IN THE HIGH COURT OF SOUTH AFRICA
NATAL PROVINCIAL DIVISION

CASE NO: 11576/07

In the matter between:

KWAZULU-NATAL LAW SOCIETY **APPLICANT**

and

PETER EDWARD VAN ROOYEN **RESPONDENT**

JUDGMENT

VAN HEERDEN AJ

1. Before us is an application brought by the KwaZulu-Natal Law Society ("applicant") to have the name of Peter Edward van Rooyen ("respondent") struck off the roll of attorneys of this Court.

2. In its founding papers applicant, through Mr Alfred Collen Rees its manager: Regulatory Affairs, contends that respondent is not a fit and proper person to continue practise as an attorney because, according to Mr Rees.

    (a) he submitted false claims to the Legal Aid Board ("the board") in respect of travelling expenses allegedly incurred by him in matters where he was instructed by the board;

(b) in the course of criminal proceedings instituted against him arising from the aforesaid claims he, in a plea bargain, admitted that his conduct in lodging such claims was wrongful and reckless and resulted in a loss to the board;

(c) he was thereafter convicted on five counts of fraud in respect of which he received a four year term of imprisonment suspended for five years.

3. According to Mr Rees "*the facts and circumstances which give rise to the aforesaid criminal proceeding being instituted against the Respondent"* appear from an affidavit deposed to by one Peter John Brits, who describes himself therein as the Legal Support Service Executive of the board. This affidavit was received by applicant under cover of a letter of complaint addressed to it by the board, the details of the complaint allegedly being contained therein. This affidavit was annexed to the founding papers in the present application and its contents constitute the basis of the relief the applicant claims.

4. The affidavit of Mr Brits, however, is flawed in material respects. In it's first five paragraphs information of a general nature appears, i.e. the identity of the deponent; a description of the manner in which legal aid instructions are issued and an explanation of the steps normally taken to tax and check a submitted account, before the board effects payment. However, in the preamble to paragraph 6, Mr Brits describes how Avalanche Forensic Services (Pty) Limited ("Avalanche") on behalf of the board, analyzed various accounts submitted to the board by one Viren Singh in respect of the latter's conduct of criminal cases. Mr Brits then proceeds to mention that Avalanche in several instances ascertained that the accounts of Mr Singh cannot be reconciled with information presented to the board by <u>him</u>. Mr Brits mentions that Avalanche had managed to identify

821 (Eight hundred and twenty one) incidents "*in which claims appear to be irregular*". He then proceeds to summarise the nature and extent of the alleged irregularities but does so on the basis that such irregularities were committed by respondent. In paragraph 7 Mr Brits then concludes that it would appear that "*the attorney*" gave out and presented to the board*:*

> "*7.1 that he was entitled to fees for appearances in Court on dates on which he did not in fact appear; and/or*
> *7.2 that he was entitled to fees for appearances in Court on dates on which the cases concerned did not come before Court; and/or*
> *7.3 that the was entitled to be reimbursed in respect of travelling expenses for travelling to a Court on a date on which the legal practitioner concerned had previously presented to the board that he was entitled to be reimbursed by the board for travelling to the same Court in respect of another matter; and/or*
> 7.4 *that he was entitled to be reimbursed in respect of travelling expenses for travelling to Court on dates on which he did not in fact appear before Court; and/ or*
> *7.5 that he was entitled to be reimbursed in respect of travelling expenses for travelling to Court on dates on which the cases concerned did not come before Court."*

5. In the final two paragraphs of his affidavit Mr Brits mentions that the total amount overcharged by "*the attorney*", presented to him by Avalanche, was approximately R468 653.25, and that he suspects that "*the attorney*" might have committed fraud and that it would be appreciated if applicant could investigate the matter further.

6. It was obviously incumbent on applicant to investigate the matter further, and clarify the confusion. For a start applicant could not have known whether it was dealing with a complaint levelled against attorney Viren Singh or against respondent.

7. Mr Rees, who deposed to the founding affidavit on behalf of the applicant, explains how he, on numerous occasions, unsuccessfully

attempted to contact Mr Brits in order to clarify this confusion. According to Mr Rees the applicant's legal representatives did eventually manage to contact Mr Brits who apparently gave them the undertaking that he would furnish an affidavit "*correcting the errors in his previous affidavit".* This undertaking prompted Mr Rees to venture that "*should it become necessary in these proceedings, I will ask for leave to supplement this affidavit to include a further affidavit from Mr. Brits".*

8. However, no such further affidavit was apparently received from Mr Brits. If it was, same was certainly not placed before us. Nor, for that matter, did the Applicant seek to place before court an affidavit from Avalanche to either confirm its findings and/or to clarify the aforesaid confusion from its perspective.

9. It would indeed appear that for the following two years applicant did not carry out any investigations into the matter until it was advised in February 2006 that respondent had, already in July 2005, been convicted of fraud relating to matters he handled on behalf of the board.

10. A flurry of correspondence then ensued between Mr Rees and respondent and this resulted in the latter furnishing applicant with an incomplete copy of the charge sheet and of the Plea and Sentence Agreement he concluded with the State. Upon being requested to do so respondent also prepared "*written submissions*" and presented same to applicant. These documents formed part of applicant's founding papers.

11. The charge sheet, as placed before Court, was also a confusing document. It specifies 1662 (One Thousand Six Hundred and Sixty Two) counts of fraud against respondent. These counts were, however, categorised, the details of which apparently appear in various columns of the schedule that was supposed to be attached

to the charge sheet, but was not, despite being forwarded to applicant in response to its request by respondent under cover of a letter dated 23 November 2006. This omission makes it difficult, to follow and understand the charges levelled against the Respondent in the Regional Court with the necessary degree of certainty, except that it is apparent that such charges related to alleged fraudulent claims for travelling expenses submitted by respondent to the board.

12. In the result this Court was by and large confined to respondent's version to determine and understand the nature and extent of his alleged transgressions.

13. Respondent's version emerges from the Plea and Sentence Agreement, his written submissions to applicant and the opposing papers he filed in this matter. This version is as follows.

14. Respondent commenced practise as a sole practitioner in Mtubatuba in or about November 1994. According to him the bulk of his practise eventually consisted of criminal work and of that approximately 90% emanated from the board. Initially legal aid instructions were, according to him, fewer and manageable but increased rapidly as the years went by. In the execution of his instructions and duties respondent, almost on a daily basis, travelled from Mtubatuba to places as far north as Ubombo, Ingwawuma and Kwangwanazi and places as far west as Vryheid and Paul Pietersburg, and back.

15. Respondent explains that from inception accounting to the board in respect of travel claims in instances of more than one instruction to the same venue on the same day was problematic, *inter alia,* for the following reasons:

(a) In most such instances, although an appearance in one matter might initially coincide with an appearance in one or more other matters, the different instructions were often not finalised on the dame day, or as the same venue for that matter. Some of these matters would be transferred to the Regional Court for finalisation, and a period of six months or more would elapse before a matter was finalised, and then periods of up to six years would go by before payment was received.

(b) Often payments were of a composite nature in that payment of a single cheque or direct deposit was received in respect of any number of cases, often with incorrect reference numbers. In some instances payments were received in respect of certain matters which did not correlate with the accounts submitted for such matters and generally payments were difficult, if not impossible, to reconcile with accounts tendered.

16. Respondent explains that when he commenced acting for the board in 1994, he claimed travelling expenses in respect of each matter he attended at a specific venue irrespective of whether he attended to another matter at that venue on the same day. He said he did so because he fully expected the board to "*tax off*" any duplication.

17. He mentions that on Tuesday 29 November 1994, after having been in practise for some three months and having submitted a total of 16 (sixteen) accounts to the board, he received a telefax from the Deputy Director of the board, Mr JL Weyers, the contents of which fortified his expectation that accounts submitted to the board would be subjected to a process of taxation to ensure that duplicated claims for travelling expenses were not paid.

18. Respondent points out that the fact that the board was satisfied with the manner in which he accounted was confirmed in a subsequent

telephone conversation with Mr Weyers. The purpose of such call initially being to explain to him the practical difficulties of keeping record of simultaneous appearances on one day, at one or more venues, especially when such matters were not finalised on the same day. He mentioned to Mr Weyers that in the context of his practise still being unsophisticated this presented as a real problem, especially against the background of rapidly increasing instructions to him. Respondent mentions that he and Mr Weyers then agreed that Respondent would endeavour to continue to reflect on his accounts to the board those matters where travelling expenses were shared, as he in any event was in a habit of doing up to then, and that the board would continue to tax of any duplication.

19. Respondent mentions that in this conversation he and Mr Weyers also discussed the possibility of respondent submitting claims for travelling expenses on a pro rata basis in a situation where his appearances at a specific venue and on a specific day coincided. Respondent says that he did indeed attempt to account on this basis at some later stage but explains that this method of accounting proved to be even more problematic.

20. In this regard respondent explained, by way of example, that where the distance of a return trip between Mtubatuba and Ingwawuma for instance was 400 (Four Hundred) kilometres and the tariff R1.00 per kilometre, his entitlement would in the normal course be limited to R400.00 (Four Hundred Rand). However, where he attended to two matters on that day at the same venue his claims would reflect a distance travelled in respect of each matter of 200 (Two Hundred) kilometres. This method of accounting proved impractical for reasons mentioned hereunder and so did his attempt to reduce the amount instead of the kilometres travelled on a pro rata basis.

21. Respondent explains that during one of his visits to the board in Pretoria he was advised that the board's computer program could

not accommodate a system of reducing on a pro rata basis either the tariff or distance travelled and that Respondent should in future rather continue to submit travelling claims in full in respect of each instruction as the board's computer programs would automatically tax off any duplications.

22. Respondent mentions that the aforesaid arrangements were confirmed by representatives of the board during the plea bargaining negotiations at the criminal trial.

23. According to Respondent he then continued to submit travelling claims to the board in respect of each case, irrespective of any overlapping or duplication.

24. As it turned out, however, the board did tax off some of the claims but, in many instances, they paid the full amounts claimed in respect of travelling in each instance. This resulted in the overpayment of travelling expenses, and sometimes substantially so. Respondent emphasises though that he was never aware of the fact that he was being overpaid. He mentions, however, that his counsel at the criminal trial explained to him that there rested a duty on him to have checked the payments received from the board against claims submitted to it and that, had he done so, he would have discovered that he was being overpaid in this manner. This, so respondent's counsel explained to him, was enough reason for a Court to reach the conclusion that he was sufficiently reckless, on the basis of *dolus eventualis,* for a finding to be made that respondent had the necessary intention to defraud the board.

25. Respondent explains that this advice played an important role in convincing him to plead guilty to only five of the counts of fraud levelled against him on the basis suggested by his counsel.

26. Respondent furthermore explains that in his experience the payment of accounts by the board to attorneys in general had always been problematic. He mentions that in 1999, in a letter dated 4 August 1999, he complained to the board that the latter was indebted to him in a sum in excess of R180 000.00 (One Hundred and Eighty Thousand Rand) and that as a sole practitioner he could hardly carry this burden. He says that this letter, as well as a number of follow-up letters, went unanswered. He mentions that he unsuccessfully spent many hours on the telephone trying to arrange meetings with the board to address the ever increasing backlog of fees due to him. All of this, he says, came to nothing. He mentions a Sunday Times article, dated 31 October 1999, which reported a showdown between the board and lawyers threatening not to accept any further work from the board because of outstanding fees. In this regard he says the newspaper reported on efforts made by the board to speed up the payment of, at that stage, approximately 80 000 (Eighty Thousand) outstanding fee claims owed by the board to lawyers for work dating back as far as 1992. He said these efforts were also futile. In this regard respondent referred to a document he compiled after attending a roadshow at Durban on 29 October 1999 and where a representative of the board mentioned that, at that stage, there were about 400 000 (Four Hundred Thousand) outstanding accounts totalling approximately R460 million, with some of the accounts still dating back to 1992. Respondent also referred to a copy of his bank account which reflected a deposit of R28 415.00 (Twenty Eight Thousand Four Hundred and Fifteen Rand) by the board into his account without any remittance advice ever being received in respect of such payment.

27. Respondent proceeds to mention that when payments were eventually received this, more often than not, occurred many months and often even years after the event. He mentions that claims were invariably paid "*in bulk"* and at any given time

represented but a fraction of the total amount due, owing and payable to him. According to respondent it was almost impossible to reconcile payments with accounts submitted and that if and when a payment was received, it was a "*red letter day*" in his office. Respondent explains that it did not occur to him to spend hours on end attempting to reconcile such payments with claims submitted in the distant past, without him having sufficient information at his disposal to do so. He mentions that his staff initially queried payments which were not sufficiently identified so as to reconcile it with claims submitted, but that no response was ever received.

28. Respondent mentions that the situation regarding payment from the board did not improve with the passage of time and when he was charged he was owed in the region of R1 112 600.00 (One Million One Hundred and Twelve Thousand and Six Hundred Rand) by the board. He explains that at that stage the accounting system which had gradually evolved in his office was "rather simple", in matters involving the board, in that the total outstanding amount due to him was periodically just "*tallied and eyed*" and that it was this figure which he kept in mind when payment was received from the board.

29. Respondent mentions that the aforesaid background was discussed at length with those representing the State during the plea bargaining negotiations. He says that he took the decision to play open cards with the State as it was abundantly clear that the board wished to proceed with the matter. The resulting trial would have been of such length and complexity that he would have been financially ruined, regardless of the outcome thereof. According to respondent he wished to avoid this and also the possibility, however remote, that he might be convicted and possibly incarcerated. He says that he was not prepared to take this risk and was therefore prepared to enter into the plea bargaining process. He mentions that it was only after counsel for the State consulted with the board and was satisfied that at all stages respondent was owed more

money by the board, than the other way around, that the plea bargaining arrangements were finalised and agreed upon.

30. Respondent mentions that during the aforesaid negotiations the board agreed that after the criminal proceeding it would reconcile its account with him and pay him what was due. This arrangement, according to respondent, was confirmed by Mr Brits in a letter dated 6 July 2005, a copy of which was attached to applicant's founding affidavit.

31. Respondent mentions that after the criminal proceedings were disposed of he indeed received from a Mrs Veary of the board an exposition of what the board considered to be a summary of his outstanding accounts. A copy of this document was attached to the respondent's answering affidavit in the present proceedings and on the last page thereof the board tendered to pay to the Respondent "*in full and final settlement*" the sum of R315 546.75 (Three Hundred and Fifteen Five Hundred and Forty Six Rand and Seventy Five cents).

32. According to Respondent Ms Veary, subsequently revoked this offer and indicated to Respondent that he was free to litigate mentioning, in the process, that should he decide to do so he should be mindful of the fact that his claim had already prescribed. Respondent explains that he decided not to take matters any further in the circumstances.

33. Respondent emphasises that the board had suffered no prejudice or financial losses, nor were they in danger of doing so as a result of his conduct. He mentions that he, in turn, had to write off considerable amounts of money due to him by the board. He also mentions that his conviction had dire and far reaching consequences for him, one of which was the fact that he could no longer serve as councillor, as he previously did and that any

application for a firearm, or emigration, or travel to foreign countries, now presented as a problem, as was employment in the formal sector. He argues that the unfortunate sequence of events in respect of which he was found guilty related to a single client only, being the board, who has in any event stopped all instructions to him and that there was accordingly no longer any danger of the situation repeating itself. He therefore reasoned that the board no longer needed to be protected from possible future prejudice by his striking-off. He argues that the general public had not been affected in any way at all and did not require that he be disbarred from practise in order to protect them as a body. He emphasises that trust funds were not involved.

34. In reply Mr Rees, on behalf of applicant reasoned that respondent, by admitting to have submitted two or more claims for travelling expenses to the same court, on the same day, had in effect, acknowledged that he committed fraud. Mr Rees argued that respondent's contention that he was instructed by the board to account in the manner he did should be rejected outright. Mr Rees accordingly claims that the name of respondent should be removed from the roll of attorneys on the basis that he committed fraud.
Mr Rees argued further that respondent's failure to keep a proper bookkeeping system, sufficiently adequate to detect duplicated payments, *per se,* meant that respondent was not a fit and proper person to practice as an attorney.

35. The approach to be followed when considering whether or not to strike the name of a practitioner from the relevant roll has been authoritatively set out in **Law Society of the Cape of Good Hope v Budricks 2003 (2) SA 11 (SCA)** by **Hefer AP,** at page 13. Referring to the wording of Section 22 (1) (d) of the Attorneys Act 53 of 1979 ("*the act*") to the effect that an attorney may be struck from the roll or suspended from practice if he, in the discretion of the court, is not a fit and proper person to continue to practice as an

attorney, the learned Acting President pointed out that the practical manner in which courts should exercise their disciplinary powers involve a threefold enquiry:

> "*the court first decides as a matter of fact whether the alleged offending conduct has been established. If the answer is yes, a value judgment is required to decide whether the person concerned is no longer a fit and proper person as envisaged in s 22 of the Act. If the answer is again in the affirmative, the court must decide in the exercise of its discretion, whether, in all the circumstances of the case, the person in question is to be removed from the roll or merely suspended from practice.*"

36. The thrust of the offending conduct applicant complains of relates to the five counts of fraud of which respondent was convicted in the Regional Court. The confusing contents of the affidavit deposed to by Mr Brits and the fact that the charge sheet placed before us was inadequate, make it impossible for this Court to consider the veracity of the bulk of the charges preferred against respondent in the Regional Court. In any event, it would appear that applicant confined its attack on respondent to the five charges to which he pleaded guilty. In this regard Mr Rees expressed himself as follows in paragraph 24 of the founding affidavit:

> "*I respectfully submit that the respondent's misconduct, which is set out above in respect of which he pleaded guilty to five counts of fraud and was thereafter convicted, indicate that the respondent is not a fit and proper person to practice as an attorney and that, on this ground, the court ought to strike his name off the roll of attorneys*"

37) In the Plea and Sentence Agreement respondent, in respect of the five counts to which he pleaded guilty, admitted that whilst claiming for the travel expenses concerned, he recklessly omitted to indicate to the board that the said claims coincided with other claims. He nevertheless carelessly and with appreciation of the risk that the board might unwillingly overpay him for such claims, accepted this risk by continuing to claim in this manner. He thus foresaw the risk to the board as a reasonable possibility and reconciled himself therewith. It is

clear that, by way of the plea agreement, respondent tendered his plea on the basis of *dolus eventualis*.

38) In his answering affidavit in these proceeding respondent does not seek to deny the correctness of his aforesaid admissions. Instead he was at pains to explain the circumstances which gave rise to his conduct, such having been narrated in some detail above and need no repeating. Applicant in reply did not dispute the circumstances alluded to by respondent.

39) Suffice it to say that such circumstances do not serve to exonerate respondent from his criminal conduct. The fact remains though that carelessness, rather than direct intent, underlies such conduct. This, in my view, is an important consideration in the process of determining whether respondent remains a fit and proper person to continue practice as an attorney.

40) The fact that respondent conducted himself in this careless manner must, however, not be considered in isolation. The context within which this conduct took place is important and in my view the following surrounding circumstances, alluded to by respondent, should carry some weight:

(a) The fact that respondent's multiplication of travelling claims was sanctioned by the board.

(b) The fact that such claims were submitted openly in the full expectation that the board would reconcile same and only pay to respondent what was due.

(c) The fact that the board's tardy payment of outstanding accounts made it extremely difficult for respondent to detect any overpayment.

41) Having regard to the threefold enquiry postulated in the Budricks matter this court is charged with first having to decide whether the alleged offending conduct has been established. In my view it was established. Respondent's conduct of simply "*tallying and eyeing"* the balance owing to him by the board when payments were made, and without a bookkeeping system in place sufficiently adequate to detect any over payments, amounted to a cavalier approach that was careless in the extreme.

42) If the answer to the first enquiry is "*Yes"* then a value judgment is required to decide whether or not respondent remains a fit and proper person to continue practice as an attorney. In this regard it is perhaps significant that applicant did not seek to suspend respondent from practice during the interim and pending the return date of the *Rule nisi*. I must hasten to add, though, that applicant persistently insisted on respondent's removal from the roll. Be that as it may, respondent has remained in practice since March 2004, when applicant received a letter of complaint from the board, and has apparently done so since then without any blemish. Then, of course, there are the surrounding circumstances already mentioned above. Mr Pretorius, who appeared for the applicant, submitted that the fact that respondent failed to maintain a proper accounting system capable of detecting the overpayments ought to be an additional factor which weighs against respondent remaining on the roll of attorneys. That this should be so cannot be doubted. However, its impact is, in my view, compromised by the chaotic manner in which the board conducted its affairs and specifically, effected payment of attorney's accounts. Respondent's detailed account of the board's failings in this regard went unchallenged, as did his statement that it was in the circumstances almost impossible to account properly to the board. Mr Pretorius also submitted that respondent's transgressions involved dishonesty and that this should militate against respondent remaining on as an attorney. I disagree with Mr Pretorius in this regard. Respondent's conduct involved reckless disregard of possible overpayments and not

conscious dishonesty. The difference between these two concepts, especially in the context of this case, is in my view important.

43) I am persuaded that respondent is no longer a fit and proper person with the meaning of the provisions of s 22(1) (d) of Act 53 of 1979. In the exercise of the discretion the court has in this regard, the circumstances and factors referred to by respondent were carefully considered, as were the submissions of applicant. In my view respondent's conduct, in all the circumstances, falls short of that which the court expects from an attorney.

44) Having concluded that respondent's fitness to continue practice as an attorney has been compromised, the third leg of the enquiry postulated in the Budricks matter comes into play. Respondent needs to be sanctioned, and sternly so. Respondent's conduct of duplicating claims for travelling expenses was, however, shy of being intentional. In the end the absence of intentional dishonesty (*dolus directus)* in respondent's course of conduct becomes decisive of whether or not he should be permitted to continue to practise as an attorney. The fact remains, that respondent's transgressions are of a serious nature and he ought to be punished appropriately. What must be kept in mind is that the board in the end suffered no real financial prejudice. It had, in a manner of speaking, the last laugh when successfully threatening prescription as a defence to respondent's acknowledged claim of R315 546.75 (Three Hundred and Fifteen Five Hundred and Forty Six Rand and Seventy Five cents). I also keep in mind the fact that respondent's actions related to one single client only and not to the public at large.

45) The sanction to be imposed upon respondent depends upon the consideration and weighing up of many factors relevant to the particular circumstances of each matter. These include the nature and extent of the misconduct determined, the extent to which such conduct adversely reflects upon respondent's character or demonstrates him to be unworthy as a member of the attorney's profession, the likelihood of

repetition and the need to protect the public. In the light of all these considerations the court, firstly needs to decide whether respondent's removal from the roll of attorney's is called for. In my view it is not. The second consideration is then whether respondent should be suspended from practice for a certain period. In my view the severity of the sanction to be imposed needs
58 to satisfy the needs to protect society, the profession and the intent of the errand practitioner.

46) In the present matter, as I have indicated, intentional dishonesty (*dolus directus)* was not involved. Respondent has suffered severe punishment and disabilities flowing from the criminal conviction and the circumstances in which the misconduct occurred are unlikely to be repeated in the future. Respondent, however, needs to be punished in such a manner as to remind him, for some time to come, of the seriousness of his misconduct, while improving his accounting and administrative skills so as to avoid even inadvertent repetition of the kind of conduct which gave rise to the present proceedings. The sanction must, at the same time also act as a warning to other practitioners that they too should guard against lax and inattentive accounting or administrative practices, which could result in prejudice to their clients, or the public at large.

47) In my view a sanction involving a suspension from practice, itself conditionally suspended, coupled with a fine partly suspended, is called for in all the circumstances of this matter.

48) I propose to make the following order:

1) Respondent be and is hereby suspended from the practice of an attorney for a period of 2 (two) years.
2) Respondent is ordered to pay a fine of R20 000.00 (Twenty Thousand Rand), such payment to be made to the KwaZulu Law Society.

3) The order in paragraph 1 and one half of the fine mentioned in paragraph 2 hereof is suspended for a period of 3 (three) years on the following conditions:

3.1) The respondent is not convicted of a criminal offence for which he is sentenced to a period of imprisonment without the option of a fine.

3.2) The respondent is not found guilty of professional misconduct by a court with regards to his practice as an attorney.

3.3) The respondent completes to the satisfaction of applicant the Finance and Bookkeeping module and the Practice Administration module of the LEAD course in Practice Management of the Law Societies of South Africa, at his own cost, within a period of 12 (twelve) months form date of this order.

4) The Respondent be and is hereby ordered to pay the costs of this application on the attorney and client scale.

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VAN HEERDEN AJ

I agree

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Van ZŸL J