REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 27/10/2016

CASE NO: 17748/13 & 63772/11

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

....
SIGNATURE **DATE**

THE LAW SOCIETY OF THE NORTHERN PROVINCES	Applicant
and	
PAUL MODIKENG RANAMANE	1st Respondent
RANAMANE PHUNGO INCORPORATED ATTORNEYS	2nd Respondent
LAVHELESANI LIMON PUNGO	3rd Respondent
PHUNGO INCORPORATED	4th Respondent

JUDGMENT

AC BASSON, J

[1] There are two applications before this court. In both applications the applicant (the Law Society of the Northern Provinces) seeks an order that the first respondent (Mr Ranamane – "Ranamane") and the third respondent (Mr Phungo – "Phungo") be struck from the roll of attorneys of this court, alternatively that Ranamane and Phungo be suspended in their practices as attorneys of this court.

[2] The two applications have a long and somewhat unfortunate history. Ranamane and Phungo previously practiced as co-directors of the second respondent (Ranamane Phungo Incorporated – "the firm").

[3] Two separate applications were initially launched against Ranamane and Phungo respectively due to the fact that they were each practising for their own account and as single practitioners at the time of the launching of the applications. Phungo subsequently resigned as a director of the firm on 16 March 2011 and is currently practising for his own account and as a single practitioner under the style of Phungo Incorporated (the fourth respondent).

[4] The application against Ranamane has been pending since 2012 and the application against Phungo since 2013.

[5] As will be pointed out herein below, the finalisation of both applications have been delayed by numerous postponements over the years mainly as a result of the fact that both Ranamane and Phungo have failed to timeously file various affidavits in the proceedings.

[6] On 24 November 2014 an order was granted joining Phungo and the fourth respondent as resondents to the application against Ranamane and the firm. Following the consolidation various further affidavits were filed.

[7] The consolidated application was thereafter set down for hearing on 17 April 2015. However, on 14 April 2015 - three days prior to the hearing of the application – Phungo filed a further affidavit in the consolidated main application.

[8] On 16 April 2015 - merely a day prior to the date of the hearing of the consolidated main application – Ranamane filed an answering affidavit to the applicant's supplementary founding affidavit filed on 18 November 2013 - some seventeen months after the date of filing thereof.

[9] At the hearing of the consolidated application on 17 April 2015, Ranamane objected to the further affidavit delivered by Phungo (on 14 April 2015) and to the three supplementary founding affidavits previously delivered by the applicant. As a result of this objection the matter was again postponed. The applicant and Phungo were ordered to formally apply for leave to file any previously filed supplementary affidavits. On 7 July 2015 the applicant and Phungo obtained leave for the filing of the supplementary affidavits previously filed by them. These applications were not opposed by Ranamane.

[10] In terms of the order granted on 7 July 2015, Ranamane and Phungo were ordered to file any further answering, opposing or explanatory affidavits to the applicant's supplementary founding affidavit previously filed within ten days of the order. No further affidavits were, however, delivered by either Ranamane or Phungo.

[11] The consolidated main application was thereafter again enrolled for hearing on 13 November 2015. The date of the hearing did not suit Phungo's counsel. A meeting was thereafter scheduled with the Deputy Judge President of this division to arrange a date for the hearing of the application suitable to all parties and to ensure that all outstanding issues are attended to prior to the hearing of the matter. A directive was also issued in terms of which Ranamane was directed to file the further affidavits indicated by his legal representative by no later than 10 November 2015 and to file Heads of Argument by 29 January

2016. It should be pointed out that no further affidavits were filed and that Ranamane has also failed to deliver Heads of Argument.

[12] The matter was set down for 10 and 11 March 2016. However, on 9 March 2016 - one day preceding the date of hearing of the application and only at 16h08 in the afternoon - a formal application for the postponement of the matter was filed on behalf of Ranamane. In the application for postponement Ranamane stated that it was necessary for him to file a further affidavit and that he was unable to do so timeously because his preferred counsel had become unavailable to assist him during November 2015 (5 months ago) and that his newly appointed counsel had not had sufficient time to assist him in preparing these affidavits. The application for a postponement was opposed by both the applicant and Phungo.

[13] On 10 March 2016 the court granted a postponement and ordered Ranamane to pay the wasted costs (of the applicant and Phungo and the fourth respondent) occasioned by the postponement on the scale as between attorney and client.

[14] The court also granted an order suspending Ranamane in his practice as an attorney pending the finalisation of the application for the striking, alternatively suspension of Ranamane and Phungo. Ranamane was further ordered to file his answering affidavits by no later than 22 April 2016. However, despite the postponement and the further opportunity granted to Ranamane to file the further affidavits - which he had indicated to have been a necessity in his application for a postponement – he failed to deliver any further affidavits or to take any further steps to provide an explanation for his conduct referred to in the affidavits which he sought to reply to.

[15] The matter was finally argued before this court on 11 October 2016.

Merits

[16] The question whether an attorney is a fit and proper person to practice falls in terms of section 22(1) of the Attorney's Act[1] ("the Act") within the discretion of the court. It also falls within the discretion of the court what an appropriate sanction should be having regard to the totality of facts placed before it.

[17] It is trite that in deciding matters such as this, the court follows a three staged inquiry:

(i) During the first part of the enquiry the court will decide whether the alleged offending conduct has indeed been established on a preponderance of probabilities.

(ii) Secondly, once the court is satisfied that the offending conduct has indeed been established, the court will consider whether, in its discretion, the respondent is a fit and proper person to continue to practice. This process requires a value judgment and requires the court to evaluate and weigh up all the evidence that was placed before it.

(iii) Once both questions have been decided the court will consider what, in its discretion, an appropriate sanction should be. More in particular, the court will consider whether a person should be removed from the roll or whether such a person should merely be suspended from practice for a specified period of time. In considering this question the court will have regard to the nature and gravity of the conduct complained of. The court will consider all of these factors in their totality and not in isolation.[2]

[18] The applicant received various complaints against Ranamane, Phungo and the firm. Ms Mapfumo ("Mapfumo) - a chartered accountant and auditor in the applicant's employ – was instructed to investigate the complaints. What follows is a brief summary of the various complaints levelled against Ranamane and Phungo.

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[1] 53 of 1977.
[2] *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) at paragraph 4.

(i) The first complaint relates to an amount of R5 million which was deposited by the Department of Public Works Roads and Transport ("the Department") into the trust account of the firm. This charge is levelled against both Ranamane and Phungo in their capacities as co-directors of the firm.

(ii) The second complaint relates to the overcharging and/or even overreaching with reference to a statement of account dated 20 October 2010 submitted to the National Health Laboratory Service ("NHLS"). This complaint is levelled against both Ranamane and Phungo although it seems that initially this complaint was levelled against Phungo only.

(iii) The third complaint is levelled against Phungo alone and entails an allegation that he practiced as an attorney without being in possession of a Fidelity Fund Certificate for the years 2005 to 2009.

(iv) The fourth complaint is levelled against both Ranamane and Phungo and relates to a complaint levelled against the firm by Mr Tywabi ("Tywabi"). In terms of this complaint Ranamane failed to attend to the transfer of an immovable property bought by Tywabi as far back as December 2004.

The complaint by the Department of Public Works

[19] The applicant received a complaint from the MEC for the Department in the form of an application against the firm (in the Gauteng High Court – Johannesburg). The firm is cited as the first respondent and the Law Society of the Northern Provinces is cited as the second respondent in that application. In that application the Department sought an order directing the firm to repay an amount of R5 million which amount was paid into the trust account of the firm. It further appears from this application that during November 2009, Kaulani Civils (Pty) Ltd ("Kaulani") instituted action against the Department for payment of an amount of R64 million. The Department appointed the firm as its legal representative in that action. Ranamane was appointed as the attorney to assist the Department in the action.

[20] Ranamane advised the Department to pay an amount of R5 million into the firm's trust account. According to the papers Ranamane confirmed to the Department that the amount of R5 million would be invested in a section 78(2A) investment account.

[21] On 8 January 2010 the Department paid the amount of R5 million into the firm's trust account. The letter accompanying the deposit states as follows:

> "Your previous correspondence on the subject matter has reference.
>
> This serves to confirm the transfer of R5 million by the department of Public Works, Roads and Transport into the trust account as a measure of good faith invested in terms of section 78 (2A) of the Attorneys Act 53 of 14979 for the purpose of the application as per above referred correspondence.
>
> The amount of R5 million is paid today, the 08 January 2010 as per attached proof of payment into the below stated banking details:
> Bank: Standard Bank
> Branch and Code: Randburg, 018005
> Account Name: Ranamane Phungo Incorporated
> Bank Account: […]
>
> Your office is expected to continuously update the department on the following:
>
> - Any interest accumulated from the amount transferred (R5 million)
> - Report on any decision taken on the trust account
>
> This information will assist the department to comply with the financial prescripts on the monies held in the trust account including the reporting in the Annual Financial Statements for audit purpose.

Your co-operation as in the past will be much appreciated."

[22] Kaulani subsequently obtained judgment against the Department and the Department paid Kaulani the claimed amount.

[23] It is important to point out that the amount of R5 million previously paid into the firm's trust account was not utilised for purposes of the payment to Kaulani in respect of the claim.

[24] It is further important to point out that during the litigation period the Department received several statements of account from the firm and settled all invoices with the exception of one invoice not exceeding R100 000.00.

[25] During August 2010 and October 2010 (after the claim had been paid to Kaulani), the Department requested repayment of the amount of R5 million plus interest from the firm. No reply was received to these letter and the Department did not receive payment of the R5 million.

[26] During February 2011 the Department again demanded payment from the firm. On 21 February 2011 the firm responded and advised the Department that the matter was referred to the accounts Department and that the firm would revert to the Department.

[27] On 3 March 2011 the acting CFO of the Department contacted Ranamane in order to enquire about the payment of the said R5 million. Ranamane assured him that the firm will see to the repayment of the R5 million together with the accumulated interest.

[28] On 3 March 2011 the firm wrote a further letter to the Department acknowledging its indebtedness. However, despite this letter the firm persisted in its failure to re-pay the amount of R5 million together with interest.

[29] Mapfumo was, as already pointed out, appointed to investigate the complaint. She submitted a particularly damming report on the financial affairs and

accounting records of the firm. She indicates in her report that very limited accounting records have been furnished to the applicant and that, due to the failure of Ranamane to cooperate with her and to grant her access to the firm's account records, she was unable to establish how the R5 million was utilised. At this juncture I should also point out that even after the hearing of this application, the court is still in the dark as to how the R5 million had been utilised. I will return to this issue herein below.

[30] Mapfumo was, however able to establish that Ranamane did indeed receive an amount of R5 million from the Department on 8 January 2010. She was also able to establish that, notwithstanding the express request from the Department, that funds were not invested in terms of any section 78(2A).

[31] From Mapfumo's report it is further clear that on the very same day of receipt of R5 million, two amounts were withdrawn from the firm's trust account: one for R 5 000.00 and one for R 15 000.00. On 9 January an amount of R 350 000.00 were withdrawn. By 27 February 2010 the entire R5 million was withdrawn. Mapfumo points out that the ledger reflects that some of the transactions had no descriptions except for cashbook and journal references. The cashbook provided to her, however, did not reflect a description of the transactions nor of the recipient of the money. Some of the transactions with descriptions reflect that the money was withdrawn as fees to the firm and/or as disbursements. There is, however, no indication of the recipient of the money withdrawn as disbursements. Mapfumo found that a trust deficit in the amount of at least R4 999655.46 existed as at 28 February 2011. It was also her view that the auditor's report should have been qualified. She was not able to establish how the amount of R5 million had been utilised although she was able to establish that the firm did not hold any section 78(2A) investments.

[32] Mapfumo concluded that the firm and/or Ranamane had contravened various sections of the Act and the applicant's Rules ("the Rules"). She also concluded that the failure of Ranamane and the firm to cooperate with the applicant in the investigation constituted a contravention of the Rules.

[33] In response to the damning report by Mapfumo and the various complaints, Ranamane raised numerous technical objections. I do not deem it necessary to refer to those objections in detail except to point out that these objections were clearly raised in an attempt to avoid answering to the gist of the complaint namely what had happened to the R5 million deposited in the firm's trust account.

[34] Ranamane, however, admitted receipt of the amount of R5 million in his trust account on 8 January 2010 and admitted that the amount is no longer available. According to him the R5 million was received by the firm as a deposit (security) for the firm's legal costs and disbursements in respect of several litigious matters handled on behalf of the Department. This version is entirely contradictory to the letter of 8 January 2010 wherein it is pertinently stated that the amount of R 5 million was to be invested in terms of section 78(2A).

[35] There is no proper explanation on the papers about the utilisation of the R5 million. What is, however, clear from the papers is the fact that on the very same day the funds were received, funds were transferred from the firm's trust account and that some of the funds were transferred to unknown beneficiaries and towards creditors not related to the Department. All of this was done contrary to an express instruction that the funds had to be invested in a section 78(2A) investment account. By 27 February 2010 – just over a month later – the entire R5 million had disappeared.

[36] The investigation was severely complicated by the fact that no accounting records were provided to the applicant. Only after this court made an order on 10 September 2013 ordering Ranamane to do so, did he provide the applicant with incomplete accounting records. When confronted with the fact that the accounting records were incomplete, Ranamane proceeded to place the applicant to the proof to show that the accounting records were in fact incomplete.

[37] Despite the fact that the accounting records that were furnished to the

applicant were incomplete, Mapfumo was able to conclude that the firm did not keep proper accounting records in accordance with the provisions of the Act and the Rules. She also concluded, *inter alia*, that - (i) the firm's cash book did not contain descriptions of the transactions and it did not reflect the beneficiaries of payments; (ii) the firm failed to ensure that withdrawals from the trust banking account were made only on behalf of a trust creditor or in respect of money due to the firm; (iii) there were irregular entries in the journals of the firm which were processed to conceal a trust deficit in the firm's bookkeeping; (iv) Ranamane failed to ensure that the total amount of the firm's trust banking account, trust investment account and trust cash was not less than the total amount of credit balances of the firm's trust creditors; (v) Ranamane failed to keep proper accounting records; and (vi) Ranamane failed to account to a client within a reasonable time.

[38] It is instructive to point out that Ranamane does not deny the fact that payments from the creditors' account did not reflect proper descriptions of the beneficiaries. He also does not deny that the funds of one trust creditor were transferred as fees in respect of different clients. Ranamane also does not attach any proof of accounting to the Department in respect of how the R5 million was utlized.

[39] Adding to the woes of Ranamane is the contents of the affidavit filed by Phungo on 13 April 2015 in which he levels serious allegations implicating Ranamane in improper conduct. In this affidavit Phungo admits that the amount of R5 million was misappropriated by the firm. He also refers to the affidavit of the firm's bookkeeper at the time, Mr Sello Christopher Raborethe ("Raborethe") in which Raborethe states that he informed Phungo that he had raised the discrepancies in the trust account with Ranamane but that he did not receive satisfactory answers. Raborethe also states that R5 million was paid from the trust account for reasons he does not know. Raborethe had also informed the firm's auditors of the discrepancies in the firm's account and that he was assured that the auditors will look into the matter. This however did not happen. Raborethe was subsequently dismissed from the firm as a result of his

persistent attempts to clarify the discrepancies in the trust account. Raborethe also confirms that Phungo did not have access to the trust account.

[40] Ranamane has up until the date of the hearing failed to file a response to these serious allegations levelled against him by not only Phungo but also by the erstwhile bookkeeper.

[41] At the hearing of the matter counsel on behalf of Ranamane conceded that he cannot advance any submissions that could absolve Ranamane from wrongdoing in respect of the R5 million deposited by the Department and conceded that there is no answer to the allegations levelled against Ranamane.

[42] After many years of acrimonious litigation and hundreds of pages, Ranamane finally, on the day of the hearing finally realised that the evidence in respect of the misappropriation of the R5 million is simply so overwhelming that he can no longer dispute his wrongdoing. It is, however, of some concern to the court, and I will revert to this issue herein below, that it took Ranamane approximately four years to come to a point where he finally realised that he can no longer defend what is clearly a misappropriation of trust funds.

[43] It is thus no longer in dispute that an amount of R5 million had disappeared without any trace from the trust account of firm and that Ranamane cannot account for the R5 million. Despite the fact that Ranamane now accepts responsibility for the misappropriated funds, there is still no explanation forthcoming from Ranamane as to what had happened to the R5 million.

[44] I am therefore satisfied, in the light of Ranamane's concession and the evidence presented to the court that the offending conduct of misappropriation of trust funds against Ranamane has been established.

[45] I have already referred to the fact that the complaint in respect of the missing R5 million has also been levelled against Phungo.

[46] The complaint against Phungo is that he misappropriated, alternatively, participated in the misappropriation, and further alternatively, that he was responsible for the misappropriation of the trust funds.

[47] From a reading of the papers it does not appear that it is the applicant's case that Phungo made common cause with the activities of Ranamane in respect of what can only be described as the plundering of the trust account. At most Phungo is called upon to answer the question as to why he did not assiduously monitor the activities of Ranamane (and other professional assistants working together with Ranamane) in order to pick up and effectively prevent deviations from the course of conduct expected of an attorney. I have considered the evidence and I am in agreement with the submission that, with regard to the disappearance of the R5 million, no culpability can be laid at the door of Phungo save for not picking up that the R5 million had been misappropriated from the trust account.

[48] In a supplementary affidavit filed in April 2015 Phungo did an about turn and admitted that he failed in his obligation as an attorney to take the necessary steps to prevent the misappropriation of trust monies. In this regard he states the following in his supplementary affidavit:

> "*2.3 The fact that I did not misappropriate the aforesaid amount does not, however, mean that the proceedings instituted against me are not competent. As an attorney of this Court and as a partner of the aforesaid firm at the relevant time, there was a statutory obligation on my part and the public expected me to ensure that all the monies placed in the firm's trust account were not misappropriated by myself and any other person who had access to the trust account.*
>
> *2.4 I regret to admit and I am not only embarrassed to admit but I am also disappointed to admit that such amount was misappropriated from the trust account during the time that I was a partner of Ranamane Phungo Inc. I have, regrettably, failed to take the necessary steps to ensure that the funds deposited into the trust*

account were at all material times as safe as this Court and the public expected them to be safe and protected from misappropriation as possible.

2.5 My obligation to ensure that trust funds were not misappropriated has nothing to do with the fact that I did not have management control of the relevant trust account. Such obligation arose from the fact that I was a partner of Ranamane Phungo Inc. and that I was an attorney of this Court. I failed to discharge such an obligation.

…

2.10 In the premises, whilst I deny that I misappropriated the monies in issue, I regrettably admit that I did not take the necessary steps as stated above to ensure that such monies were not misappropriated. The position would have been different if I had taken such steps."

[49] It is clear from this affidavit that Phungo has taken this court in his confidence and that he has fully owned up to the fact that he had failed in his obligation to ensure that all monies placed in the firm's trust account were not misappropriated. This he did not do and he admit that the position would have been different had he taken such preventative steps.

[50] Although it is not this court's conclusion that Phungo is complicit in the misappropriation of the trust funds or that he was aware of the misappropriation, it cannot be ignored that Phungo was a co-director at the time of the misappropriation. He can therefore not escape accountability for the offence relating to the firm's trust account: Where attorneys practise in partnership or as co-directors, they are jointly responsible to comply with the provisions of the Act relating to the handling of trust funds. They are also jointly liable for the irregularities that occurred.

National Health Laboratory Service

[51] A complaint was received from the National Health Laboratory Service ("NHLS") against the firm. In terms of the complaint the NHLS had instructed

Phungo to act on its behalf in several matters since 2010. When Phungo filed his answering affidavit (under case number 17748/2013) it was pointed out that the matter was in fact dealt with by Ranamane. After consolidation of the applications the complaint was also served on Ranamane.

[52] This complaint relates to an amount of R99 180.00 that was paid to Ranamane in respect of services rendered during February 2011. The relevant statements of account are attached to the letter of complaint. Initially an account in the amount of R129 447.00 was rendered but was subsequently reduced to R99 180.00. The complainant states that it is not satisfied with the amount in respect of Ranaman's fees and disbursements.

[53] If regard is had to the statement of account dated 20 October 2010 it appears to contain excessive and irregular entries and appears to confirm overreaching. For example, on 3 October 2010 Ranamane spent 22 hours on conducting research which on the face of it is excessive taking into account a 24 hour day. Further, on 3 October 2010 Ranamane spent 32 hours on the instruction for which a fee of R48 000.00 was debited. This is clearly an example of overreaching as it is not possible to spend 32 hours during a 24 hour day.

[54] It is therefore *ex facie* clear from the invoice itself that the firm dealt with NHLS matters at the time when both Ranamane and Phongo were co-directors of the firm. The invoice issued by the firm, however, specifically indicates that Ranamane and attorney Tuswa were the attorneys handling the matter.

[55] I have already pointed out that Ranamane has, on the day of the hearing, conceded that he had no defence against the charges levelled against him. Counsel on his behalf also wisely did not even attempt to deny the charge of overreaching.

[56] I am therefore satisfied that in light of the concession and the evidence that the applicant has established (an a balance of probabilities) the alleged offending conduct in respect of the NHLS complaint.

[57] It must, however, be pointed out that prior to the hearing Ranamane also vigorously disputed and defended this complaint against him. I do not intend, in light of Ranamane's concessions of wrongdoing, set out in detail the manner in which he defended this complaint. Suffice to point out that he raised a point *in limine* that an alleged dispute of fact existed in respect of the NHLS complaint and that the complaint cannot be resolved on the papers. He persisted with this point up until the hearing of this matter.

[58] In addition to the first point *in limine*, Ranamane raised a second point *in limine* alleging that the complaint by the NHLS does not constitute a complaint but merely calls for an investigation regarding the reasonableness of the fees charged and that the applicant is accordingly not entitled to refer to it or to treat it as a complaint. Apart from the fact that this contention is without merit, this *point in limine* serves to demonstrate the unwillingness of Ranamane to assist the court in these proceedings and to appreciate his conduct in circumstances where there simply is no defence against the account submitted to the NHLS which was patently excessive.

[59] In terms of the third point *in limine* raised by Ranamane, it is alleged that the application is premature and *ultra vires* as a result of the fact that the complaint was not investigated. This point *in limine* is equally unmeritorious: The applicant may exercise its disciplinary powers even in the absence of a complaint or even where its own disciplinary hearing has not yet been finalised or without any disciplinary inquiry having been conducted.

[60] Phungo submitted that the conduct complained of relates to the conduct of Ramanane and a professional assistant in the employ of the firm by the name of Zolelwa Tuswa ("Tuswa") and that he was not involved in the matter at all.

[61] In respect of Phungo it is accepted that he did not overcharge the NHLS. It is, however, also accepted that co-directors of a firm cannot blame one of their employees for irregularities in the firm and that directors are equally responsible for the conduct of their employees.

[62] It is therefore accepted that Phungo, as a co-director, is responsible for the conduct of their employees and that he, at all times, also had the obligation to supervise the firm's employees properly. Phungo is therefore, although to a much lesser degree than Ranamane who was directly involved in the NHLS matter, guilty of the offence by virtue of the fact that he was a co-director of the firm.

The Tywabi complaint:

[63] The applicant received a complaint from Wayne van Niekerk Attorneys on behalf of Tywabi. In terms of the complaint Tywabi purchased an immovable property in 2004. Ranamane was instructed to attend to the registration of the transfer after Tywabi had paid the purchase price and moved into the property during December 2004. Tywabi has also paid the transfer costs in the amount of R2 405.00. Ranamane failed to attend to the transfer of the property and as of today – 12 years later – the property has still not yet been transferred in the name of Tywabi.

[64] The seller passed away during December 2006. Since 2005 Tywabi has made at least ten attendances at the firm and was assured on each occasion that he would receive his title deed. It is common cause that he has not received the title deed.

[65] On 13 January 2013 the deceased's wife and an estate agent attended at the property and advised Tywabi that the property would be sold. It was then that Tywabi instructed Wayne van Niekerk Attorneys to assist him.

[66] Between 15 February 2015 and 30 May 2015 Van Niekerk addressed four letters to Ramanane. All went unanswered. A further letter dated 3 June 2013 also went unanswered.

[67] Finally on 8 July 2013 Ramanane sent an e-mail to Van Niekerk and enquired whether Tywabi would be prepared to consider settling the matter. Van Niekerk replied to this email and requested further particulars concerning the transaction. This letter again went unanswered.

[68] As was the case in respect of the two previous complaints, Ranamane has also now finally conceded that he did not attend to the transfer as was required from him. Counsel on behalf of Ranamane in fact conceded that Ranamane's conduct in respect of the Tywabi transfer was "shoddy".

[69] The conduct of Ramanane amounts to unprofessional, dishonourable and unworthy conduct. It is simply unacceptable that a member of the public should wait approximately 12 years for a property that he has bought and paid for to be transferred into his name. In fact, as already pointed out, Tywabi is still waiting for the property to be transferred into his name.

[70] Of concern again is the manner in which Ramanae dealt with this complaint. He dealt with the complaint by raising certain technical objections. Elsewhere in his papers Ramanane denied that Tywabi purchased the property and placed the applicant to the proof thereof. This denial should also be considered taking into account the fact that Tywabi had stated under oath that he purchased the property and the fact that Ramanane in a letter to the applicant dated 8 October 2013 acknowledged this.

[71] Once against, Ramanane's conduct in defending this complaint is not only inappropriate, but reflects negatively on him. Ramanane continued to dispute the complaint against him but at the same time did not deny that Tywabi had paid the transfer costs to him, that he failed to attend to the registration of the property and that he had promised Tywabi that he would provide him with the title deed to the property.

[72] In this regard, apart from the fact that Ranamane has conceded the offending conduct, it is clear from the papers that the offending conduct has been established on a balance of probabilities.

[73] In respect of Phungo, I am in agreement with the submission that the Tywabi complaint cannot be conceived as in any way directed at Phungo who became a co-director only years after he accepted the instruction to transfer the property.

Fidelity Fund Certificate

[74] It was common cause that Phungo practised as an attorney without being in possession of a fidelity fund certificate for the years 2005 to 2009 and that the applicant withheld the certificates.

[75] It is also common cause that the certificates were subsequently issued to Phungo.

[76] On behalf of the applicant it was submitted that, although the certificates were subsequently issued, the fact remains that Phungo practised as an attorney without being in possession of a Fidelity Fund Certificate and that this conduct constitutes a contravention of section 4(1) of the Act in terms of which it is peremptory to be in possession of a Fidelity Fund Certificate.

[77] From the papers it appears that no certificate was necessary for the year 2005 as Phungo did not practice for his own account and did not satisfy the test requiring a Fidelity Fund Certificate for that year. He did however for the years 2006 to 2009 practise without fidelity fund certificates.

[78] It is, however, also common cause that Phungo was vindicated by a decision of this court which ordered that his fidelity fund certificates be retrospectively issued.

[79] I am therefore in light of the peculiar circumstances of this complaint not persuaded that Phungo is guilty of this offence.

In summary

[80] Ranamane admitted having transgressed various provisions of the Act and the Rules in respect of the firm's trust account. These include the existence of a substantial trust deficit; irregular withdrawals from the trust banking account; irregular entries in the journals of the firm in an attempt to conceal a trust deficit in the firm's trust account and misappropriation of trust funds in the amount of R5 million. Ranamane has also admitted and it has been

established that he had overreached and he had failed to diligently and professionally attend to the transfer of the Tywabi property.

[81] Phungo has likewise accepted that his conduct of not paying any attention to the firm's trust account and the transactions transacted therein have contributed to the misappropriation of funds. Phungo has also accepted that, although he was not involved in the NHLS matter, he should have supervised the relevant attorneys who were involved in the matter more closely.

[82] I have also pointed out that it is accepted that Phungo is not complicit in the misappropriation of the R5 million from the trust fund. The disappearance of the R5 million must be laid squarely at the door of Ranamane. Phungo was nonetheless, as a director, jointly responsible for the management of the firm's trust account and consequently jointly responsible to comply with the provisions of the Act relating to the handling of trust funds.

Second enquiry: Fit and proper

[83] In light of the fact that both Ranamane and Phungo have admitted their wrongdoings, the next question to be considered is whether, in light of the misconduct thus established, Ranamane and Phungo are fit and proper persons to continue to practise as attorneys.

[84] Scott JA in *Jasat v Natal Law Society* 2000[3] points out that the discretion of the second stage "involves, in reality, a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment."

[85] The courts attitude towards the preservation of trust funds is well documented: In this regards various courts have consistently emphasised the important principle of the attorneys' profession that attorneys should at all times keep proper accounting records. Attorneys are obliged to keep

[3] (3) SA 44 (SCA) in paragraph (10)

proper records and books of account in line with generally accepted accounting practices and procedures. In general the courts regard a failure to keep proper accounting records as a serious contravention warranting an order that an attorney be either struck from the role or be suspended. See, for example, in this regard: *Cirota And Another v Law Society, Transvaal*:[4]

> "The failure to keep proper books of account as required by s 33 of Act 23 of 1934 is a serious contravention and our Courts have repeatedly warned that an attorney who fails to comply with the section renders himself liable to be struck off the roll or to suspension. (See, in this regard, *Incorporated Law Society v Benade*1956 (3) SA 15 (C) at 17 - 18, *Incorporated Law Society, Transvaal v S*1958 (1) SA 669 (T) at 675; *Incorporated Law society, Transvaal v Goldberg*1964 (4) SA 301 (T) at 303 - 4.) Non-compliance with the rules of the Law Society relating to the proper keeping of books is, in my view, also a serious matter.[5]

See also*: Holmes v Law Society of the Cape of Good Hope and Another Law Society of the Cape of Good Hope v Holmes*[6]

> "[28] The failure to keep proper books is a serious offence. The keeping of proper books underpins the Legislature's endeavours to protect the interests of the public. As succinctly stated by Van Winsen J in *Cape Law Society v Mda* 1971 (2) SA 201 (C) (at 204H):
>
> > 'It is not sufficient that trust moneys should not be misappropriated. It is equally necessary that an attorney's dealings with such moneys should be properly recorded. . . . Failing that, much of the machinery provided by the Legislature, eg regs 59 and 60, for the protection of clients, and, indeed, of the

[4] 1979 (1) SA 172 (A).
[5] At 193E – G.
[6] 2006 (2) SA 139 (C) at 152B – F.

> Attorneys', Notaries' and Conveyancers' Fidelity Guarantee Fund, is rendered nugatory.'

In respect of the important duty of attorneys to guard clients' trust accounts, the court in *Law Society, Cape v* Marock:[7]

> 'It cannot be sufficiently stressed that a careful adherence to the requirements of the law as to keeping of clients' trust accounts and the proper operation of a trust banking account number amongst the most important of the attorney's duties to his clients. The lack of strict compliance with these rules cannot fail to undermine the confidence of the public in the profession, a situation which, I hardly need stress, ensures to the detriment of all the members of the profession. It is, in my view, the Court's duty to take such action as is necessary to maintain, in full, that confidence and to make its condemnation of a departure from the requirements of the law, both with regard to the administration of a trust banking account and in regard to the proper keeping of trust accounts, plain for all to see.'"

[86] An attorney therefore has an absolute duty towards the preservation of trust funds. See in this regard *Law Society, Transvaal v Matthews* 1989(4) SA 389 (TPD) at 394 A-E:

> "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 in the possession of an attorney

[7] 1974 (2) SA 204 (C) at 206H -207A.

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 Viljoen* 1958 (4) SA 115 (T) at 118F - H. An attorney's duty in 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 905H. It is significant that in terms of s 83(13) of the Attorneys Act a practitioner who contravenes the provisions relating to his trust account and investment of trust money will be guilty of unprofessional conduct and be liable to be struck off the roll or suspended from practice."

[87] Ranamane's misappropriation of the R5 million from the firm's trust account reflects adversely on his honesty and integrity and constitutes a serious transgression of his duties as an attorney. I have repeatedly referred to the fact that the applicant's investigations demonstrate that in little over a month, R5 million were misappropriated from the trust account with no trace. Up until today Ranamane has made no attempt to explain the whereabouts of the R5 million. The only conclusion that the court can come to is that Ranamane has no appreciation of the seriousness of the offence and has no interest in taking this court into his confidence.

[88] The attorney's profession is an honourable profession. It is a profession that demands complete honesty, integrity and professionalism from its members. Ranamane's reckless conduct in respect of the trust funds deposited by the Department demonstrates an absolute lack of integrity towards his duties as an attorney. I have in light of the seriousness of the offence, especially in respect of the misappropriation of R5 million from the trust account little hesitation to conclude that Ranamane is not a fit and proper person to continue to practise as an attorney. Ranamane's overreaching and his failure to professionally and diligently attend to the Tywabi transfer are further clear indications that he is not a fit and proper person to practise as an attorney

[89] I am also of the view that Phungo is also not a fit and proper to practise as an attorney in light of his failure to properly ensure compliance with the Act and the Rules relating to the handling of trust funds. Although the moral culpability of Phungo is significantly less than that of Ranamane in light of the fact that he is not complicit in the misappropriation of trust funds, he is nonetheless found not to be a fit and proper person to practise.

Third enquiry: Approprate sanction

[90] The final question to consider is what would be an appropriate sanction in respect of Ramanane. (I will return to the position of Phungo hereinbelow.)

[91] As point of departure reference can be made to the decision in *Hepple v Law Society of the Northern* Provinces[8] where the court said the following in respect of the third leg of the enquiry namely whether an attorney should be removed from the roll of attorneys or whether an order suspending him from practice would be an appropriate sanction:

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

[92] I have, in addition to the seriousness of the misconduct, also taken into account the manner in which Ranamane has conducted himself in defending

[8] 2014 JDR 1078 (SCA).

the complaints against him. In this regard two observations can be made: Firstly, the manner in which Ranamane had opposed this application shows a total disregard of his duties as an officer of this court. He raised endless *points in limine* and went out of his way to delay the finalisation of this application. Secondly, Ranamane's continued and persistent denial of any wrongdoing even in the face of overwhelming evidence of such misconduct reveals a total lack of understanding of his conduct.

[93] I have referred to the fact that the application against Ranamane has been pending since 2102 and that the process has been marred by attempts from Ranamane to prevent this application from serving before this court. Ranamane also raised numerous unmeritorious points in *limine* which only resulted in frustrating attempts to bring this matter to finality. His conduct in defending this matter is, in my view, a further indication that he is not a fit and proper person to continue to practise as an attorney. S*ee in this regard: Prokureursorde aan Transvaal v Kleynhans.*[9]

> "Verder moet dit nie uit die oog verloor word nie dat die Hof te doen het met 'n ondersoek van 'n dissiplinêre aard wat *sui generis* is. Hieruit volg dit dat van 'n respondent verwag word om mee te werk en die nodige toeligting te verskaf waar nodig ten einde die volle feite voor die Hof te plaas. Blote breë ontkennings, ontwykings en obstruksionisme hoort nie tuis by dissiplinêre verrigtinge nie.

See also *Law Society of the Northern Provinces v Sonntag:*[10]

> "[18] The conduct of the respondent in defending the charges brought against her was wholly unsatisfactory. She attacked the appellant for referring to further complaints against her, accused it of unprofessional and unethical conduct, and sarcastically questioned its ability to distinguish between different kinds of offers of settlement. This was uncalled for. But the matter goes further. Far from disclosing at the

[9] 1995 (1) SA 839 (T) at 342I – 343A.
[10] 2012 (1) SA 372 (SCA)**.**

outset fully and openly all the circumstances of her relationship with Van Schalkwyk and Swanepoel, the truth emerged only gradually. Initially she repeatedly denied that she and Van Schalkwyk shared fees. It was only in her affidavit responding to the appellant's replying affidavit that she admitted that this had occurred. But her admission was not unconditional but an attempt to justify her actions in some or other way. She admitted to Ms Geringer that Van Schalkwyk at some or other stage had shared an office with her. He did and indeed kept the third party files there. In her answering affidavit, however, she emphatically denied that this had been the position. But she admitted in her affidavit responding to Ms Geringer's report that Van Schalkwyk came and went to her offices as he liked until she stopped him in 2005. The minutes of the staff meeting of 5 October 2005 make clear references to Van Schalkwyk's office. Her denials that he had an office are simply not credible. The respondent denied that she had 'purchased' third party claims. She denied that she had advertised the services of Van Schalkwyk. She denied, during her interview with Geringer, that she had paid the touts employed by her. All these denials have been shown to be untruthful. She never informed the court of the real extent of the third party work undertaken by her firm, the fees earned and amounts paid to her touts. The fact that her trust account was properly kept is irrelevant. Her plea of guilty does not assist her for she attempted to withdraw it. It has been observed that '(t)he attorneys' profession is an honourable profession, which demands complete honesty and integrity from its members'. The various defences and the manner in which they were raised by the respondent cannot be said to evince complete honesty and integrity. The court below misdirected itself by not considering these factors."

[94] Although it is so that Ranamane did eventually own up to his misconduct, this only happened on the day of the hearing when his counsel addressed the court. As already pointed out, counsel in his address conceded that he can advance no submissions in respect of the various offences and

proceeded to only make submissions in respect of a penalty short of striking-off the role.

[95] The submissions in respect of an appropriate penalty should, however, also be seen against the fact that, a day before the hearing, Ranamane's attorneys addressed a lengthy letter to the applicant accusing it of being inconsistent in dealing with the complaints against Ranamane. In the letter it is also stated that there exists a dispute of facts and that the applicant has caused substantial prejudice being suffered to Ranamane. More instructive is the threat contained in the letter that should the applicant not revert back to Ranamane's attorneys by 16H00 (the day before the hearing) and agree to stay the proceeding against him, a formal application will be brought.

[96] From the contents of this letter it is clear that, once again, at the 11th hour, Ranamane made a desperate attempt to prevent this court to deal with this application that has been pending since 2012. This letter, written a day before the hearing, casts, in my view, serious doubts on the *bona fides* of Ranamane.

[97] This brings me to question whether Ranamane and Phungo should be removed from the role of attorneys or whether an order suspending them from practise would be an appropriate sentence taking into account all relevant circumstances.

[98] I am mindful of the fact that the decision to strike-off an attorney from the role is a narrow one. I am also mindful of the fact that, although an offence involving dishonesty will normally lead to a striking-off, a court must nonetheless carefully consider all relevant facts. See: *Malan and Another v Law Society, Northern Provinces*[11] where the court held as follows:

> "[10] The appellants relied on *Summerley v Law Society, Northern Provi*nces2006 (5) SA 613 (SCA) for the proposition that unless a court

[11] 2009 (1) SA 216 (SCA).

finds dishonesty during the first leg of the inquiry, it ought not to remove the attorney concerned from the roll. In *Summerley* the following was said in connection with the exercise of this discretion (at para 21):

The further argument on behalf of the appellant was that, as a general rule, striking-off is reserved for attorneys who have acted dishonestly, while transgressions not involving dishonesty are usually visited with the lesser penalty of suspension from practice. Although this can obviously not be regarded as a rule of the Medes and the Persians, since every case must ultimately be decided on its own facts, the general approach contended for by the appellant does appear to be supported by authority [citations omitted]. This distinction is not difficult to understand. The attorney's profession is an honourable profession, which demands complete honesty and integrity from its members.

Obviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal. (Exceptional circumstances were found in *Summerley* and in *Law Society, Cape of Good Hope v Peter* [2006] ZASCA 37 and the court was able in the formulation of its order in those cases to cater for the problem by requiring that the particular attorney had to satisfy the court in a future application that he or she should be permitted to practise unconditionally.) Where dishonesty has not been established the position is as set out above, namely that a court has to exercise a discretion within the parameters of the facts of the case without any preordained limitations".

[99] In respect of Ranamane it was concluded that he has misappropriation trust funds in the amount of R5 million. It was further concluded that Ramanane is guilty of the offence of overreaching in respect of the NHLS account and that he has failed to professionally attend to the transfer of the Tyawi property.

[100] I am of the view that the transgressions in this matter are so serious that it warrants the striking-off of Ranamane. Ranamane has displayed a total disregard for the professional duties of the attorneys' profession and had displayed a total lack of honesty and integrity.

[101] On behalf of Phungo it was submitted that the fact that an attorney may be guilty of professional misconduct does not necessarily mean that he should be removed from the roll of attorneys. I am in agreement with this submission and I should also point out that this is also the approach of our courts. See *Hepple v Law Society of the Northern* Provinces:[12]

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

[102] I am, however, mindful of the fact that despite a finding that Phungo failed to safeguard trust monies, it does not follow that an order removing him from the role is necessarily an appropriate sanction. In this regard I have taken into account the fact that, although he was negligent and that he had failed to properly apply his mind to the affairs of the trust fund, it cannot be said that he was dishonest and deceitful when he failed to take the necessary steps to ensure that trust monies were not misappropriated. No case has been made against Phungo that he benefited from the misappropriation. I have also taken note of the fact that Phungo, albeit after a long time, finally owned up to the fact that he did not properly execute his duties as an attorneys towards the safeguarding of trust funds.

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[12] 2014 JDR 1078 (SCA).

[103] On behalf of Phungo it was submitted that this court should consider a lesser sanction than a sanction striking him off the role. I am of the view that it would not be an appropriate sanction to remove Phungo from the roll and that a lesser sanction should be considered.

[104] I have also taken into account that Phungo has been practicing for his own account since March 2011 without a partner and that he has consistently been issued with the appropriate Fidelity Fund Certificates by the applicant. It is also common cause that there are no pending complaints against him. See in this regard: *Law Society, Transvaal v* Matthews[13] where the court held as follows:

> "It was further submitted that this Court should take into account that the respondent has practised on his own account since May 1984 without any complaint by the Law Society in regard thereto and without his having transgressed any professional rule or requirement, whether statutory or otherwise. This is true and we are fully aware of that position.
>
> It was further submitted that in the circumstances it would be unduly harsh and wrong to strike him off the roll. Counsel relied heavily for this submission on the decision in *Vereniging van Advokate van Suid-Afrika (Witwatersrand Afdeling) v Theunissen* 1979 (2) SA 218 (T). The headnote at 219H reads:
>
> > 'When a body such as the Society of Advocates or the Incorporated Law Society acts against a member then it must act responsibly from the point of view of that member's interest and it must go about it with necessary care and compassion. It borders on the inhuman to allow a person to continue for three years to pursue his calling for which he is qualified without doing anything and then suddenly bringing down the axe on his head.'"

[13] 1989 (4) SA 389 (T).

[105] In light the foregoing I am therefore of the view that it would not be appropriate to strike Phungo from practicing as an attorney but to suspend him from practice and to suspend the suspension order. A similar approach was followed in *Law Society of The Cape of Good Hope v C:*[14]

> "There have been many cases in which a Court has not found that an attorney is unfit to practise but has nevertheless suspended him from practice and suspended the suspension order. One such case is *Incorporated Law Society, Transvaal v G*1953 (4) SA 150 (T) where MURRAY J said at 160E - F:
>
> > "We have come to the conclusion that the case, although proved against the respondent, is not of such gravity as to require the drastic step of removing respondent from the rolls of the attorneys, notaries and conveyancers of the Court. At the same time we entertain a very unfavourable view of his conduct; his conduct as proved to us passes beyond that which could appropriately be dealt with by a reprimand, however severe. It appears to us that some form of disciplinary action midway between the drastic step of striking off and the mere administration of a reprimand must be imposed."
>
> Other such cases are to be found in the list of cases set out in *The Law of South Africa* vol 14 at para 357.
>
> > If a Court makes an order suspending an attorney from practice it follows that at the end of the period of suspension he is automatically entitled to resume practice. In making such an order the Court is not necessarily giving effect to a finding that he is unfit to practise.
> >
> > It follows from what has been said above that the Court has retained its common law power to suspend an attorney from practice by reason of unprofessional conduct falling short of what is required for his striking off. If the legislation had intended to deprive the Court of its common law power to suspend an

[14] 1986 (1) SA 616 (A).

attorney (or to suspend such a suspension order) in cases where it has not been shown that the attorney is unfit to practise, the old s 28 *bis* and the new s 22 (1) *(d)* would have been differently worded."

[106] I should also point out that the suspension of the suspension order was debated with Mr Smith on behalf of the applicant who conveyed to the court that the applicant does not in principle have a problem with a suspension order nor with an order suspending the suspension.

[107] In the event the following order is made:

Order in respect of the first respondent: Mr Paul Modikeng Ranamane

1. The name of Mr Paul Modikeng Ranamane is hereby struck from the roll of attorneys of this Court.
2. The relief as set out in paragraphs 4 up to and including paragraph 14 of the order of this Court dated 10 March 2015 will remain in force.
3. Mr Ranamane is ordered to pay the costs of the application on the scale as between attorney and client.

Order in respect of the third respondent: Mr Lavhelesani Limon Phungo

1. Mr Lavhelesani Limon Phungo is suspended from practicing as an attorney of the High Court of South Africa for a period of one year.
2. The suspension provided for in paragraph 1 of this order is suspended for a period of three years on condition that he does not make himself guilty of any of the provisions of the Attorneys' Act and/or the Law Society's Rules during the period of suspension.
3. Mr Phungo is ordered to pay the costs of the application on the scale as between attorney and client

_____

AC BASSON

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

_____

M SENYATSI

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant	:	Mr PJ Smith
Instructed by	:	Rooth & Wessels Inc.
For the first respondent		
Instructed by	:	Ranamane Mokalane Inc
For the second Respondent	:	Michale R Hellens SC
Instructed by	:	Hogan Lovells (South Africa) Inc