IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 6399 /2018

In the matter between:

KWAZULU-NATAL LAW SOCIETY	Applicant
and	
KRISHNAN MOODLEY	First Respondent
NEDBANK LIMITED	Second Respondent

Coram: Koen et Ploos van Amstel JJ

Heard: 21 November 2018

Delivered: 26 November 2018

O R D E R

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1 Paragraph 1.1 of the Notice of Motion is amended by the insertion of the words ‘and conveyancers’ after the word ‘attorneys’.

2 An order is granted in terms of paragraphs 1.1 (as amended) to 1.13 inclusive of the Notice of Motion.

3 The Registrar of this Honourable Court is directed to transmit a copy of the papers in this application to the Director of Public Prosecutions for a decision as to whether any criminal proceedings should be instituted against the first respondent.

J U D G M E N T

Koen J (Ploos van Amstel J concurring)

[1] This is an application to strike the name of the first respondent from the roll of attorneys and conveyancers.

[2] The first respondent was admitted as an attorney on 12 June 1989 and as a conveyancer on 2 March 2009.

[3] The approach to be adopted in applications of this nature has been stated authoritatively in *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at page 51B. Although that judgment specifically dealt with a court exercising its discretionary jurisdiction in terms of s 22 of the Attorneys Act No. 53 of 1979, there is no reason to suggest that the approach should be different where the High Court is approached for an order striking an attorney's name from the roll as contemplated in s 40(3) of the Legal Practice Act No. 28 of 2014. In *Jasat* the following was said:

'Ultimately, therefore, what is contemplated is a three-staged enquiry. First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities…The second enquiry is whether … the person concerned 'in the discretion of the Court' is not a fit and proper person to continue to practise…The third enquiry is whether in all these circumstances the person in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice.'

[4] The first enquiry is not controversial in this application. Indeed the facts on which the application is based are largely common cause.

[5] The applicant's decision to approach this court for the relief it seeks is founded on:

(a) A complaint received from Amod Sadek Kareem and his wife Sardia Bibi Kareem ('the Kareems') relating to the first respondent's conduct in the handling of a conveyancing transaction; and

(b) The results of an investigation which was conducted by an inspection committee appointed by the applicant consisting of Mr T K Pearce and Mr V Badri following upon the complaint of the Kareems, from which it appeared that the first respondent did not maintain proper books of account and *prima facie* misappropriated trust money.

[6] As regards the former, the facts briefly are that the first respondent was instructed to attend to the conveyancing when the Kareems sold their immovable property for the sum of R1 020 000.00. The transfer of ownership of that property into the name of the purchaser was registered in the Deeds Registry on 30 January 2017. In the ordinary course, the net proceeds were required to be paid to the Kareems on that date. The first respondent however failed to pay the purchase price upon transfer and only paid R300 000.00 on 10 February 2017 and R671 210.00 on 7 July 2017. At the time the complaint was made, the Kareems still had not received their full purchase price. The first respondent also did not deposit the money into an interest bearing account.

[7] The first respondent's version is that he intended to obtain a loan from one Caroline Chetty for R500 000.00. Confident that this loan would be advanced to him he used the Kareems' moneys that were in his trust account. Contrary to his expectation the loan from Chetty however did not materialise.

[8] He subsequently obtained a loan from proceeds raised by his wife against an access mortgage bond on their private home, for which she would be responsible, apparently for an amount of R700 000.00. This amount was deposited into his trust account on 27 July 2017 to repay what he described as 'unauthorised loans' he had taken from his trust account.

[9] Specifically in regard to the Kareems' complaint the first respondent contends that the surrounding circumstances at the time that the complaint was lodged by the Kareems together with his efforts to remedy the situation, by applying the proceeds

raised from the loan by his wife, would render a sanction, less than a striking off, appropriate. He submits that the use of the Kareems' money was an error of judgment on his part, not intended to permanently deprive the complainants of their moneys. He argues that he had not prejudiced the complainants for a long period, and that he very quickly remedied the situation and re-established himself as a genuine, complete and permanently reformed attorney (*Swartzberg v Law Society of the Northern Provinces* [2008] ZASCA 36; [2008] 3 All SA 438 (SCA); 2008 (5) SA 322 (SCA)). It was contended on his behalf that this lapse of judgment occasioned by his desperation should not be regarded as a defect in his character, that it was of limited duration, that on becoming aware of the error of his ways he wilfully followed a programme to rebuild his character to ensure that such defect was cured, that he begged forgiveness from the Kareems who forgave him and withdrew their complaint, that he had sought counselling and assistance from his Guru and priest in an effort to develop as a purer individual, and accordingly that the temporary defect of character, which may give rise to the perception that he is not a fit and proper person to practice as an attorney, no longer exists. The submission concluded that he will continue to conduct himself as an honourable member of the profession and one who will become to be trusted to carry out the duties of an attorney in a satisfactory way insofar as members of the public are concerned. (*Law Society, Transvaal v Buhrman* 1981 (4) SA 538 (A) at 557B – C).

[10] Mr Winfred on his behalf in this context submitted that the first respondent's expression of contrition is genuine and that his efforts in repairing the harm were rapid. Further that the first respondent is deeply embarrassed and remorseful for what he had done and that he begged forgiveness from the complainants and was forgiven. With reliance on *Ex parte Aarons (Law Society, Transvaal, intervening)* 1985 (3) SA 286 (T) it was submitted that the character trait that caused him not to be a fit and proper person, no longer exists, that he had accepted full responsibility for his wrongdoings, did not dilute blameworthiness and made a full disclosure of the details leading up to the application for his strike off.

[11] Accordingly it was submitted that he had rehabilitated himself, that he was a fit and proper person considering the extent of his contrition, that he is involved in religious affairs and has become deeply religious, that he has made attempts to

attend an accounting course, is willing to attend a practice management course that may be offered by the applicant or the fidelity fund, is extremely remorseful for his conduct, has learned to manage his financial affairs and realises it is essential that the rules and ethics of practice must be strictly adhered to. Finally it was pointed out that he has furnished a rule 21 certificate.

[12] It was further submitted that he had been sufficiently punished for his error in that he had lost his stature in the community, suffered financially, his marriage has broken down, he has developed an anxiety condition and skin disorder and that he has lost the respect of his family. The submissions conclude on the basis that he has paid his debt to society and that there is no evidence to support any contention that the first respondent may repeat his past conduct.

[13] The aforesaid submissions are not all valid. Inter alia it is difficult to understand how it can be said that the Kareems had not been prejudiced. Furthermore, I am by no means satisfied that the first respondent had made a complete and full disclosure, as will be apparent below. More importantly however, in focusing his comments primarily on the transaction with the Kareems, the first respondent has largely ignored the findings of the investigation committee appointed in response to the Kareems' complaint, consisting of attorneys Pearce and Badri, whose report revealed a number of accounting deficiencies and *prima facie* evidence of the misappropriation of trust money. The first respondent has not disputed the allegations made by the applicant in that regard, but has provided very little explanation for having acted in the manner which he did.

[14] The findings of the inspection committee are detailed in the founding papers. In brief, the inspection of the first respondent's books demonstrated various non-compliances. The trust receipt book had not been written up at the time of their inspection on 19 February 2018 but was only completed up to the end of September 2017. The dates of receipts were not sequential. This could not be explained by the first respondent. Indeed the members of the inspection committee concluded that the receipt book had only been written up for the purposes of the inspection. In addition, the first respondent did not maintain a cash book. He also did not maintain a fee journal, nor did he maintain trust and business and transfer journals. When

questioned he reported that he did not maintain such books and simply transferred moneys from trust to his business account as and when he needed funds, treating these as ‘unauthorised loans’. That is a startling and disturbing response.

[15] In addition, the first respondent did not maintain individual ledgers for trust creditors. He produced a ledger for the period March 2017 to September 2017 but the first three pages of the ledger were not forwarded to the inspection committee and it appeared to the committee as having been written up as at the end of September 2017. The first respondent had no other documents in his possession for the period from September 2017 to the date of inspection in February 2018. The members of the inspection committee concluded that the first respondent had not been frank with them and did not make a full disclosure of his books although they had given him notification to do so. They concluded that he had no accounting records beyond September 2017 and that from what they had seen, there were serious discrepancies which they determined to indicate the misappropriation of trust funds.

[16] They also concluded that there was a complete lack of proper accounting for trust funds and a clear misappropriation of trust funds from the trust account. Indeed it was discovered that the first respondent used his trust account to pay *inter alia* school fees for his children. An amount of R36 063.00 was also transferred from trust moneys to pay staff salaries. The inspection committee identified three trust accounts which clearly showed that although no moneys were received into those accounts, substantial amounts totalling R419 426.97 had been paid out. This they determined to be a misappropriation of moneys belonging to other trust creditors.

[17] The first respondent generally conducted and treated his trust creditors’ moneys as unauthorised loans. He admits that he has been negligent and remiss in not keeping proper books of account and understands the prejudice he caused to trust creditors.

[18] The conduct of the first respondent fell well short of that which can be expected of an attorney and conveyancer. Regarding the second stage of the enquiry, the first respondent is not, in our discretion, a fit and proper person to

practice as an attorney and conveyancer. We do not view his conduct as merely negligent, but probably more correctly as fraudulent.

[19] What remains is the third inquiry. In *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) at para 19 it was said that a court must satisfy itself that a lesser penalty – such as a suspension from practice – will not achieve the overall purpose. Brand JA stated that the objectives in this regard are however not only 'to discipline and punish errant attorneys [but also] to protect the public, particularly where trust funds are involved'. Ultimately a court makes a value judgment based on all the proved facts.

[20] The first respondent contends that a sanction less than a striking off would be appropriate in all the circumstances outlined above. His counsel Mr Winfred referred us to the judgment in *KwaZulu-Natal Law Society v Moodley and another* [2014] ZAKZPHC 33, delivered on 9 May 2014, where the attorney concerned was suspended from practice as an attorney for a period of one year, but that suspension itself was suspended for a period of three years on certain conditions. It was submitted to be a matter 'almost on all fours' with the present matter and we were urged to conclude that a similar order would be justified in this matter. I am not persuaded that the case referred to is *in pari materia* at all. It is clearly distinguishable. It involved a complaint relating to overreaching in respect of a contingency fee arrangement and the incompetent handling of a deceased estate. There was no misappropriation of trust money.

[21] The first respondent also contends that he had previously operated his accounting system manually but that he was at the time of deposing to the answering affidavit converting his practice 'digitally' and that using the new system will minimise any further mistakes. He maintained that he did not foresee any discrepancies in regard to an audit which was required and due to be finalised on or before the 28th September 2018.

[22] In our view the first respondent did not act diligently, and indeed acted criminally in misappropriating moneys, euphemistically referring to them as 'unauthorised loans' belonging to trust creditors to their prejudice whether actual or

potential. The first respondent appears to have lost sight of the important objective that the best interest of clients cannot take a back seat to any temporary personal difficulties that he may have experienced. He cannot use trust funds as if it is his own.

[23] A reading of the allegations summarised in the brief factual account earlier in this judgment, leads to the irresistible inference that the 'unauthorised loan' of the Kareems' funds was not an isolated incident. What was found by the inspection committee would suggest a rolling of trust funds as he practised. There is nothing to suggest that such conduct would not have continued if his conduct had gone undetected.

[24] Proper bookkeeping is a primary responsibility and obligation of any practising attorney. The lack of bookkeeping post September 2017 could not be inadvertent. The first respondent would have realised that his books were not being written up as the accounting records were being kept manually. He would also have realised where he was transferring moneys from trust to his business account that he was acting unlawfully and fraudulently. When confronted with the inferences drawn by the inspection committee and recorded in the founding affidavit the first respondent was content simply to admit those allegations, attributing them to negligence on his part which he says he will not repeat, but not recognising that they were *prima facie* intentional fraudulent acts. That lack of insight on his part is concerning and reflects seriously on his fitness to remain on the roll of attorneys and conveyancers.

[25] The founding affidavit sketches a comprehensive account of a practitioner who did not keep proper accounting records, who could not but have been aware that he was failing in his duty in that regard, and who exploited the lack of proper bookkeeping to use trust funds by transferring the funds from the trust account for his own use as and when required, all to the prejudice or potential prejudice of trust creditors. As much as the first respondent has and is seeking to address his shortcomings, these were not addressed spontaneously when he should have realised that his accounting system, especially as it was a manual one, was not being maintained up to date. He nevertheless did nothing until his conduct was detected. His conduct reveals a deep seated flaw in his professional character as an

attorney which renders him unfit to practise, and which apart from any effect of a sanction it may have on him, requires a striking off in the best interest of and to protect the public. Profuse apologies and the ‘mitigatory’ factors advanced by him do not excuse the serious of the contraventions of which he is guilty. These would have continued had his conduct not been detected. It renders him manifestly unfit to practise. As and when he has addressed these adequately and rehabilitated himself fully, he can apply for readmission if he is then able to discharge the onus of proving that he is a proper and fit person to be readmitted.

[26] The first respondent’s conduct *prima facie* amounts to a theft of trust money, which should be investigated by the Director of Public Prosecutions to determine whether any criminal prosecution should follow.

[27] The following order is granted:

1 Paragraph 1.1 of the Notice of Motion is amended by the insertion of the words ‘and conveyancers’ after the word ‘attorneys’.

2 An order is granted in terms of paragraphs 1.1 (as amended) to 1.13 inclusive of the Notice of Motion.

3 The Registrar of this Honourable Court is directed to transmit a copy of the papers in this application to the Director of Public Prosecutions for a decision as to whether any criminal proceedings should be instituted against the first respondent.

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Appearances

For the Applicant:	MR S CHETTY
Instructed by:	Messrs Siva Chetty & Company
Ref.:	Mr S N Chetty/shalina/KZN366
Tel.:	033 – 342 9636
For the First Respondent:	MR N G WINFRED
Instructed by:	Messrs Vincent Moodley & Associates
c/o	Dev Maharaj & Associates
Ref.:	Sahil Singh
Tel.:	033 – 342 2794