltd (Ravenswood). The transfer was registered during November 2010 (pg 415, par 30.1). The firm's statement of account in the matter reflected that an amount of R153 022.76 was due and payable to Nortje. The firm failed to account to Nortje in respect of these funds that were no longer available.

7.2 The Allegations in the complaint of Nortje are not denied. The First Respondent merely blames the Second Respondent. It is alleged that he (the Second Respondent) as the conveyancer was in control of Nortje's file. The Second Respondent admits that he attended to the transfer (pg 415, par 30.2), however denies any wrong doing. The Second Respondent's denials are unfounded and, with respect, argumentative.

7.3 The allegation that Nortje's funds are no longer available on trust is not denied. It is, therefore, submitted that this admission is indicative of unprofessional conduct and leads to an inevitable conclusion that there is a deficit in the Respondent's trust account.

7.4 In the Second Respondent's own version, the transfer of Nortje's property was registered during November 2010 (pg 415, par 30.1). Therefore payment of Nortje's trust funds was delayed. According to the First Respondent he only became aware of Nortje's matter almost a year after registration, at which time Nortje was still not paid. At this stage Nortje's trust funds were no longer available.

7.5 The Second Respondent's denial of negligence in handling Nortje's matter is also unfounded. The Second Respondent does not explain how a bond was registered in the full amount when Nortje had paid a substantial deposit. The Respondents should also have at least explained how the balance of Nortje's funds was paid to Ravenswood when such funds were not utilised as part of the purchase price.

7.6 Geringer's analysis of the ledger account in the matter of Nortje established that payments were made to Ravenswood (a company wherein the Second Respondent is a director and shareholder) before the property was even transferred in the name of Nortjie and that such payments were highly irregular.

7.7 It, therefore, appears that the Second Respondent as a director and shareholder of Ravenswood had effected payments to himself before the registration of the transfer of the property and that he failed to properly account to Nortje on registration of the transfer. This failure constitutes a contravention of the provisions of Rule 68.7 of the Law Society's Rules.

Andrew De Jongh Attorneys obo J N Norton

7.8 Andrew De Jongh attorneys submitted a complaint on behalf of Joanne and David Norton (the Nortons) in terms of which the Nortons had each bought a property in the Bella Vie Development from Ravenswood for an amount of R300 000.00 per property. An amount of R600 000.00 in respect of the purchase price was paid into the firm's trust banking account. The registration of the properties were not effected but the amount of R600 000.00 was not available in the firm's trust banking account.

7.9 The First Respondent advised Geringer that, although it appears from the written agreement that the amounts paid by the purchasers were to be invested in a section 78(2A) account, it was orally agreed between the parties that the seller would be entitled to payment of the monies and that the purchasers would be entitled to receive the monthly rental income. These

allegations were denied by the complainants. It was argued on behalf of the Applicant that these were not the only complainants to deny the arrangement. The Respondents are using the argument to justify their conduct in paying the seller before transfer takes place in various transactions).

7.10 Geringer inspected the ledger account of Norton/Ravenswood with reference number **MAT-3059** and found the following:

7.10.1 On 8 March 2011 the firm received amount of R300 000.00 from 4Max, the estate agent. The amount was then paid to Imagina on behalf of Urban Worx, a company of which both the First and Second Respondent are directors and shareholders.

7.10.2 Although the sellers confirmed that the purchase price was sufficient to cover the outstanding debts or payments to effect the transfers, no funds were retained in the trust banking account for this purpose. Geringer found this to be highly irregular in view of the fact that the first Respondent and/or the Second Respondent were shareholders of the company which received the payments.

7.10.3 Thereafter certain monies were transferred to this ledger account by means of a journal entry from other unrelated accounts.

7.11 With regards to the second ledger account of Norton/Ravenswoods with reference number **MAT-3052** Geringer established that on 7 March 2011 the firm received an amount of R300 000.00 into its trust account. The firm then paid this amount to Imagina on behalf of Urban Worx. Although the seller confirmed that the purchase price was sufficient to cover the outstanding debts, the funds were not retained in the trust banking account, but paid to the seller prior to the registration of the transfers. It was therefore not invested as provided for in the agreement. The amount is furthermore no longer available in the firm's trust banking account.

8. INSPECTION OF LEDGER ACCOUNTS

8.1 Geringer requested specific ledger accounts which she received and inspected.

8.2 In the ledger account of Bella Vie Admin File, ref No. **MAT-1650** Geringer discovered that the ledger account went into debit at regular intervals due to numerous journal entries and payments made to and on behalf of Ravenswood and Urban Worx respectively. Although the First Respondent has no interest in Ravenswood, both the First and Second Respondents are shareholders of Urban Worx. Transfers to and from and payments on behalf of or to Urban Worx occurred at regular intervals from the ledger account of Ravenswood.

Ravenswood / Soldimar Investments (Pty) Ltd – MAT 2559

8.3 Geringer discovered that on 5 August 2010 the firm received an amount of R135 000.00 from Ravenswood. It then reversed the deposit. The firm in any event paid an amount of R135 000.00 to Urban worx on the same day. This led to a debit balance in the amount of R135 000.00 in contravention of the provisions of Rule 59.3.2. This debit balance existed until 28 February 2011 when the firm reversed the entry in the amount of R 135 000.00 from Urban Worx.

8.4 Geringer also discovered debit balances in the ledger account of Ravenswood / Mosikari – MAT 2282 and Ravenswood / The Brotika Property Trust – MAT 2216. The existence of a debit balance is a contravention of the provisions of rule 69.3.2 of the law society's Rules.

9. Claims against the Attorneys Fidelity Fund

9.1 After Geringer's visit to the firm she learnt that a claim had been lodged with the Attorneys Fidelity Fund by Steyn Inc. on behalf of Brotika Children's trust (Brotika).

9.2 Brotika had purchased 3 properties in the Belle Vie Development from Ravenswood. The total of the purchase price that was paid into the firm's trust banking account amounted to R1 040 000.00. The transfer of the properties was however not registered in the name of Brotika and the funds are no longer available in the firm's trust banking account.

9.3 In answer to this complaint the Respondents repeat allegation that there was an agreement to transfer funds to the seller before the transfer of the property.

10. FURTHER COMPLAINTS

10.1 The Law Society received a further complaint from Mr Geofffrey Muir. Mr Muir also purchased a property from Ravenswood for R300 000.00. The same approach as in the other matters was followed: monies were paid to the seller before transfer. The complainant's money is no longer available on trust and the seller (Ravenswood) has now been liquidated.

10.2 The Applicant also received complaints from Mountain Property Investment Trust, the Buick Investment Trust, the Charles Rent Trust, Mark Arthur James Bradshaw, Wendy Murrell, Emarentiana Martha Maria Bradshaw, Erika Geertuida Helmbold, and the Purple Plum Property Trust. The facts of the complaints are somewhat analogous and can simply be summarised as follows

10.2.1 The complainants all purchased properties from Ravenswood which company the Second Respondent is the sole director. The purchase price was paid directly into the Firm's trust account. The monies were paid out to the purchaser (Ravenswood) before transfer of the properties. The payments to Ravenswood were not authorised, were irregular and contrary to the terms of the provisions of the written sale agreements which provided that purchasers' monies had to be held in interest bearing trust accounts in favour of the purchasers, to be paid against the registration of the transfers.

10.2.2 The properties have not yet been registered into the purchasers' names, the purchasers have not been reimbursed and the monies are no longer available in the trust account.

10.4 Another complaint was received from 4 Max Properties an agent who was mandated to market and sell immovable properties on behalf of Ravenswood.

10.5 The firm as the representative of the seller (Ravenswood) was instructed to attend to the transfer of properties. The Respondents have since failed to pay the agent's commission due to Max Properties in the amount of R2 094 700.00.

10.6 A complaint was also received from Strinivasan Moodley the facts of which can briefly be summarised as follows:

10.6.1 Moodley purchased a property from Carlswalk 57 (Pty) Ltd for an amount of R 850 000.00 during July 2007. The Firm was appointed

as conveyances and instructed to attend to the transfer of the property.

10.6.2 Moodley signed consent for the whole of the purchase price to be invested in a section 78(2) (A) interest bearing account pending the registration of the property in his name.

10.6.3 Prior to the registration of the property in Moodley's name, the Respondents paid the total amount received from Moodley to the Developer of the property, Urban Worx Development CC, an entity in which the First and Second Respondent are members.

10.6.4 The agreement was subsequently cancelled and Moodley became entitled to a full refund. The First and Second Respondents advised Moodley that his monies were transferred to the developer by error and offered to repay the amount in full.

10.6.5 The Respondents have since only repaid an amount of R460 000.00 to Moodley and the balance remains outstanding. Moodley has instituted legal proceedings against the Respondent which action the Respondents have now opposed and claims that Moodley's claim has prescribed.

10.7 A further complaint was received from Van Heerden Schoeman Attorneys on behalf of Mr L Van Der Merwe (Van Der Merwe).

10.8 Van Der Merwe purchased 8 properties on behalf of 3 trusts from Ravenswood. An amount of R 420 000.00 was paid into the Third Respondent's trust banking account on 19 November 2010 on the strength of which amount the First and Second Respondents provided attorney Van Heerden with guarantees.

10.9 Ravenswood was liquidated on 15 February 2013 and it transpired that the amount of R 420 000.00 was no longer available in the Firm's trust banking account as the monies were paid over to Ravenswood. The payment to Ravenswood had occurred without the instructions, knowledge and consent of Mr Van Der Merwe.

11. **FURTHER AFFIDAVITS**

11.1 The First Respondent has filed further affidavits wherein he deals with the Law Society's Supplementary Founding Affidavit subsequent to their Opposing Affidavits. He also apologises under oath for certain remarks which he made in his Opposing Affidavit dated 18 December 2012. In these further affidavits the First Respondent seems to shift the blame for the transgressions to the Second Respondent, indicating how much he alone had done in attempting to resolve all these issues. He also pointed out that Second Respondent as the conveyancer was tasked and responsible for the conveyancing work.

11.2 The Second Respondent has failed to file any affidavits in terms of the Court Order dated 22 October 2013.

12. **LEGAL CONSIDERATIONS**

12.1 The court is duty bound to consider all arguments presented to it with an objective eye. The approach of the Court in relation to trust shortages and the duty of an attorney with regard to trust money was stated in *Law Society, Transvaal v Matthews* (Supra) on 394 as follows:

> *" I deal now with the duty of an attorney in regard to trust money. Section 78(1) of the Attorneys Act obliges an attorney to maintain a separate trust account and to deposit therein money held or*

received by him on account of any person. Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. It is imperative that trust money have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. It is imperative that trust money in the possession of an attorney should be available to his client the instant it becomes payable. Trust money is generally payable before and not after demand. See Incorporated Law Society, Transvaal v Visse and Others; incorporated Law Society Transvaal v Viljioen, 1958 (4) SA 115 (T) at 118 F-H. An attorney's duty with regard to the preservation of trust money is a fundamental, positive and unqualified duty. Thus neither negligence nor wilfulness is an element of a breach of such duty: Incorporated Law Society, Transvaal v Behrman, 1977(1) SA 904 (T) at 905 H. It is significant that in terms of Section 83 (13) of the Attorneys Act a practitioner who contravenes the provisions relation to his trust account and investment of the trust money will be guilty of unprofessional conduct and be liable to be struck off the roll or suspended from practice.

12.2 In *Law Society, Transvaal v Matthews* (Supra) on 395 the Court said the following regarding the keep of proper accounting records by a practitioner:

" failure to keep proper books of account is a serious contravention and renders an attorney liable to be struck off the roll of practitioners or liable to suspension; and the Courts have repeatedly warned practitioners of the seriousness of such a contravention. See Cirota and Another v Law Society, Transvaal

(Supra at 193 F-G). The seriousness is again underlined in rule 89 read with rule 89(11) of the applicant's rules which provides that it is unprofessional or dishonourable or unworthy conduct on the part of the practitioner to contravene the provisions of the Attorneys Act or the applicant's rules."

12.3 It was submitted, that the Law Society has made a proper case for the order which it seeks against the two Respondents. The Law Society submitted further that the Respondents should pay the costs of this application on attorney and client scale.

12.4 The Law Society as the professional body to which all practitioners belong. On joining the Law Society practitioners undertake to abide by the provisions of the Attorneys Act and the Provisions of the Rules. The Law Society is required to monitor the acts of its members. It is vested with the power to launch an application to strike the name of a member from the roll of attorneys or to suspend him from practise should it find that such member has acted in dishonourable, unworthy or unprofessional manner.

12.5 It was submitted that in these circumstances the law Society should not be burdened with legal costs when launching an application to discipline a member, and that an attorney who has made himself guilty of dishonourable, unworthy or unprofessional conduct should pay all Law Society's legal costs so that the Law Society does not find itself out of pocket. It was further submitted that the nature of the offences committed warrants an order of costs on this basis.

As a consequence of the above I am of the view that the 2nd Respondent has made himself more guilty by failing to make use of the opportunity to be heard or be represented on the date of the hearing. 1st Respondent's case will have to be dealt with separately. He is currently practicing under another firm of attorneys as an assistant.

The question that needs to be answered is whether both respondents can be viewed as fit and proper persons to practice law as attorneys:

a) 1st Respondent is, as already stated above is practicing and there has been no revocation of his right to practice by the applicant.
b) 2nd Respondent is no longer practising and his whereabouts can not be assumed without facts as he chose not to be in court to state his case.

13. Weighing of Arguments

It was Applicant's submissions, amongst other things, that the Respondents delayed payments from the trust account; made payments on matters in conflict of interests and at some stage there would be no funds in the trust account despite the existence of trust creditors; trust funds used without instructions; Urban Works, the Respondent's company, received money paid into the trust account. There was no dispute to these allegations and the allegation remains serious as is. Their conduct is tantamount to stealing, especially in instances where money was paid to Respondents without having fulfilled the purpose for which it was received in their trust account. The fact that they cannot pay the money back aggravates the situation.

14. The question whether, both Respondents, are fit and proper persons to practice as attorneys has to be approached by enquiring into each Respondents individual comportment. It was Applicant's submission that the seriousness of the allegations render both of them not fit and proper and that their names deserve to be removed from the roll of attorneys.

Further submission was that 1st Respondent wanted to be treated differently as he was not, according to his arguments, directly involved. This was disputed by the Applicant referring to another analogy on partnership practices. That on

proper attendance to matters of trust, a partner is held to be both jointly and severally liable as partners or directors. It is trite law that there is no exemption to liability on matters of this nature: both partners are liable for each other's conduct on transactions made from the trust account.

15. It is settled law that attorneys must always be vigilant on matters of trust otherwise they will be equally liable. Applicant's final submission was that both Respondents should not be regarded fit and proper and should be struck off the roll.

16. The 1st Respondent counsel argued that on the second and third leg of the enquiry the court has a discretion to make a value judgement; the court must weigh the seriousness on the enquiry; how to deal with the two Respondents regarding their roles and to distinguish the levels of involvement. It was his submission that the court is not there to punish but to protect the attorneys profession more especially that there were, by and large, distinctive participation on both respondents: on the issue of the causa or reason for the transgression the court must be slow to take the opinion of the Applicant and take its own consideration. It was his further submission that a fair hearing of the 1st Respondent would entail the circumstances as to who started the problem. 2nd Respondent was a property developer and also a conveyancer and notary who always engaged estate agents who drew the contracts he used.

It was 2nd Respondent who wanted to separate the hearings. 1st Respondent was only involved when payment had to be made after being assured by his partner that all was in order and took his partner's word.

It was 1st Respondent's co-operation with Applicant's investigators that indicated his state of mind not to conceal any fact.

17. An element of rehabilitation was used to describe 1st Respondent's sincerity by giving up his practice when the investigation started and started working as a professional assistant for another firm of attorneys and never practised on his own account for two years. This happened with the Applicant's knowledge and

no steps were taken by the Applicant against him. This was a clear indication that 1st Respondent is a fit and proper person to practice as an attorney. The 2nd Respondent left legal practice and even failed to appear in court on this hearing. Reference was made at page 417 of the paginated bundle: 2nd Respondent said: "I would personally be willing to maintain his (complainant) bond instalments until such time as the outstanding amount is paid to him." This was an admission to his liability made under oath.

18. It was 1st Respondent's submission further that he made an error of judgement while working with the 2nd Respondent. He has conducted himself as exemplary and the risk to the public was limited and prays that he should not be struck off the roll but be given a second chance to prove his fitness to practice Law. It was submitted on his behalf further that he had no character defect and was only a victim of too trusting and he was never an instigator of wrong – doing.

19. Both parties referred the court to various decided cases from the Supreme Court of Appeal. They all dealt with almost similar cases where the court had to decide on whether the attorneys charged were fit and proper to continue practising as attorneys. Various factors were taken into account in considering suitable orders. What is almost important is that the court has to use its own discretion on each case. One decision cannot make the trial court to follow it blindly without a clear consideration of all submissions or evidence before it.

20. In terms of Section 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 practices:-

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

21. The nature of the enquiry we are concerned with in this case, a determination of the question whether the attorneys concerned are not fit and proper persons to continue to practice and how a court should exercise its discretion in that regard,

including the issue of the appropriate sanction as provided in section 22(1)(d) of the Act, was re-iterated by Brand JA in the *Summerly v Law Society Northern Provinces* 2006 (5) SA 613 SCA at 615B-F: "It has now become settled law that the application of Section 22(1)(d) involves a three-fold enquiry: The first enquiry is aimed at determining whether the Law Society has established the offending conduct upon which it relies, on a balance of probabilities. 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 practice as an attorney. " The third enquiry again requires the court to exercise its discretion. At this stage the court must decide, in the exercise of its discretion, whether the person who has been found not to be fit and proper person to practice as an attorney deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice." This is an indication that our courts are im common understanding in the interpretation of the rules and jurisprudence on this aspect.

22. The offending conduct which prompted the Applicant, to bring the application to remove Mr. Coetzee (the 1st Respondent) and Mr. Nortje (the 2nd Respondent) from roll of attorneys is outlined in the founding affidavit deposed to by its President Mr. Mabunda and supported by investigation reports into the accounting and financial records of the firm (3rd Respondent). These uncovered a number of irregularities amounting to contraventions of certain provisions of the Act and the Rules of the Law Society. They included the existence of substantial misappropriation of trust funds, trust deficit by concealment, conducting investment practice in which interest was paid out of trust account in contravention of the Act amongst other things. There was no objection nor any opposition to its content and findings.

23. In consideration whether a case has been made out the court will consider that this type of cases are not like ordinary civil cases but they are proceedings of a disciplinary nature and are *sui generis* as enunciated in *Cirota and Another v Law Society Transvaal* 1979 (1) SA 172 (A) at 173 A.

24. It follows that therefore that where allegation and evidence are presented against an attorney they cannot be responded to by denials and simply brushed aside. Material response and explanation by the attorney is required and failure to do so may count against the attorney. It must be noted that the Respondents did not raise any defence nor a denial of the alleged offending conduct. The 1st Respondent, in his submissions, pleaded a form of diminished responsibility in that he took his partner's word and acted on it in authorising payments prepared by his partner. The 2nd Respondent did not attend the hearing or exercise his right to be heard

25. Based on the above the court is satisfied that both respondents made themselves in some respects equally guilty and in others 2nd Respondent carried more accountability than the 1st Respondent of the offending conduct. The court is required to exercise its discretion to determine whether in that regard each Respondent is fit and proper to practice as a attorney and if not whether a suitable order will be to remove each one from practice or be suspended:

(a). The court heard submissions on behalf of the 1st Respondent. It is on record that there are no denials of the offending conduct and therefore pleaded for mercy or to be given a second chance to practice as he has always been in practice though not on his own account. He is indeed, working as a salaried professional assistant with the Applicant's knowledge (and consent). The question of being fit and proper person is supported by the fact that he continued to practice the past two years without any risk to the public, or value judgement. This is where the court has to apply its mind to the submissions whether his distinctive participation in the offending conduct could render him to an adverse or ultimate sanction of striking off the roll of practicing attorneys. It carries weight that he did not deny his responsibility as an attorney except

that according to him he was and became a victim of ignorance by allowing his partner to be leading and he had no character defect on his own and a measure of mercy should be considered for him.

(b). Being less involved in the preparation for payments from trust is no defence at all. The duty of compliance with the Act and the Rules is expected of any attorney in practice, whether on his own or in partnership. Having weighed his conduct during the two years of practice where no further complaints have been received, I am however inclined to accept to a certain degree his diminished responsibility.

(c). This brings the court to the third leg of the enquiry whether the 1st Respondent should be removed from the roll of attorneys or an order suspending him from practice would be an appropriate sanction. In the protection of the public and the legal profession the court bears the duty to carefully mete out or issue appropriate orders and have to make a value judgement on the rehabilitative prospects of the 1st Respondent. The Applicant's none response on the issue 1st Respondent's continued practice in the last two years bears testimony that his fitness and properness was not in question. This does not, however, makes the court not to consider all factors presented but be mindful that it's reigns supreme. This view was confirmed in the Supreme Court of Appeal case of the Law Society of the *Northern Provinces v/s Dube* unreported case number 874/2011, (2012) ZASCA 137.

26. Having heard both parties to the hearing it is proper to also focus on the 2nd Respondent. Although he chose not to be part of this process, the allegations levelled against him remain uncontroverted and binding on him as the offending conduct was proven on balance of probabilities, his unfitness or being a proper person to practice Law thereby also confirmed by his conduct of failing to avail himself to be heard. The court will on that aspect decide after consideration of all

submissions to enable it to exercise its legal discretion. Further consideration of allegations against him in applicants Notice of Motion which are unopposed and his own affidavit filed is not helpful to raise a defence.

27. As a consequence of the above I propose as follows:

(a) That the 1st Respondent be suspended for a period of 5 years not practicing as an attorney on his own account.

(b) After the expiry of the suspension period the 1st Respondent may approach the Applicant for permission to practice on his own account.

(c) That 2nd Respondent be struck off the roll of practicing attorneys.

(d) That both Respondents be ordered to pay the costs of this application on attorney and client scale jointly and severally liable each one paying the other to be absolved.

VRSN NKOSI
Acting Judge of The High Court of South Africa
Gauteng Division: Johannesburg

I agree:

N V KHUMALO
Judge of The High Court of South Africa
Gauteng Division: Pretoria

Applicant's Counsel: Attorney Leotlea

Instructed by: Rooth & Wessels Inc.

1st Respondent's Counsel Adv Quinton Pelser (SC)

2nd Respondent was represented by his counsel.