Reportable

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 6171/2010

In the matter between:

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE **Applicant**

and

HANS JURIE ZIETSMAN **Respondent**

JUDGMENT DELIVERED: 10 DECEMBER 2010

DLODLO J *et* BINNS-WARD J

[1] It is not in dispute that the respondent, an attorney who practised in Mossel Bay until the end of July 2009, misappropriated an amount of at least R1,8 million from the funds entrusted to him to be held on behalf of clients and third parties. The Law Society has applied for an order that the respondent's name be struck off the rolls of attorneys and conveyancers, together with the other relief that is ordinarily granted ancillary to such orders.

[2] The respondent does not oppose the application. Indeed, in so far as may be determined from the papers, he appears to have been moved, sometime in

June 2009, himself to report the occurrence of the defalcations to the applicant. This was done through the agency of a fellow practitioner ('the intermediary attorney') who forwarded to the Law Society an email sent to him by the respondent setting out a summary of the trust accounts on which there was an identified shortfall.

[3] The standard of professional conduct required from an attorney is an exacting one. This has been emphasised in any number of judgments of the superior courts over many decades; see e.g. *Incorporated Law Society, Transvaal v Visse (1); Incorporated Law Society, Transvaal v Viljoen (2)* 1958 (4) SA 115 (T) at 131D-G; *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 395F-396H; and *Botha and Others v Law Society, Northern Provinces* 2009 (3) SA 329 (SCA). The respondent has fallen grievously short of the standard of conduct required from him as an attorney. As Hefer AP observed in *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) ([2002] 4 All SA 441) at para. 11, the misappropriation of trust funds is 'about the worst professional sin that an attorney can commit'.

[4] There can be no question in the circumstances that the respondent is not a fit and proper person to continue in practise as an attorney and that the discretion of the court in terms of s 22(1)(d) of the Attorneys Act 53 of 1979 (as amended) should be exercised in favour of granting the Law Society's application.

[5] It is unfortunately necessary, however, for us to say something about two aspects of the manner in which the Law Society brought the current application. The first concerns the extent of the evidence put before the court and the second concerns the delay in bringing the application.

[6] The forwarding email, which was sent to an officer at the Law Society on 15 June 2009, contained no narration or explanation by the intermediary attorney. The absence of any covering explanation in the forwarding email led us to believe that there must have been some previous contact between the intermediary attorney and the addressee of the email, Mr Glenn Flatwell, an officer of the Society, to whose individual email address it had been sent. The founding papers therefore left us wondering what had preceded the email. Mr Ncanisa, who represented the applicant, was unable to enlighten us as to why the narrative of the evidence in the founding papers had such an abrupt and apparently incomplete introduction. We therefore decided that the hearing, which commenced before us on 19 November 2010, should be postponed in order for him to make the necessary enquiries and to allow the applicant to supplement its papers in this regard, if it considered it appropriate to do so to address our concern. As we pointed out to Mr Ncanisa when the application was first called, in matters like this, particulars of the manner in which the misconduct is discovered and the reaction of the delinquent attorney in the particular circumstances are issues which might become of interest later should the attorney apply in the future for re-admission. If that should occur, the court seized with the re-admission application will always look at the judgment in the

striking off matter to see how these issues were treated there. It would, for example, be significant for that purpose if it were to appear from the striking off judgment that the delinquent attorney had turned him or herself in, rather than being reported by a client, or discovered in the context of an audit to have been plundering the trust funds. On the state of the founding papers in this matter, however, we were none the wiser because the narration of events appeared to begin with what read as if it should have been the second chapter.

[7] Furthermore, as already noted, the Law Society was informed of the respondent's misconduct in June 2009. It took more than nine months from then, until 25 March 2010, before the current proceedings were instituted. We considered this delay to be unsatisfactory on the face of it. An additional reason for the postponement of the further hearing of the application was to allow our request that the Society provide an explanation for the delay.

[8] Both of the aforementioned issues raised by the court were addressed in a supplementary affidavit made by a councillor of the Law Society. It states that the applicant first became aware of the shortfall in the respondent's trust account when Mr Flatwell received the email forwarded by the intermediary attorney, described earlier. Accepting that to be so, we consider it odd that the applicant's officers apparently made no enquiry into the circumstances that led to the email being forwarded in that manner. While it would have made no difference to the result, it would have assisted in the production of a more enlightening judgment at this stage for possible reference by another court in a different context in the future.

[9] On the aspect of undue delay, the explanation given in the applicant's supplementary affidavit went as follows:

> After an investigation pursuant to the receipt of the abovementioned email from the intermediary attorney, the applicant's council resolved on 22 June 2009 to institute an application urgently to interdict the respondent from practising, pending an application for his removal from the roll.
>
> The Society's attorneys were, however, instructed only on 6 August 2009, by which stage the respondent had, of his own accord, ceased practising on 31 July 2009.
>
> The manner in which the respondent had dealt with his trust account was then investigated and clients whose moneys had been misappropriated were advised of their entitlement to submit claims for compensation to the Attorneys Fidelity Fund.
>
> A draft founding affidavit in the intended striking off application was prepared by the applicant's attorneys and forwarded for consideration to the Society on 22 October 2010.
>
> The further preparation of the application was described thus:
>
> 'The [draft] affidavit required amplification and the Respondent's dealings with his trust funds were further investigated with reference to the trust bank account statements. The Respondent operated three trust banking accounts. The bank statements were not available and had to be obtained from the banks in question. The process of obtaining the bank statements from the banks in question took some time.

> This application was not immediately launched as the Respondent had ceased practising and did not, in the Applicant's view, constitute a danger to his clients or to the public.'

[10] We regret that we have to say that we find the explanation for the delay to be unsatisfactory.

[11] It is apparent from the founding papers that the case against the respondent is founded entirely on the basis of the report of the Law Society's officers who attended on the respondent on 17 June 2009 to investigate matters after receipt of the email forwarded by the intermediary attorney two days earlier. That report was substantiated by extensive reference to trust ledger accounts, insight into which had been afforded to the Society's investigating officers during their interview with the respondent on 17 June. The report and copies of the trust ledger accounts in question comprise 55 pages of the 108 page long founding papers. The notice of motion takes up 11 pages and the greatest part, by far, of the 21 page founding affidavit is no more than a narrative rehearsal of the content of the investigators' report and the accompanying copies of the trust ledger accounts.

[12] The balance of the founding papers comprised a computer generated trust account reconciliation, obtained from the respondent and which had been produced on 28 February 2009 at 1:36 pm, and also bank statements or certificates reflecting the closing balances on 28 February 2009 of the three trust banking accounts maintained by the respondent. This additional documentation added nothing of substance to the material the applicant had obtained when its officers had interviewed the respondent on 17 June 2009. It was in any event

evident from the investigators' report that material defalcations from his trust accounts had been perpetrated by the respondent in the period after 28 February 2009.

[13] Why it should have been difficult to obtain information from the banks at which the relevant trust accounts were maintained is not explained; nor is there any explanation of what efforts were made to expedite the provision of this information, and at what stage. There is also no explanation as to why the information that the Society was reportedly having difficulty in obtaining from the banks was considered sufficiently material, in the context of the evidence of which it was already possessed, to justify the attendant delay in the institution of striking off proceedings.

[14] The Law Society is not an ordinary litigant in matters of this nature. It acts as the both the statutory *custos morum* of the attorneys' branch of the legal profession and as protector of the public in their dealings with that profession; cf. *Holmes v Law Society of the Cape of Good Hope and Another; Law Society of the Cape of Good Hope v Holmes* 2006 (2) SA 139 (C) at para. 16. The court is in turn heavily dependant upon the law societies to submit to them the information concerning facts necessary for the courts to fulfil the function of oversight exercised originally at common law, and currently in terms of the Attorneys Act, in respect of who should be admitted to, or removed from the roll of attorneys; cf. *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 409.

[15] In matters in which it is appropriate for the court to determine in its discretion whether a delinquent attorney's name should be removed from the roll, it is the duty of the law societies to bring the relevant facts to attention of the courts without delay. The degree of urgency with which these matters must be attended to will obviously be affected by the extent to which the public might be exposed to danger by the attorney in question remaining active as a practitioner; but in all cases in which a striking off or suspension order might be appropriate expedition is required. The somewhat leisurely course that preceded the launch of these proceedings is therefore to be deprecated.

[16] Even in cases in which the attorney has ceased to practise, it is inimical to the high status and esteem in which the attorneys profession should, in the public interest, be generally regarded if persons whose names should not be on the roll in consequence of their defalcation of clients' money remain registered as attorneys any longer than practicably necessary. This much is inherent in any achievement of the object of maintaining and enhancing the prestige, status and dignity of the profession; the very first of the objects of a law society listed in s 58 of the Attorneys Act. Thus in all striking off applications, even where no considerations of urgency are involved, there is nevertheless a duty on the society concerned to institute proceedings expeditiously. That duty was not satisfactorily discharged in this case.

[17] In the circumstances described above we do not consider it appropriate that the respondent should be made liable for the costs occasioned by the postponement of the hearing of the application on 19 November 2010.

Order:

1. It is directed that the respondent's name be struck off the roll of attorneys and conveyancers of this Honourable Court.

2. Pursuant to the provisions of paragraph 1 of this order, and to the extent that may remain necessary, relief is further granted as prayed for in paragraphs 2 – 12 of the notice of motion, save that there shall be no order in respect of the costs of appearance on behalf of the applicant at the hearing on 19 November 2010.

D.V. DLODLO
Judge of the High Court

A.G. BINNS-WARD
Judge of the High Court