REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No: 1074/10

In the matter between

KwaZulu-Natal Law Society **Applicant**

and

Binesh Bene Singh **Respondent**

JUDGMENT

Delivered on: 12 November 2010

STEYN J

[1] This is an application in terms of s 22(1)(d) of the Attorneys Act No 53 of 1979[1] for the removal of the Respondent's name from the roll of attorneys together with ancillary relief which is generally granted in applications of this nature. The application is based on the ground that the respondent is no longer a fit and proper person to practice as an attorney. The Respondent was admitted as an attorney of this Court on 22 July 2003 and thereafter practiced for his own account under

1 Hereinafter referred to as 'the Act'.

the name and style Binesh Bene Singh and Associates. On 21 April 2009 he was conditionally suspended from practicing as an attorney, such order was confirmed on 29 May 2009 and is still in operation.

[2] The respondent started his tertiary education in 1988 at the University of Durban-Westiville. He suspended his studies in 1991 when his wife fell pregnant. Thereafter the respondent supported himself by doing a number of jobs. In 2001 he was offered the opportunity to go back to university to complete his degree. He obtained his B. Proc degree and commenced his articles with attorneys Siven Samuel and Associates in Chatsworth. Within two years of his qualification he successfully passed the board exams and then duly qualified to be admitted as an attorney in 2003. As will appear from the dates on which the complaints were lodged, he soon fell into temptation to use money entrusted to him.

[3] The grounds of complaint against the Respondent are as follows:

(a) that he misappropriated trust monies; and

(b) that he failed to provide a Rule 21A certificate.[2]

[4] I shall now deal with the complaints:

(i) <u>The Naidoos' complaint:</u>

The Naidoos purchased a house, the true purchase price of the property was R550 000. On Singh's advice the purchase price was reflected in the sale agreement as R650 000 to cover payments in respect of transfer duty and legal costs. The difference between the reflected purchase price and the actual purchase price less the transfer costs of approximately R30 000 should have been refunded to the complainants on registration. Despite the sale being registered on 3 December 2007, the Naidoos were not refunded. In addition Singh did pay the occupational rental to the complainants despite written instructions to do so.

ii) <u>The Reddys' complaint:</u>

A complaint was lodged by the Reddys' where monies were improperly paid directly into the respondent's business account. In this matter the total amount

2 The Rule 21 form was not submitted for the period 1 March 2007 till 29 February 2008.

misappropriated was R359 506,08.

iii) The Ramsooders' complaint:

Upon investigation and examination of the trust account and bank statements it was established that R450-00 was paid into the account by Mrs Ramsooder on 22 January 2009. From the amount Singh paid R125 000 into his business account even before any transfer had taken place. In this matter he misappropriated an amount of R125 000.

[5] Upon inspection of the office the applicant found that the respondent's files were in a state of disarray. A disturbing factor is that the respondent when questioned by the inspection team was evasive in giving reasons and explanations for the shortfall in his trust account, he went as far as to blame his paralegal for the shortfall in money.

[6] The respondent seems to minimise his wrongdoing, that much can be gleamed from his answering affidavit:

> *"Accordingly the only prejudice that has been suffered by the complainants is that of financial prejudice and such*

prejudice has been accordingly cured by myself."[3]

"I now wish to place certain facts before the above Honourable Court which in my respectful submission demonstrate the lack of mala fides *and intent on my part commit any wrongful act."*[4]

What follows in his affidavit is an explanation on how he got involved in horse-racing gambling and how his gambling habit contributed to his financial woes. According to him, he misappropriated the monies in his trust account in order to feed his gambling habit, to support his family and to repay the money that he had borrowed from loan sharks.[5] The Respondent is not disputing the facts nor the allegations set out by the Applicant in its founding affidavit. He is basically contending that the sanction prayed for should not be granted. It is evident from his affidavit that he expects this Court to exercise its discretion to rather suspend him from practice than strike him off the roll.

[7] I shall now deal with the applicable legal principles and the jurisprudence as it developed. The correct approach whether an attorney is not a fit and proper person to practice is set out

3 See para 21 of the answering affidavit.
4 See para 22 of the answering affidavit.
5 See para 31 of the answering affidavit.

in *Jasat v Natal Law Society*[6] where Scott JA said:

> *"Ultimately, therefore, what is contemplated is a three-staged inquiry. First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities. (See, for example,* Nyembezi v Law Society*,* Natal *1981 (2) SA 752(A) at 756H-758A where the Court was concerned with the equivalent section in the now repealed Attorneys, Notaries and Conveyancers Admission Act 23 of 1934; see also* Kekana v Society of Advocates of South Africa *1998 (4) SA 649 (SCA) at 654D in relation to s 7 of the Admission of Advocates Act 74 of 1964). The second inquiry is whether, as started in s 22(1)(d), the person concerned* ***'in the discretion of the Court'*** *is not a fit and proper person to continue to practise. The words italicised were inserted in 1984 (see* Law Society of the Cape of Good Hope v C *1986 (1) SA 616 (A) at 637b-c). It would seem clear, however, that, in the context of the section, the exercise of the discretion referred to 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. The discretion is that of the Court of first instance. It is well established that a Court of appeal has a limited power to interfere and will only do so on well recognised grounds,* viz *where the Court of first instance arrived at its conclusion capriciously, or upon wrong principle, or where it has not brought its unbiased judgment to bear on the question or where it has not acted for substantial reasons (Law Society of the* Cape of Good Hope v C *(*supra *at 637D-H);* Reyneke v Wetsgenootskap *van die Kaap die Goeie Hoop (*supra *at 369E-G);* Vassen v Law Society of the Cape of Good Hope *1998 (4) SA 532 (SCA) at 537D-G). The third inquiry is whether in all the 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."*[7]

[8] It is also necessary to examine and measure the Respondent's conduct against the ethical standards of the attorney's profession. The standards have been discussed

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6 2000 (3) SA 44 (SCA).

7 *Ibid* at 51C-G.

and described in a number of cases, including *Law Society, Transvaal v Matthews,*[8] where the court stated:

> *"[T]he attorney is a person from whom the highest standards are exacted by the profession and this Court. If an attorney wishes to digress from that standard he may do so but he must then first cast aside his profession by resigning and then pursue his chosen course. He cannot serve two masters."*[9]

[9] It is trite that proceedings like the present are *sui generis* and that practitioners should make full and frank disclosure of all the relevant facts.[10] In the recent case of *Malan v The Law Society of the Northern Provinces,*[11] Harms ADP referred to the co-operation of a respondent, in matters like the present, in the following terms:

> *"The application of the 'rule' in cases such as this, requires a consideration of the fact that it is a* sui generis *procedure, and that an attorney is not entitled to approach the matter as*

8 1989 (4) SA 389 (T).

9 *Ibid* at 395G-H. At 394A-E, the following is said about the duty of an attorney in regard to trust money:

> *"[W]here 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 should be available to his client the instant it becomes payable. Trust money is generally payable before and not after demand … 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) 905H."*

10 See *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 851 G-H; *Cirota and Another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 187H.

11 [2009] 1 All SA 133 (SCA).

if it were a criminal case and rely on denial upon denial and, instead of meeting the allegations, to deflect them and, as part of the culture of blame, always blame others."

[10] Respondent has demonstrated a clear lack of insight into the seriousness of his conduct as is apparent from his answering affidavit. It appears from the papers that he is of the opinion that his wrongdoing is mitigated by his gambling addiction.

[11] There is no doubt in my mind that the applicant has established that the respondent had misappropriated the money in his trust account and practiced without being issued, a Rule 21 certificate. The question is whether the aforesaid professional misconduct shows that the respondent is not a 'fit and proper person to continue to practice as an attorney.' It is now accepted that this court has a discretion to exercise in relation to this enquiry, and it has been stated in *Jasat, supra*, at this level of the enquiry the exercise of discretion 'involves, in reality a weighting up of the conduct complained of against the conduct expected of an attorney.'[12]

[12] In *casu* the following can be said about the conduct of the

12 *Jasat supra* at 51E-F; also see *Summerly v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) at para 2.

respondent:

(a) He did not take the Law Society into his confidence, neither did he make a full and frank disclosure when asked to explain his conduct. In fact, at one stage of the enquiry he shifted the blame to his paralegal for any shortfalls in the accounts;

(b) He failed to have acted responsibly, in respect of the complaints lodged;

(c) He failed to keep proper financial records and books of account;

(d) He failed to attend to the affairs of the firm responsibly; and

(e) He misappropriated trust funds.

The aforementioned conduct displayed by the respondent is incompatible with being a fit and proper person in terms of the meaning of the Act.

[13] In my view, the respondent has, through his conduct, brought the profession into disrepute. His unprofessional conduct is not only unethical but it is criminal in nature. Simply put his conduct constitutes theft of trust money. Furthermore s 78 of

the Act stipulates the obligations on any practitioner in dealing with trust money.[13] Section 78(4) is compulsory and the respondent failed to act or keep proper accounting records as has been required by the Act. He failed as a practitioner to show the standard of care required of practitioners to manage and control trust monies.

[14] Lastly, it is incumbent on this court to enquire in all of the circumstances whether the respondent should be removed from the roll of attorneys or suspended. In my view, the conduct is so serious, that it warrants a removal from the roll of attorneys. This court has a duty to the public at large to protect them from professionals like the respondent. I have carefully considered the factors listed by the respondent as militating against a sanction of being struck off the roll. I am not convinced that a suspension, given the circumstances of this case, is the appropriate sanction or that it will serve the objectives of this Court's supervisory powers over the conduct of the attorneys. The essence of Singh's contraventions cannot be attributed to neglect of his practice or ignorance.

13 See *Cape Law Society v Parker* 2000 (1) SA 582 (C) at 586I-J:

> ". . . there is high authority for the proposition that utilisation of trust moneys without the authority of the person entitled thereto constitutes misappropriation, which amounts to and is treated as theft."

The penalty for misappropriating trust monies is usually striking off and in my view striking off given the circumstances is justified.

[15] Accordingly, it is ordered:

15.1 That the rule *nisi* be confirmed.

15.2 That the name of the respondent be struck off the roll of attorneys of this Court;

15.3 Respondent to pay the costs of this application on the scale as between attorney and client.

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Steyn, J

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Kruger, J: I agree.

Date of Hearing:	12 November 2010
Date of Judgment:	12 November 2010
Counsel for the applicant:	Adv Choudree SC
Instructed by:	Jay Pundit and Company c/o Stowell & Company
Counsel for the respondent:	
Instructed by:	Krish Naidoo, Govender & Co. c/o M/S K Ramkaran & Company