REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION: PRETORIA)

CASE NO: ~~05744/12~~ 69300/13

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

16/08/2016
DATE SIGNATURE

16/8/2016

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES APPLICANT

and

PETER JOHN COWLING 1ST RESPONDENT

CHRISTIAAN MAURITZ JANEKE 2ND RESPONDENT

JUDGMENT

KHUMALO J (with MOSEAMO J concurring)

INTRODUCTION

[1] The Applicant is seeking an order for the striking off from the roll of attorneys of this Honourable Court, the names of Peter John Cowling and Christiaan Mauritz Janeke (jointly referred to as "the Respondents" or respectively as "Cowling" or "the First Respondent" and "Janeke" or "the Second Respondent"), erstwhile partners in a law practice Trollip, Cowling & Janeke ("the partnership").

[2] This is a continuation of legal proceedings instituted by the Applicant against the Respondents on an urgent basis on 18 November 2013 that resulted in the Applicant being granted an interim order on 5 December 2013 suspending Cowling from practice pending the finalisation of this application for the striking off of both Respondents from the roll of attorneys.

[3] At the time of Cowling's suspension Janeke had already resigned as a partner from the partnership. No order was made against him. Both Respondents are opposing the application.

THE PARTIES

[4] Cowling was admitted as an attorney of this honourable Court on 14 December 1970. He practised for his own account in partnership with Janeke under the name Trollip, Cowling and Janeke until 12 August 2012. Subsequent thereto he practised as a single practitioner under the name of Trollip Cowling and Associates at First Floor, Libertas Building, No 61 Voortrekker Road, Brakpan, Gauteng until his suspension.

[5] Janeke was admitted as an attorney of the High Court in the Orange Free State Division on 27 October 1977. He was enrolled as an attorney in the Gauteng Division on 31 March 1978. He practised for his own account in partnership with Cowling under the name Trollip, Cowling and Janeke Attorneys until August 2012 when he resigned. Until recently he was practising for his own account under Janeke Attorneys at no 60 Van Der Walt Street, Dalview, Brakpan.

[6] Following the suspension of Cowling, the erstwhile partners were finally sequestrated, individually, Janeke suspension came sooner on 29 January 2014 and Cowling's on 12 November 2014.

[7] When Cowling was suspended, Applicant had alleged that the Respondents were guilty of conduct that is unprofessional, dishonourable and unworthy of an attorney, having deviated from the standard of professional conduct that is set out in the rules governing the attorneys profession embodied in the Act, of such an extent that the respondents are not fit and proper persons to remain in the roll of practising attorneys.

[8] Now the Applicant contends that the Respondents' conduct constitutes not only such a deviation that they are not fit and proper persons to continue to practice as attorneys, but justifies the order sought from the Honourable Court that their names be removed from the roll of attorneys as indicated in its Founding and Supplementary Affidavit.

[9] The Applicant is the professional body that governs the attorney's profession, to which all attorneys in practice belong. It is vested with the authority to monitor the acts of its members. Whilst the practitioner undertakes to abide by the provisions of the Attorneys Act 53 of 1979 ("the Act") and of the Rules, to remain a member and in practice.

THE DISCRETION OF THE COURT

[10] 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; see *Law Society of the Good Hope v C* 1986 (1) SA 616 (A) and *Law Society of the Good Hope v Budricks* 2003 (2) SA 11 (SCA), beign a value judgement.

[11] It is trite law that applications such as this one are *sui generis* and of a disciplinary nature. There is no *lis* between the Applicant and the Respondents. The

Applicant, as *curatos morum* of the profession, places facts before the Court for consideration.

[12] Whilst on the other hand a Respondent is as such 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 these disciplinary proceedings; see *Prokereursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 851E-f.

[13] 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 preponderance of probabilities;

(b) The second inquiry is whether, as stated in s 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; See *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA). .

[14] 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.

[15] The court's discretion must be based upon the facts placed before it, proven upon a balance of probabilities and which it has considered in their totality. The Court must not consider each issue in isolation.

OFFENCES COMMITTED BY RESPONDENTS

[16] The Applicant alleges that upon its investigation conducted on receipt of complaints against the partnership, it found the following facts and circumstances that prompted it to bring this application against the Respondents:

16.1 The Respondents misappropriated trust funds;

16.2 A substantial trust deficit in an amount of more than R9 Million in the firm's bookkeeping;

16.3 Excessive and irregular transfers effected from the practice's trust banking account to its business banking account; mostly in rounded and unidentifiable amounts.

16.4 The Respondents placed the attorneys Fidelity Fund at risk.

16.5 Failure to keep proper books of accounting in respect of bookkeeping by attorneys.

16.6 Contravention of several provisions of the Attorneys Act and the Law Society Rules relating to bookkeeping by attorneys;

16.7 Failure to account to clients and delayed payments of trust funds; and

16.8 Claims in the amount of more than R6 Million that to date been lodged with the Attorneys Fidelity Fund which claims are founded on the misappropriation of trust funds by the first and second Respondents.

LAW SOCIETY'S INVESTIGATION

[17] The Applicant initially received complaints relating to the Respondents' irregular handling of trust funds. It instructed Mr Vincent Faris, a chartered accountant, to investigate the complaints and to conduct an inspection of the firm's accounting records and practice affairs.

[18] Cowling was advised of Faris' mandate on 11 June 2013 and of the two complaints received by the Applicant that precipitated the Applicant's investigation, that of Backo and Badenhorst.

FARIS INVESTIGATION & REPORT

[19] Faris executed his instructions and on 30 August 2013 reported to the Law Society in writing as follows: that,

[19.1] Cowling had alleged that the one complaint was resolved and the other did not relate to the handling of the trust funds. He undertook to furnish Faris with written explanations regarding the two complaints. He subsequently in his written explanation alleged that the Bakco matter was handled not by him but by Janeke.

[19.2] Since 1 September 2012 Cowling has been practising as a single practitioner. Prior to that he was in partnership with Janeke. In early September 2012 Janeke informed Cowling that he was not returning to the practice. They subsequently during February 2013 concluded a formal agreement providing for the dissolution of the partnership. Cowling consequently changed the name of the partnership from Trollip, Cowling and Janeke to Trollip, Cowling and Associates '(the firm").

[19.3] The partnership accounting books were however not closed off as at 31 August 2012 as it would have been expected on the dissolution of a partnership. Faris suggested to Cowling that he approaches his auditors and bookkeeper for purposes of preparing a set of financial statements and to close the affairs of the partnership.

[19.4] On 16 July 2013, by the time a subsequent interview was conducted, the Applicant had received more complaints from M P Badenhorst that was also attended by the bookkeeper.

[19.5] Cowling told Faris that he had met with Badenhorst and advised him of the **misappropriation of the estate funds** and a pending investigation. **He also acknowledged the existence of a substantial deficit** in the partnership's bookkeeping. Faris estimated the deficit by then to **be more than R6 Million**.

[19.6] The partnership's bookkeeper was an independent contractor who attended at the firm's offices from time to time when called upon to do so or when the need

arises. She took the bookkeeping functions of the partnership fifteen to eighteen months prior the investigation.

INTERVIEW WITH JANEKE

[20] When Faris interviewed Janeke, he alleged to have terminated the partnership at the end of August 2012 when he became aware of a number of matters which he suspected had resulted in the firm's financial constraints.

[21] According to him the financial management and bookkeeping was left entirely to Cowling who worked closely with the previous bookkeeper, Ms Gouws. He had accepted that everything was in order.

[22] He said one of the matters that caused concern to him was the financial transaction conducted by Cowling with SC and M De Beer. He advised Faris that he would not be surprised if Cowling was involved in money laundering activities.

REPORT BY FARIS

[23] **Faris found that all the transactions relating to the complaints were initiated prior to 31 August 2013, when the Respondents practised in partnership.** The trust banking accounts were not correctly referenced. They were described as investment accounts in terms of s 78 (2A) of the Act whilst they were in fact in terms of s 78 (1) of the Act and the trust accounts were on occasion overdrawn.

[24] In preparation of a summary of the month-end business bank statement balances for the period February 2012 to August 2013, the investigation revealed substantial overdrafts, at times in excess of the overdraft limits and that payment and cheques were returned as unpaid by the firm's banks as a result thereof.

[25] The ledger account of the interest payable to the Law Society refer to interest received and bank charges for the period 29 February 2012 to 28 February 2013. It reflects an opening debit balance of R14 661.78. Notwithstanding the fact that payments appear to have been made to the Law Society from time to time, the

balance of the account continued to be a debit. No closing entries have been made as could have been expected in order to reflect the true position.

[26] The opening balance as at 29 February 2012 represented a debit in an amount of R113 084.40. The closing balance as at 28 February 2013 represented a debit in an amount of R149 946.76. The debit balance therefore increased by R36 862.36 over a period of twelve months. This led to Faris concluding that there was no trust liability for the relevant period.

[27] All monies irrespective of whether they were trust or business monies, were deposited into the trust banking accounts.

[28] The bookkeeper advised that the firm effected transfers from the trust banking accounts to the business banking account from time to time as instructed by Cowling. He found that amounts transferred were rounded amounts and therefore not identifiable to specific client's accounts.

[29] He was not satisfied that the transfer system and procedures utilised comply with the requirements of the Law Society Rules.

[30] Cowling confirmed the existence of two trust investments in terms of s 78 (2A) of the Attorneys Act in a total amount of R500 000.00 however not described as s 78 (2A) investment as they should have been. Cowling identified one of the investment in an amount of R250 000 as that of his spouse and was unable to identify on whose behalf the other amount of R250 000.00 had been invested.

[31] The listing of trust and business account balances were as at 28 February 2013 and no such listings were prepared since then. A failure in contravention of the provisions of Rule 69.7 of the Law Society Rules. On perusal, Faris found that they did not reveal the existence of any trust client's accounts being in debit. Faris did however identify an instance of a trust debit balance which he referred to later in his report.

[32] The trial balances were also as at 28 February 2013. No financial information was processed since March 2013 and no private ledger accounts and trial balances have been printed since 1 March 2013.

[33] There were returned trust paid cheques that were issued to specified payees as 'bearer' cheques, that being in contravention of the provisions of Rule 69.6.1 of the Law Society Rules. Cowling said he was not aware of the Rule.

[34] Cheques **that were crossed as non-transferable made payable to PJC Janeke** were explained by Cowling to may have been deposited in Janeke's personal account. The firm's bookkeeper confirmed that the cheques have not been deposited into one or more of the firm's business banking accounts.

[35 There were client's business accounts that reflected a credit balance, which signifies the depositing of trust monies into the business banking account and the transfer of monies from the trust account to the business account in excess of the debit balance, alternatively debit on specific client's business account. The business credit balances in both instances were irregular. The bookkeeper told Faris that most probable the credit balances arose as a result of the failure to raise and debit fees.

MRS C M NORTJE COMPLAINT

[36] Mrs Nortje paid an amount of R645 000 to the partnership on 15 November 2011 and instructed Janeke to invest the money on her behalf. Janeke led Nortje to believe that the amount had been invested. Various payments were made to Nortje and her attorneys after pressure was placed on Cowling to account. The complaint was settled during May / June 2013 by Cowling.

[37] **Faris confirmed that the matter was indeed handled by Janeke.**

[38] Nortje also had a claim against the estate of one Groenewald. The firm / partnership settled the claim for Nortje for an amount of **R645 000.00. The amount was received by Janeke and was supposed to be invested.** Nortje was supposed to be advanced an amount of R20 000 per month. There was no

opening balance on the ledger account, the amount of R645 000.00 had been withdrawn and debited against the credit received.

[39] Even though there was a note saying that "We have R645 000.000 of her money, she needs R20 000.00 per month. We must invest and 29 /2/12. We have R600 000.00, paid her R45 000.13/12/11 Less R7500.00 = R592 500.00. "Faris found **no evidence that the amount was in fact invested. He also did not find evidence of any written consent from Nortje to invest** the amount in a s 78 (2A) trust investment account in compliance with the provisions of s 78 (2A) (a) of the Attorneys' Act and Rule 69.9.2 of the Law Society Rules.

[40] A reconciliation statement by Faris on the initial amount received and subsequent payments made to Nortje revealed that what appears to be a capital payment was made during November 2011 in an amount of R45 000.00. Apart from that amount, certain other amounts reflected on the reconciliation statement also appear in the ledger account. Certain payments reflected on the ledger account were made from the trust banking account whilst others were made from the business banking account.

[41] **In all of the above there were no funds available in order to facilitate the payments. For payments to be made from the trust banking account, reverse transfers had to be and were effected.** Faris found no evidence that physical transfers of monies from the business banking account to the trust banking account were in fact made.

[42] Fees totalling R30 314.17 were raised as business debits in the Nortje file and Faris found no evidence in the file to support the debits. The ledger revealed that two receipts were credited to the account, the source of which is unknown. **The closing business balance as at 28 February 2013 was a debit of R56 725.00**

[43] **It appeared that the capital amount due to Nortje together with interest thereon had subsequently been repaid.**

COMPLAINT: MS A T HARILAOU

[44] Jari Cerney & Co, **Harilaou's** accountants were in correspondence with the firm **trying to get payment of R 2.9 million**, an amount that was payable to Harilaou as proceeds of a sale of Harilaou's immovable property registered on 28 October 2011. **Harilaou was made to believe that the money was invested.** In correspondence prepared by Cowling, **he indicated that the proceeds of the transaction were loaned to him and that interest at the rate of 12 % would be paid by him monthly.** Faris concluded that since the correspondence was prepared on the firm's letterhead of the firm, this indicated that the loan was made to the firm and not to Cowling personally.

Commented [JK1]:

[45] It did not appear like **there were fixed terms of repayments of the loan.** Cowlings made several undertakings to make periodic payments of the capital, which undertaking he failed to honour. **The recent correspondence where he indicated that he was unable to pay was June 2013.**

[46] A computer ledger account attached by Faris indicate an amount of R900 000.00 credited to the account during October 2011. **The office file did not reflect the receipt of the balance of the monies in the amount of R2 million.** The beneficiary of the payment can therefore not be established without a detailed audit of the whole transaction. The first entry on the ledger account is a **payment from the trust banking account to the town treasurer in an amount of R214 087.24. There were however no funds available on the account in order to justify the payment.** The payment therefore gave rise to a trust debit balance on the account. **The debit balance on a trust account is irregular and constitutes a contravention of the provisions of Rule 69.3.2.of the Law Society's Rules.**

[47] It appeared that regular payments were made to Harilaau that appear to be for interest at the rate of 12 % on the Capital amount of R2.9 Million. Apart from two instances were payments were made from the business account, interest payments were made from the trust banking account. No trust funds were available as credits in order to justify the said payments. Reverse transfers were accordingly made.

[48] Faris found no evidence that physical transfers of monies from the trust banking account to the business banking account were effected. The amount of R900 000.00 was used to make several payments that were unrelated to Harilaou's matter. Various fees were also raised as business banking account which did not relate to Harilaou's matter.

[49] Despite Cowlings allegation that the R2.9 Million represented a personal loan to him, Faris found no evidence or documentation that supports this contention.

DE BEERS

[50] Faris also referred to certain payments that were made to the De Beers. He reports that Janeke furnished him with copies of what appeared to be the accounting statements relating to the De Beers' matters. Faris says in the absence of evidence to the contrary, he provided for the amount of R2.9 million to represent a trust liability in his calculation of the firm's trust position.

BACKO LEGGINGS (Pty) Ltd COMPLAINT

[51] The partnership registered a property on 23 July 2010 and the proceeds from the sale in the amount of R1 Million Rand were deposited into the partnership's trust banking account to be held in trust pending the outcome of a dispute. After bank charges in the mount of R450.00 were subtracted an amount of R995 550.00 was to be held in a trust banking account.

[52] Both Respondents advised Faris that their files relating to the matter could not be traced. The account was credited with an amount of R965 580.00 on 30 July 2010. On 31 August 2010 a trust cheque in the amount of R900 000.00 in favour of Absa Bank was debited against the account. It is not known for what purpose the cheque was drawn as the documentation indicated that the amount should have been held in trust.

[53] In the ledger various amounts were debited as fees. An amount of R50 388.85 was received from Stanley Brasg and Associates that represented capital and accrued interest in terms of s 78 (2A) of the Attorneys Act. Faris provided for the

two amounts R965 580.95 and R50 388.85 respectively to present trust liabilities for purposes of calculating the trust position.

BADENHORST COMPLAINT

[54] Cowling advised Faris that the file was handed over to Badenhorst. The documentation perused indicated numerous amounts that were credited and debited against the account over a certain period of time. The inflow of funds was most probably sourced from the estate banking account. Faris was unable to comment further on the movement of the funds or the nature of the payments made from the trust banking accounts in the absence of the office files.

[55] However Faris stated that attached to the papers was an acknowledgement signed by both Respondents admitting to the partnership having misappropriated an amount of R5 Million. Notwithstanding the acknowledgement of debt, Cowling denied to Faris that he admitted to the misappropriation of trust funds and that the matter was being investigated.

[56] Without the relevant files Faris was unable to determine the correct trust position. He found several reverse transfers that were made in both sets of accounting records in order to cover the payments made from the trust banking account when there were no or insufficient funds in order to justify the payments.

TRUST POSITION

[57] Faris examined the firm's trust position at several months end based on the client's business listings up to February 2013 and found that there were trust deficits at each of the month end dates.

[58] Faris determined the firm's position as at 31 August 2012 and 28 February 2013. **He found trust deficits in the amounts of R9 198 208.45 and R9 232 366.17 respectively.**

[59] Cowling advised Faris that he had serious concerns about Janeke's son who was employed as a professional assistant by the partnership. He indicated that he had

previously launched an investigation in this regard and requested Absa to provide information on all cheques that were cashed coming from the partnership. Cowling also furnished Faris with a document from Absa dated 8 August 2013. He informed Faris that he was not satisfied with the document as it did not provide the details that he had called for.

[60] Applicant contends that what is evident is that the firm's trust and business accounting were not kept up to date. At the time of Faris visit in June 2013 the financial information had only been processed up to the end of February, with **Janeke insisting that he had left the financial administration to Cowling and that he had no knowledge of the financial affairs of the practice.**

[61] The Applicant submits that the Respondents did not give proper care to the administration of the trust account. **Trust bearer cheques were issued and Janeke's explanation that he was not aware of the Law Society's Rules relating to cheques cannot be accepted.** It is more serious that trust payments were made in circumstances when there were no trust funds available. The payments gave rise to reverse transfers that were not isolated incidents. The reverse transfers indicate the failure to properly administer the transfer system of the practice. According to Faris this is further confirmed by the rounded transfers which were made from the trust banking account to the business banking account, which could not be identified to specific clients' account.

[62] In that regard Applicant found the following provisions of the Act to have been contravened and necessary to take urgent action against the Respondents:

[62.1] Section 78 (1) of the Act due to that the practice failed to hold and keep sufficient monies in the trust banking account at all times in order to meet its obligations to trust creditors;

[62.2] Section 78 (4) of the Act read with s 78 (6) (d) of the Act due to the fact that the practice failed to keep proper accounting records and that the trust accounting records did not reflect the trust true position;

[62.3] Rule 68.1 read with Rule 68.5 of the Law Society's Rules ("Rules"), due to the fact that the records were not kept up to date and the books not balanced in accordance with the requirements of the Law Society'.

[62.4] Rule 68.7 of the Law Society Rules due to the fact that the partnership failed to account to its clients;

[62.5] Rule 69.3.1 of the Rules due to the fact that the partnership failed to hold and keep sufficient funds in its trust banking account in order to enable the trust to meet its obligations to trust creditors.

[62.6] Rule 69.3.2 of the Rules due to that the accounts of a trust creditor was in debit.

[62.7] Rule 69.6.1 of the Rules due to that fact that the practice issued trust cheques in contravention of the Rules.

[62.8] According to Faris the possibility of further contraventions of Rule 69.7 and Rule 69.9 could not be excluded and the Attorneys Fidelity Fund was at risk.

CLAIMS LODGED WITH FIDELITY FUND

[63] **Applicant was informed by the Fund that claims totalling more than R6 Million have been lodged with the Attorneys Fidelity Fund** ("Fund") which claims are founded on the misappropriation of trust funds by Cowling and Janeke and a schedule thereof provided by the Applicant.

F RAKGABALETSI COMPLAINT

[64] Rakgabaletsi and her spouse sold an immovable property and instructed Trollip, Cowling and Janeke Attorneys to attend to the registration of the transfer. The property was sold for an amount of R340 000.00. The amount was paid into the firm's trust banking account. Although the transfer was registered the partnership failed to pay to Rakgabaletsi the proceeds of the transaction.

[65] According to Rakgabaletsi, the partnership made excuses for a period of three months for the non-payment and explained that a partner of the firm had misappropriated the money from the trust banking account. As a result of such misappropriation the firm was unable to account for the monies.

[66] The firm subsequently furnished Rakgabaletsi with a cheque in respect of the proceeds of the transaction, but the cheque was **dishonoured by the firm's** bank. The Applicant referred the particulars of the complaint to Cowling on 9 September 2013 and requested him to furnish the Applicant with his comments thereon. He failed to reply to the Applicant's letter.

ROUSSEAU COMPLAINT

[67] The Applicant filed a supplementary affidavit indicating that they received more complaints against the Respondents following the suspension of Cowling, inter alia, that of Gay Desmond Rousseau received on 20 November 2013.

[68] **Rousseau,** a qualified company secretary and a financial director of two companies filed a **complaint in a written statement submitted in support of a claim to the Fidelity Fund**. Due to his forensic background and expertise, he was instructed by Cowling to assist in the dissolution of the firm Trollip Cowling and Jeneke. Rousseau had been inspecting the affairs of the practice for a few months when he came across what he refers to as fraudulent transactions relating to trust funds. The said transactions relate to instances where trust funds were paid to the partnership by clients but where the receipt of the monies were not reflected in the partnership's accounting records.

[69] During the investigation Rousseau communicated with certain of the firm's clients who had deposited cash into the partnership's trust banking account. These cash deposits were not reflected in the firm's accounting records.

[70] Rousseau further found that **Janeke had irregularly cashed several trust cheques which were marked not-transferable at various banking institutions.** Those monies were not deposited into the firm's trust banking

account where they should have been deposited and **resulted in trust deficits that Rousseau calculated the total amount to be R4 295 885.04.** The trust cheques were annexed to his written statement.

[71] Some of these trust cheques that were cashed by Janeke, despite the cheques having been marked not-transferable were from Absa. The bank officials from Absa confirmed that both Cowling and Janeke cashed the trust cheques and did so on numerous occasions, identifying a total of 65 cheques which they **cashed totalling an amount of R1 302 486.09.**

[72] The same *modus operandi* applied at Absa bank was found to have been applied at **FNB** with a list of 14 cheques cashed by either of the Respondents at the bank's Voortrekker Road branch in Brakpan. **The amount involved is R97 831.50.**

[73] The pattern was again followed by the Respondents, cashing in another 14 cheques at **Standard Bank totalling an amount of R45 282** at the Voortrekker Road Standard Bank branch.

[74] There was another list of 4 cheques that were cashed by the Respondents at **Nedbank** Square Central, Brakpan, **amounting to R701 900.00**.

[75] A schedule of 5 additional cheques that Rousseau said was still being investigated by several banking institutions and various amounts paid which were reflected in the firm's accounting records in respect of monies received from clients, but which monies were in fact not received in the firm's banking accounts.

[76] **The total cash received** by the Respondents and not deposited into the firm's trust account amount to **R381 473.76.**

[77] By **receiving trust funds and failing to deposit** the said funds into the trust account Cowling and Janeke contravened, inter alia, the provisions of s 78 (1) of the Act. **The Respondents' conduct and the said contravention of s 78 (1a) constitute an offence in terms of s 83 (9) of the Act.**

[78] Rousseau also found that Janeke removed several of the firm's files when he left its employ. Janeke's former secretary provided Rousseau with a handwritten list of the files removed by Janeke. **An amount of R720 603 is being owed to the firm on the files which had been removed by Janeke.**

[79] The partnership instructed the firm Silber, Fourie & Nel ("SFN") in several property transactions. Rousseau requested SFN to furnish him with a schedule of payments which had been made to the partnership in these transactions.

[80] Rousseau reconciled the amount to the general ledger account of the firm. This proved to be difficult as Rousseau is in possession of the firms entire general ledger account. **SFN paid a total of R1 762 727.92 to the Third Respondent by way of non-transferable trust cheques. According to Rousseau an amount of R1 092 791.08 remains unaccounted for.** The receipt of the amount is not reflected in the firm's accounting records.

[81] Rousseau further explained that he has been unable to finalise the deceased estate of his late wife due to maladministration on the part of the Respondents. He is the executor of his wife's late estate and had appointed the Respondents to administer the estate.

[82] Rousseau investigated the financial affairs of the firm and explained as deduced that it was necessary to institute a claim against the Attorneys Fidelity Fund, founded on the misappropriation of trust funds by the Respondents. **He previously requested Cowling to pay him the proceeds in his late wife's estate, and Cowling failed to do so.** The estate comprised of two investments and one immovable property. **The total amount due to Rousseau is R1 167 898.91.**

[83] It is alleged by the Applicant that the above mentioned facts provide additional evidence that the Respondents have failed to keep proper accounting records in respect of their practice and that they have handled trust funds irregularly and irresponsibly. The Respondents contravened the provisions of, inter alia Section

78 (1) of the Act and Rules 68.1, 68.2, 68.5, 68.62, 68.8, 69.1, 69.3.13 and 69.7.1 of the Law Society's Rules.

ELIZABETH CHRISTINA CILLIERS JANSE VAN RENSBURG (JANSE VAN RENSBURG) COMPLAINT

[84] On 28 November 2013, the Applicant received Janse van Rensburg's complaint. The facts appear from the claim she has filed against the Fidelity Fund. Cowling attended to the administration of her late husband's estate and van Rensburg was the beneficiary to her late husband's pension fund. The estate was not in a position of sufficient cash in order to cover the costs pertaining to payment to creditors and administration fees.

[85] **Janse van Rensburg at the firm's request paid an amount of R544 000.00 into the firm's trust banking account.** She has annexed proof of payment. She suspects that **the amount is no longer available in the firm's trust banking account and most probably misappropriated.**

[86] A firm of attorneys DLBM Attorneys Inc of Pretoria, who acts on behalf of the trustees appointed in the insolvent estate of Cowling reported that the preliminary investigations showed that **there were insufficient funds available in the estate to pay the partnership and firm's trust creditors.**

[87] This additional facts, argues the Applicant, provide further evidence that the Respondents have made themselves guilty of conduct that is very unprofessional, dishonourable and unworthy and that they are both not fit and proper persons to remain on the roll of attorneys.

[88] Even though the report by Rousseau and van Rensburg came to the attention of the Applicant on 28 November 2013, and a report on the initial complaints was filed by August 2013 and Cowling suspended by 5 December 2013, Cowling already held a Fidelity Fund Certificate for the period ending 30 December 2013.

SEQUESTRATION

[89] The Applicant submit that Cowling has been sequestrated and in terms of s 22 (1) (e) of the Attorneys Act provides that any attorney may on application by the Applicant be suspended or struck off the roll of attorneys if his estate has been finally sequestrated and if he is unable to satisfy the Court that, despite his sequestration, he is still a fit and proper person to continue to practice as an attorney.

COWLING'S RESPONSE

[90] Cowling is disputing that he is responsible for all the complaints brought against the firm. In brief, he states that:-

[90.1] In the matter of Rousseau he denies that in his affidavit Rousseau mentioned him and Janeke as the ones that cashed the non-transferable cheques at the various banks in Benoni but that Rousseau mentioned Mauritz and Chris Janeke (Janeke' son), who practised as a professional assistant in the firm until October 2011.

[90.2] Cowling also contends that there is a Third Respondent. The sum referred to was due to the firm.

[90.3] In as far as the matter of Van Rensburg is concerned, he says he understood that the complainant was not proceeding.

[90.4] The person referred to by Rousseau whom he alleges removed the files that had an amount of R720 603.16 owed to the firm, is Chris, Mauritz Janeke's son.

[90.5] The amount that is supposedly due to the firm is R1 092 791.08.

[90.6] **Cowling alleges that he discovered theft of trust funds by Janeke on his departure that has taken place also as long ago as 2010 and 2011.** For example a sum of R30 000.00 was owing to the practice by one Ronel Smit whose house was subject to attachment for monies owing to the practice. On the sale of the house Janeke arranged that payment of the amount of R30 000.00 by the

transferring attorneys against the release of the attachment not to be credited to the firm's trust but to his personal trust, namely Wall Trust.

[90.7] According to him the investments were attended to by the main bookkeeper on the instruction of a partner concerned, who would on receipt of a completed requisition by a partner or his secretary obtain the necessary authority from the client. He alleges the same happened with cheques.

[90.8] He also indicated that he was incapacitated since he did not have access to the files that were removed by the provisional trustee in October 2013 and as he was also suspended his replies were from memory. He replied as follows to the claims submitted to the Attorneys Fidelity Fund:

[90.8.1] With regard to estate late Badenhorst – the sum claimed should be reduced by (i) an amount of R1 -000 000 for interest (ii) an amount of R 300 000 for administration costs and (iii) an amount of R250 000 for disbursements omitted and (iv) R750 000 repaid, totalling some of R2 250 000.00

[90.8.2] He denied the allegations with reference to Rousseau and alleged that Rousseau's report was being read wrongly.

[90.8.3] In respect of Barbour claim- he said the capital balance excluding interest claim should be R250 000.00.

[90.8.4] He denied also knowing anything about a claim relating to a Brisley.

[90.8.5] He admitted the claim of Bell to be more or less correct;

[90.8.6] He admitted the claim of Rousseau' to be more or less correct;

[90.8.7] He believed that an amount of R250 000.00 was repaid and the amount outstanding should be R1 030 000.00;

[90.8.8] Estate late Nolte was handled by Chris as the Executor of the estate and he resigned in 2011. By that time almost all funds due to the estate had been realised. Janeke then attended to the administration of the estate until his

departure at end of August 2013. There should not be any money still outstanding. He says he met Mrs Nolte in early 2013. Nolte sold a property so a deposit of R106 000.00 and instalments of R40 000 were paid to Trollip, Cowling and Associates. She needed money and the estate seemed almost wound up. Believing the funds previously paid during the executorship of Chris to be in trust, he paid her R200 000.00 which he believed was more than what Trollip and Cowling received. Faris confirmed that the books were not in order and the amount led to an overpayment being made. Cowling says he was then appointed as an Executor in July 2013 and contends that the claim should be filed against the previous executor Chris who remained so until July 2013, as it was during his executorship and administration that the estate funds were realised. He was an executor for only two months and any shortfall must be discussed with Chris. Mr Jordaan from the Applicant was informed of the shortfall in October 2013 however due to the files being taken by the provisional liquidator he could not take the matter any further.

[90.8.9] He further admitted to be aware of a claim of R1 000 000.00 but says to the best of his recollection an amount of R750 000 was paid and only an amount of R250 000 remains to be paid.

[90.8.10] **He says according to him then the balance of the claims against the partnership should be R 6 6000, 000.00.**

[91] Cowling sees this, in a nutshell, as errors made in the way the books were kept, cheques and transfer of funds from trust to business was made out and effected, arguing that most of them are just contraventions of the Rules of the Applicant that he deeply regrets.

[92] What happened to the partnership during the last quarter of 2011 is what Cowling apportions the blames to, saying after 42 years of clean practice the situation caused everything. **He says even though the financial and bookkeeping records were not lost, the disruption caused by the collapse of the building made it impossible to manage the bookkeeping and accounting of the practice.** Matters were not kept up to date. **They never managed to adequately**

overcome the backlog. It was not only the collapse of their building, but a fire and a personal experience of crime that resulted in him being unable to establish the correct financial situation at the end of August 2012. **This in turn brought to light huge thefts of funds that had taken place and been concealed over a long period of time.** He attributes the problem to the provisional sequestration order that was brought against him on 7 October 2013, the closure of his practice and removal of files and financial records. He also state that it prevented further investigations which were in progress. **He alleges not to have been aware of theft of these funds prior to the investigation by the accountant Rousseau.**

[93] **He claims to have realised his personal assets and paid to the partnership's business and trust accounts funds exceeding R4 Million Rand and accused Janeke of not to have contributed anything.**

[94] Janeke's sudden departure at the end of 2012 is also alleged by Cowling to have further complicated the situation. He says he only then was made aware **that there were no funds available to make a payment to the estate late Bardenhorst** in 2013, after Janeke's departure.

[95] **He confirmed that it was Rousseau who discovered and came to a conclusion that a major theft of funds from the partnership took place over a long period of time.** Rousseau identified R2 Million in trust cheques that needed to be investigated and also obtained letters from Absa that confirmed that cheques that were not transferable were cashed and that senior staff at Absa confirmed that the crossed cheques were cashed by Chris Janeke ("Chris") who had a good relationship with the various tellers at the bank. Chris was employed by the partnership as a professional assistant from 1999 to 31 July 2011.

[96] In addition, Cowling acknowledges that **Rousseau confirmed a shortfall in the trust funds of the firm during August/ September 2011 period and** alleges that the situation could not be avoided due to the fact that all this time they operated in the dark not being aware of what was going on.

[97] Cowling also acknowledges **a trust deficit but denies that it was in the amount of R9 Million saying it was probably more or less than R3 or R4 Million. He denies that it is his reckless conduct that placed the Attorneys Fidelity Fund at risk declaring that it was as a result of trust theft that was not detected or identified by the auditors who carried the annual trust audit at the time.** He alleges to have made periodic transfers to the business account of such funds as were thought to be available.

[98] He denied that there were any restrictions on Janeke which in any way limited his participation in the financial management of the partnership affairs. He alleged that Janeke was as much aware as he was of the financial situation of the partnership. He was aware of all dealings with clients such as the De Beers. He met the De Beer's at Janeke's house.

[99] **He also regarded what happened to be just errors in bookkeeping methods and failure to ensure tighter control over the finances, where certain sanctions may be applicable.** He says they however do not justify the conclusion that he is not a fit and proper person to practise as an attorney. **He denied being a party or being aware of the theft of trust funds which he argues to be an entirely different matter.** He says as soon as he became aware of the theft he reported that to the Law Society in July 2013

JANEKE'S RESPONSE

[100] Janeke in his response is dismissive of the allegations made by the Applicant and Cowling against him and also of the claims that are based on a report attributable to Rousseau, bar to allege that:

[100.1] All the allegations made by Rousseau and various unnamed persons that Rousseau refers to in his affidavit are denied and nobody ever sought from him an explanation regarding Rousseau's complaint as expounded in his statement to the AFF.

[100.2] Rousseau's claims pertains to the administration of estates that was handled by Cowling. The Applicant conflates the partnership's trust account with estate account.

[100.3] Rousseau's allegation that monies were paid into the partnership's business account and not deposited in the trust account are unsupported by any primary facts and constitute hearsay.

[100.4] Rousseau's allegations on the irregular cashing of cheques are not levelled at him but his son. Rousseau makes it clear that the majority of the cheques where cashed by his son Chris and not him. At the same time he denies the allegation by Rousseau that "The main culprit is Mr Christiaan Janeke."

[100.5] He does not have the recollection of a cheque of R36 021.00 he received as from Rousseau and deny having received any monies that he failed to deposit into the trust account as alleged by Rousseau.

[100.6] he denied cashing cheques that amount to R1 302 486.09 or any of the cheques mentioned by Rousseau, stating that Applicant's mentioning Cowling and him is not borne out by Rousseau's affidavit. Most of the monies he mentions were allegedly taken by Chris.

[100.7] He denied that he removed any files from the partnership offices when he left its employ and allege that he is being confused with his son Chris. He alleges that his former secretary actually provided a list of files on which an amount of R720 603.16 was owed to the firm that were removed by his son Chris not him.

[100.8] He could not deal with the allegation that Silber, Fourie and Nel paid a total amount of R1 762 727.92 that is unaccounted for in the partnership's accounting books as the accounts were managed by Cowling.

[100.9] Cowling was the only one appointed as the administrator of Rousseau's late wife's estate not him therefore Rousseau requested payment from him. According to him the money should have been deposited in the estate's account anyway, not in the trust account.

[101] He stated that the failure to keep accounting records and all the irregularities and irresponsible handling of trust funds as set out in Rousseau's affidavit were perpetrated by Cowling. He also denies misappropriating any trust funds.

JANEKE ON COWLINGS RESPONSES

On Cowling's replies his response was that:

[102] Cowling never alleged that he misappropriated any of the funds missing from the trust account or that he dealt with the financial administration of the accounting records.

[103] Cowling admitted to funds missing when the estate was administered by him supported by all the cheques that were issued by him except for one as indicated in Rousseau's affidavit.

[104] When he joined Trollip Cowling and Brocker, Cowling was already the office manager and the financial manager of the firm which he continued to do later in the partnership for a period of 34 years without a qualified audit report. Cowling also attended to the administration of estates and other commercial transactions. He had no reason to suspect Cowling's nefarious activities.

[105] Presently, he is practising as a consultant in the employ C J Janeke, his wife and is not operating a trust account. He has no other professional training and would be placed in a position where he is not earning a living if he is struck off from the roll of attorneys.

[106] He therefore pleads with the court to impose such sanction as it deems fit other than the striking off.

ANALYSIS AND WEIGHING OF ARGUMENTS

[107] The court is duty bound to consider all arguments presented to it with an objective eye. It is not in contention that in the partnership of the Respondents there was a deficit of trust funds. The parties may not be in agreement as to the exact amount

of the deficit. It is agreed that the amount exceeded an amount of R9 Million at the time of Cowling suspension.

[108] The claims that were lodged with the Attorneys Fidelity Fund amounted to +- R9 Million Rands. Cowling alleges to have paid an amount of R4 million to reduce the liability.

[109] It is also common cause that there were serious irregularities in the manner in which the financial affairs of the partnership were conducted and managed with Cowling admitting his role in some of the instances and in others blaming his erstwhile partner or his son Chris, whilst Janeke is alleging Cowling to be responsible or his son to be involved. All the same, it is of significance that the existence of irregularities *per se* is not denied.

[110] There were returned trust paid cheques that were issued to specified payees as 'bearer' cheques, that being in contravention of the provisions of Rule 69.6.1 of the Law Society Rules, with Cowling pleading ignorance. He did not know how it came about that a **cheque that was crossed as non-transferable was made payable to** Chris.

[111] The Respondents failed to properly monitor how the financial affairs of the partnership are conducted and to make sure that the partnership keeps proper accounting records, which is a serious contravention of the duties of an attorney. An attorney who fails to comply with this obligation is liable to be struck off the roll or to be suspended from practice; see *Cirata and Another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 193 and *Holmes v Law Society of the Cape of Goodhope and Another* 2006 (2) SA 139 (C) at 152 B-F. In this instance, the magnitude of Respondents transgressions is such that it is all mind-blowing.

[112] Janeke pleads not to have been involved in the financial affairs or management of the partnership for 34 years, having left it to.Cowling to deal with financial issues of the partnership. He therefore urges the court to instead hold Cowling accountable for all the irregularities. His declaration amounts to the highest degree of imprudence and breach of his duties as an owner and partner who is

supposed to be responsible for his practice. So even if it is correct that he was not involved in the everyday running of the financial affairs of the partnership, besides being grossly in breach of his duties, he would still be 100% accountable for any mismanagement of the company, financially or otherwise.

[113] Chris was employed by the partnership as a professional assistant and both Respondents allude to his involvement, shadily, in the cashing in of the partnership's non-transferable cheques at various financial institutions that led to the misappropriation of the partnership trust funds. Janeke confirms that it was Chris who was involved in the cashing of the cheques which happened under both partners' watch. Janeke, still does not consider himself accountable as a partner, even for Chris' conduct perpetrated against his own practice and clients.

[114] Chris Janeke was not a partner and yet he had access to cheques and trust accounts apparently with signing powers and was allowed to operate or to have control and leeway in the partnership's finances without being monitored, which amounts to a dereliction of duty and serious reckless conduct by both Respondents.

[115] The fact that Cowling initiated an investigation into the cashing of the cheques and his suspicion of irregularities on the part of Chris provides evidence of both Respondent's failure to dedicate sufficient attention to the administration of trust client's accounts as they were supposed to have signed the issued cheques or authorised the requisitioning of cheques by non-partners.

[116] The Applicant's attorney has argued that where an attorney consents to a partner or a member of his staff dealing with trust moneys, the failure to keep proper books of account becomes all the more reprehensible. It is his duty to keep a vigilant eye on such trust moneys and to see that they are paid into the trust account and not used improperly. In that regard, for the sake of the public and the profession it is of utmost importance to enforce on all attorneys the high standard of duty which rest upon them and to demand the great integrity that is expected of them; see Incorporated *Law Society, Transvaal v Visse and Others* 1958 (4) SA 115 (T)..

[117] Claims lodged with the Attorneys Fidelity Fund exceeding an amount of R9 Million Rand is *prima facie* proof of also misappropriation of trust money and its extent, which inference is strengthened by the fact that most of the files in these matters as well as accounting records could not be found, such unfortunate state attributable to the Respondents who could not say where the files were.

[118] The Fidelity Fund was put on such immense risk without any possibility to limit the exposure, the Respondents have been sequestrated.

[119] Payments were made to trust clients when there was not enough money in their trust accounts resulting in a lot of trust reversal transactions. The money having been misappropriated by the partners. . *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; see Incorporated Law Society, Transvaal v Behrman, 1977(1) SA 904 (T) at 905 H.*

[120] The pleading by Janeke that the court should take into consideration that notwithstanding him not being involved in the financial management of the partnership, it had an impeccable auditing record spanning a period of 34 years and Cowling's assertion that it was a faultless 40 years for him is negated by Cowling statement repeated in his affidavit that **Rousseau discovered and came to a conclusion that there has been a major theft of funds from the partnership over a long period of time albeit undetected.**

[121] **Cowling also confirmed that the turn of events in 2012 brought to light huge thefts of funds that had taken place and been concealed over a long period of time.** Further he claimed that **the Attorneys Fidelity Fund was placed at risk as a result of trust theft not realised or detected at the time by the auditors who carried the annual trust audit.** So it cannot be true that the partnership's record of handling its affairs was for all that long impeccable. The transgressions were just not discovered due to the Respondents' failure to exercise proper control on the financial affairs of the partnership and their personal involvement in the mismanagement and misappropriation. The accounting records as

investigated by Faris and Rousseau bear testimony to that, going back to misappropriation in 2010. In *Law Society, Transvaal v Matthews,* the following was said by the Court regarding the failure of keeping 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."*

[122] Cowling seems not to appreciate the seriousness of their transgressions. He alleges that their transgressions only amount to errors not theft, committed in bookkeeping and therefore should not lead to their striking off. Notwithstanding the fact that they were involved in substantial misappropriation of trust monies. Cowling has agreed in the Badernhost matter that he informed the latter about the misappropriation of funds by the partnership and also even queried the amount outstanding alleging that it was R2 250 000.00. He never pleaded consent by Badernhost for the partnership to use the money or that it was loaned to the partnership. He denied that he and Janeke signed an acknowledgement of misappropriation of R6 Million Rands. Janeke on the other hand did not address the non-availability of Badernhost's money, which makes the Respondents guilty of theft.

[123] The Respondents also failed to contradict the evidence indicating the unscrupulous handling by the partnership of the funds in the Nortje matter that Janeke failed to invest as instructed or to deposit into the partnership's trust account and for which the partnership could not account. It also came to light that there was no consent to either Janeke or the partnership to use the money for any other purpose other than investment. Cowling paid most of the money owing to Nortje from his pocket when the money was supposed to be in the trust

account. The matter was not reported to the Applicant. On investigation there was no evidence of any written consent from Nortje to invest the amount in a s 78 (2A) trust investment account in compliance with the provisions of s 78 (2A) (a) of the Attorneys' Act and Rule 69.9.2 of the Law Society Rules.

[124] In respect of the De Beer matter, Janeke furnished statements that purportedly indicated a payment of R2 900,000.00 to the partnership whilst the trust account was reflecting a deficit for which Janeke could not provide evidence proving otherwise. He has not submitted anything of substance to refute the prima facie inference of having misappropriated the money.

[125] The nature and extent of Janeke's involvement in the disappearance of monies in the Backo matter was also not rebutted. It was indicated that the proceeds were paid to the partnership after the sale of an immovable property but only an amount of R35 000, in interest was paid to the client and the balance of R965 000.00 was not there.

[126] Facts were established and unchallenged that Cowling misappropriated R2,900 000.00 in the Hariloau matter which on receipt was supposed to be invested. Cowling's justification for his personal use of the money that it was a loan did not absolve him because the letter he submitted indicated a loan to the partnership not to him personally. Also **money was disbursed on behalf of client when there were no funds to justify the payment** giving rise to a trust debit balance on the account. **The debit balance on a trust account is irregular and constitutes a contravention of the provisions of Rule 69.3.2.of the Law Society's Rules.**

[127] Also regular payments were made to Hariloau of interest on his Capital amount of R2.9 Million on two instances from the business account, and all other times from the trust banking account whilst there were no trust funds available as credits to justify the said payments. Necessitating reverse transfers which were accordingly made, causing a debit balance in the trust account.

[128] In the case of monies received in the matter of Rakgabeletsi, Rousseau's mother's estate and Van Rensburg, it was a case of straight theft. Cowling could not explain the deficit in the trust accounts of the clients when money was received by the partnership on behalf of the client. 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* 1989 (4) SA 389 (T) 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. 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:*

[129] Taking into consideration all these matters, the Applicant has succeeded to establish on a preponderance of probabilities the offending conduct of the Respondents, which conduct amounts to several serious offences, by which, as correctly argued by Plaintiff's counsel, whether each is considered alone or cumulatively, the Respondents have made themselves guilty of unprofessional, dishonourable and unworthy conduct of an attorney. See *Malan v The Law Society of the Northern Provinces* [2008] ZASCA 90; [2009] 1 All SA 133 (SCA).

[130] The court has now to decide on the basis of that conclusion whether, as stated in section 22(1)(d) of the Attorneys Act, in its discretion the Respondents are after all, still fit and proper to continue to practise. 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.

[131] Counsel on behalf of the Applicant submitted that the conduct of the Respondents reveal character defects which cannot be tolerated in a practitioner or officer of the Honourable Court and does not meet the standard of behaviour and conduct and reputation which is required of an attorney and of an officer of the Honourable Court. He argues that by virtue of their conduct and behaviour the Respondents have damaged and affected the good standing and reputation of the profession as a whole. Consequently, their names should not be allowed to remain on the roll of attorneys, as they have made themselves to worthy are no longer fit and proper persons to continue to practise as attorneys or officers of the Honourable Court.

[132] Janeke persisted in his argument that he is not to be punished to the extent of a striking off due to his backdrop of 30 years of unqualified audits and trust built up in his partner for all those years plus his involvement in the transgressions of the rules. It was argued on his behalf that he was not involved in the books of the partnership entirely. 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.

[133] 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. It is also settled law that attorneys must always be vigilant on matters of trust otherwise they will be equally liable.

[134] Based on the above, the court is satisfied that Respondents made themselves in all respects equally guilty, both carrying accountability of the partnership, each other's offending conduct and any other person acting under their authority. Being less involved in the running of the practice and or 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. Non-compliance with that does not automatically result in a diminished moral blameworthiness.

[135] The transgressions of the Respondents are very serious and involves 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, failing to account to his clients in respect of trust funds, delayed or non-payment of trust funds.

[136] In other instances the Respondent's conduct is tantamount to mere stealing, especially in instances where money was paid to Respondents without fulfilling the purpose for which it was received in their trust account. The fact that they cannot pay the money back aggravates the situation. They opened the Fidelity Fund to such considerable risk.

[137] The seemingly failure by the Respondents to understand the magnitude or gravity of their transgressions, pleading that they are not guilty of serious misconduct, with Cowling equating these transgressions to just errors in books of accounting and Janeke wanting to be exonerated for dereliction of his duties, indicates that they are beyond redemption. They are apparently not troubled or perturbed by their deeds making any rehabilitative prospects seem far-fetched. 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 judgment on the rehabilitative prospects of the Respondents. This does not, however, make 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.

[138] The requirement of an auditor's report and the prerequisite for an attorney to be issued with a fidelity fund certificate annually in order to continue practising is supposed to serve as a safety mechanism for the public and the client's money. In the Respondents' case those measures have failed, misappropriation had

occurred whilst the Respondents were in possession of the fidelity fund certificate and the unqualified audits, a manifestation that undoubtedly put the profession into disrepute. This signals the magnitude of the risk if the Respondents are left to be in the roll of attorneys. Consequently their removal from the roll of attorneys would save the profession from further embarrassment and disrepute and restore the dignity and the trust of the profession that is slowly eroded by the unbecoming behaviour of such attorneys and also circumvent exposing the public to any further risk; see *Jasat v Natal Law Society*, 2000 (3) SA 44 (SCA).

[139] The fact that the Respondents are insolvent exacerbates their situation. They have exhibited an inability to conduct their lives within their means and not afraid or deterred to expend monies they are entrusted with by the public. It would be precarious to leave them open to a possibility of being in a position of trust again within the profession whilst they have been proven by the court not to be able to manage even their own affairs and to pay their debts. The onus being upon them to convince the court otherwise, which they have failed to do.

[140] The Applicant has made a proper case for the order which it seeks against the two Respondents. 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. .

[141] The Applicant submitted further that the Respondents should pay the costs of this application on an attorney and client scale as the Applicant approaches this court not as an ordinary litigant. It submitted with reference to *The Law Society of the Northern Provinces v Mogami & Others and Law Society of the Northern Provinces v R F Sonntag* 2011 ZASCA 204 (25 November 2011) that the general rule is that the Applicant is entitled to its cost, even if unsuccessful, and usually on an attorney and client scale.

[142] As indicated the Applicant 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.

[143] It is therefore reasonable that in these circumstances the Applicant 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 of Applicant's fees so that the Applicant does not find itself out of pocket. The nature of the offences committed warrants an order of costs on this basis; see *Botha v Law Society of the Northern Provinces* **[2008] ZASCA 106; 2009 (1) SA 227 (SCA)** at 236F-G.

[144] The 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. Now having heard all parties to the hearing and after consideration of all submissions on the appropriate sanction to be meted out and as a consequence of all the raised factors in the conduct of the Respondents.

[145] It is ordered:

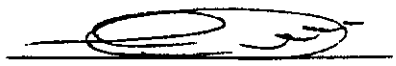
[145.1] That the Respondents' names be struck off the roll of practicing attorneys;

[145.2] 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.

[145.3] All the ancillary relief constituted in the draft order that is annexed hereto marked "X" are incorporated into this order.

N V KHUMALO

Judge of the High Court of South Africa; Gauteng Division, Pretoria



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