IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between

BERNARD MICHAEL CIROTA.....FIRST APPELLANT
LESLIE ERNEST LEVISOHN.....SECOND APPELLANT

and

THE LAW SOCIETY OF THE TRANSVAAL .....RESPONDENT

Coram: MULLER, MILLER, DIEMONT, JJA., et VILJOEN, HOEXTER, AJJA.

Heard: 29 August 1978.

Delivered: 28 September 1978.

J U D G M E N T.

MULLER, J.A.

This is an appeal against an order made by F.S.STEYN, J., and KIRK-COHEN, AJ., in the Transvaal Provincial Division, striking the name of the first appellant off

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the roll of attorneys and conveyancers of the said court and the name of the second appellant off the roll of attorneys, notaries and conveyancers of the said court.

The first appellant was born on 15 January 1942. He was admitted and enrolled as an attorney on 8 March 1965 and as a conveyancer on 2 August 1965.

The second appellant was born on 26 May 1943. He was admitted and enrolled as an attorney, notary and conveyancer on 5 April 1966.

As from March 1965 to February 1966 the first appellant was employed as a professional assistant by the firm Cirota and Company in Johannesburg. From March 1966 until October 1970 he practised in partnership with his father, one Hyman Cirota (hereinafter referred to as Cirota snr.) During November 1970 the second appellant joined the said partnership which continued in existence until the end of February 1976 when Cirota snr. retired from the partnership. The

partnership..../3

partnership was then continued by the two appellants under the style or firm of Cirota, Cirota and Levisohn and is still in existence.

Before the second appellant joined the aforementioned firm he practised on his own as an attorney for approximately four years.

It appears from the documents filed of record that the council of the respondent society (hereinafter referred to simply as the Law Society) received various reports and complaints concerning the conduct of the firm of Cirota, Cirota and Levisohn, as a result whereof it was resolved by the council to have the books of account of the said firm inspected by the Law Society's firm of auditors. The said auditors duly carried out an inspection and on 25 October 1976 submitted a report to the Law Society. This report dealt in detail with the books of account kept by the appellants, the accounting system followed and the state thereof. At

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the end of the said report the following conclusions were expressed:

"CONCLUSIONS.

Based on our findings and comments previously contained herein, we are of the opinion that the Firm,

6.1 Has contravened the provisions of Section 33 of Act. No. 23 of 1934, in that it has failed to keep proper books of account of Trust moneys.

6.2 Has contravehed the provisions of your Society's Rule 47(1) 5, in that it has failed to keep proper books of account.

6.3 Has contravened the provisions of your Society's Rule 64 (2) and

6.4 Did not at all times have sufficient Trust moneys in its Trust banking account to meet its obligations to Trust creditors."

On 25 November 1976 the Law Society wrote to the appellants and furnished them with a copy of the aforementioned auditors' report. The appellants were informed that they could, should they wish to do so, prepare submissions in writing in reply to the said report and they were summoned

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to appear before the council of the Law Society at a special meeting on 11 February 1977.

During January 1977 the Law Society received from the appellants a letter enclosing a memorandum dated 17 January 1977 prepared by a senior advocate. In this memorandum counsel stated that he had been consulted by the appellants in connection with the complaints which had been lodged with the Law Society and in connection with the aforementioned auditors' report. Counsel stated further that he had advised the appellants that they should "make a clean breast of every possible thing they can think of which could be regarded as unprofessional" and that he told the appellants that he was only prepared to act for them on condition that they accept his advice, which the appellants did unreservedly.

The memorandum went on to say that, unbeknown to the Law Society, the appellants were guilty of touting. The memorandum described in detail how the practice of touting

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in the appellants' firm had its origin, what it involved and how it grew over the years. In short the position was as follows.

The practice of touting started in 1969/1970 when a Coloured man brought to the firm of the appellants a person who had been injured in a motor vehicle collision and who intended instituting action in terms of the Motor Vehicle Insurance Act, 1942. This matter was successfully concluded and, by way of appreciation, first appellant gave the Coloured man a small sum of money. In due course the appellants' firm built up a reputation, particularly among the Non-European population, that they were able to conclude third-party matters promptly and successfully. The practice of touting grew. All the touts were Non-Europeans and "there were never more than 3 or 4 touts operating at any time."

As to the amounts paid to the touts by appellants' firm the following appears in the memorandum:

"Some...../7

> "Some of these people received more than others but in the cases where they received more, this happened where they had, for instance, assisted in conveying clients by fetching them for consultations, taking clients to doctors, etc. The amount paid to the touts, qua touts, varied from R10 to R15. On occasions, which were very few and far between, the amount would be higher and the highest that can be remembered would be in the vicinity of R100 which would be paid over a period, mainly for conveyance and the touts' expenses."

The remuneration paid to touts was borne by the appellants themselves and was not recovered from the clients of the appellants.

It also appears from the memorandum that from 1972/1973 the appellants' third-party practice "increased very rapidly", and, with a few exceptions, the first appellant dealt with all third-party matters. The second appellant was however aware that his firm was involved in the practice of touting. Just to complete the record on this aspect of the case it is necessary, at this stage, also to refer to a passage in the minutes of a meeting of the Special Disciplinary Sub-Committee of the council of the Law Society held on

11 February...../8

11 February 1977, which meeting was attended by the appellants. At this meeting first appellant was recorded as having explained as follows:

> "dat hy na skatting 1000 onvoltooide derdepartysake het waarvan 70% na hom gekom het deur werkwerwers (touts)."

The minutes of this meeting also record a statement by first appellant that his father, Cirota snr., while he was still a partner in the firm, was against the practice of making use of touts.

I return now to the contents of the memorandum. On the question of touting, it was further stated in the memorandum that the appellants had, since investigations were commenced, ceased to deal with touts and that they were prepared, if the Law Society so required, not to accept any further third-party work.

The memorandum of counsel also dealt with the fact that, in addition to their trust account (with Barclays

Bank)...../9

Bank) and their business account (with Volkskas) the appellants had, in September 1974, opened a secret banking account with The Standard Bank in the name "The Partners, Cirota, Cirota, & Levisohn". This matter was raised in the aforementioned report of the auditors of the Law Society in which it was explained that the existence of this banking account was discovered as a result of abbreviated annotations on certain cheques which had been drawn on the appellants' trust account. It was found by the auditors that these cheques were paid in to the Standard Bank account. In this manner, so the auditors found, substantial sums of money had from time to time been transferred to the last-mentioned account without any record being kept of what these moneys represented. Nor had any entries been made recording such transfers in the appellants' business accounts. The auditors considered this practice to be "highly irregular" and stated in their report

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> "The facts and circumstances indicate, and the possibility cannot be excluded, that this practice was devised as a means of tax avoidance."

In his memorandum counsel furnished the following explanation:

> "Mr Cirota Jnr. (first appellant) was carrying on the third-party practice and I may add - much against his father's wishes - and this was in fact a factor which precipitated his father's retirement from the practice. Mr Cirota Jnr. persuaded his father that he needed small amounts of cash from which he could pay for the services of persons assisting him in third-party cases and this led to an account being opened, although in the name of the partnership at the Standard Bank."

It is convenient at this stage to record also the following explanation given by the first appellant himself in an affidavit which was later filed in the court proceedings:

> "When the touting practice came to the knowledge of my father and when he objected to being involved in any way in the said practice, i.e. having business

funds...../11

funds used for payment of travelling expenses to people like Kaynie (a tout) or medico-legal expenses being advanced to the claimants, the so-called Standard Bank Account came into being. My reasoning was simple: instead of debiting fees, I merely paid the fees over into the Standard Bank Account, which constituted a pool whereby I could operate my third-party practice. In connection with the Standard Bank Account, I wish to say little in my defence or in mitigation, other than to draw the Honourable Court's attention to the fact that the payments I made were not only payments to so-called touts, but also included various other disbursements viz. for medico-legal reports, actuarial reports and fees for medical services which the clients had required and which I had undertaken to pay. I also advanced money to some clients when their situation was desperate and when it was obvious that they could get help from no other source."

With regard to the Standard Bank account counsel's memorandum also contains the following statement:

"The contents of the next paragraphs will shock you but as I have stated, I have advised my clients to make a clean breast of everything. It became apparent to my clients and here I specifically exclude Mr. Cirota (Snr.) who at that stage was

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> no longer really active in the firm, that this account could be used very conveniently as a vehicle for tax evasion. My clients only saw this opportunity during March 1975. Fortunately, their Return for the year ending 28 February 1976 has not yet been submitted, and therefore although this evasion had been started, this will be rectified and the Receiver of Revenue will suffer no damage because correct returns will be submitted."

And the memorandum explained further that

> "the tax evasion contemplated had the effect that cheques would appear on the clients' accounts as paid into the Standard Bank accounts, which cheques really reflected fees, whereas they should have reflected debits and an ordinary transfer from Trust to business accounts had to be done."

On this aspect of the case it is convenient to refer again to the first appellant's opposing affidavit. This affidavit explained as follows:

> "In so far as it appears from the record that the Second Respondent and I had already set in motion by way of the so-called Standard Bank Account a scheme whereby we were to benefit by tax evasion, I would

like...../13

like to make it clear that the scheme had never actually been put into effect. My partner and I had merely observed the opportunities which the Standard Bank Account had presented to us for tax evasion, but we had never in fact gone so far as to implement the scheme or to consider all the various implications of our actions. In retrospect I albeit naively, would like to think that we would have realised the folly of my misdemeanours timeously and would never actually have proceeded to implement the scheme."

Another matter dealt with in counsel's memorandum was the charge made by the auditors of the Law Society that there was a deficiency in the appellants' trust account. It appears that this charge was based by the auditors on the figures obtained by them from a list of trust balances prepared by the appellants. Rule 62(1) of the Law Society provides that every practising attorney shall extract a list of amounts standing to the credit of any person in respect of all moneys held or received by such attorney on account

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of such person. The rule requires that such lists be prepared at least once every three months. The auditors based their calculations on the trust balances furnished by the appellants and, on that basis, found that there were the following deficiencies in the appellants's trust account:

(i) on 31 May 1976, R17 282-52

(ii) on 30 June 1976, R18 918-22

(iii) on 31 August 1976, R30 782-39

Counsel's memorandum contains the following paragraph in explanation of the above finding:

> "Unfortunately, the books did not reflect a correct position and therefore, while your auditors report is from a bookkeeping point of view, immaculately correct the true position is completely different."

The reasons why the books of account did not reflect the correct position was later explained by second appellant in an affidavit filed of record. His explanation was that

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(a) the appellants had in certain cases ommitted to debit the accounts of trust creditors with the fees that the partnership had already earned and become entitled to,

(b) because of incorrect postings, the credits reflected in favour of certain trust clients in the appellants' books of account were in excess of the true credits owing to them, and

(c) incorrect postings were made in the sense that particular clients who had no balances to their credit were debited with certain amounts, whereas other clients who did have credit balances, should have been debited with the said amounts.

Counsel's contention, as expressed in the memorandum, was that, upon the books of account being brought up to date and the necessary corrections being made, it would be found that there were no deficiencies in the trust account. Indeed,

said...../16

said counsel, there were excesses in the account on each of the dates 31 May 1976, 30 June 1976 and 31 August 1976, and certificates by the appellants' own auditors were annexed to the memorandum in proof thereof.

For the rest counsel's memorandum dealt with the general complaint by the auditors of the Law Society that the appellants had failed to keep proper books of account, an allegation which was admitted by the appellants, and with queries raised by the auditors concerning the accounts of particular clients of the appellants. For present purposes it is not necessary to deal with these matters specifically. In the final chapter of the memorandum, under the heading "Comment", counsel for the appellants stated:

> "I realise that with regard to the system of bookkeeping, the Standard Bank account, touting and certain other contraventions of bye-laws, my clients must be found guilty but I sincerely feel that my clients are not of a type who are a danger to the profession."

After...../17

After the said memorandum had been received by the Law Society, the appellants, as already stated above, appeared before a Special Disciplinary Sub-Committee of the council of the Law Society on 11 February 1977.

The appellants were interrogated by the said sub-committee. The sub-committee decided to recommend to the council of the Law Society that the names of the appellants be struck off the roll. The appellants were however informed by the sub-committee that they could make further representations in writing to the council and that they could also, if they so desired, appear in person before the council on a later date.

Pursuant to the opportunity afforded them, the appellants, on 21 January 1977, lodged with the Law Society a further memorandum prepared by counsel. It is not necessary to discuss in detail the matters dealt with in this latter memorandum. Suffice it to say that the object of this memorandum was to explain, and advance contentions concerning,

matters...../18

matters which had been raised by the Special Disciplinary Sub-Committee in its interrogation of the appellants.

The appellants also attended a meeting of the council of the Law Society on 25 February 1977 after which the council resolved to apply to court for the striking off of the names of the appellants from the respective rolls of attorneys, notaries and conveyancers upon which they were enrolled.

In June 1977 the Law Society applied to court on notice of motion. In the founding affidavit by the president of the Law Society it was alleged that the appellants were guilty of unprofessional or dishonourable or unworthy conduct. This allegation was made on the ground of certain alleged contraventions listed in the affidavit. These contraventions will be mentioned later.

Both the appellants filed opposing affidavits in which they referred to the memoranda prepared by counsel on their behalf, which memoranda had been submitted to the Law

Society...../19

Society, and they adduced reasons for their submission that the court should not strike their names off the rolls of attorneys, notaries and conveyancers but should rather impose a lesser form of punishment.

In view of the fact that, in support of its application, the Law Society alleged a number of contraventions, it will be convenient, before discussing the appeal, to set out shortly each alleged contravention, the response of the appellants thereto and the finding by the court a quo with regard to each alleged contravention. I proceed to do so.

First Contravention.

That the appellants contravened section 33(1) of the Attorneys, Notaries and Conveyancers Admission Act, 23 of 1934, in that they failed to hold trust moneys in their trust banking account that they should so be holding therein and were deficient in such holding. The Law Society relied on the finding by its auditors as explained above, that there were substantial deficiencies on 31 May 1976, 30 June 1976 and

31 August...../20

31 August 1976.

The appellants, as already mentioned, explained that in fact there were no deficiencies. Their books of account did not reflect the correct position and they contended that, upon the books being brought up to date and the necessary corrections made, it would be found that there was in fact no deficiency. This contention, as already stated, was supported by certificates which the appellants had obtained from their own auditors.

The court a quo found that the appellants were deficient in their holding of trust moneys and that the appellants were accordingly guilty of a contravention of section 33(1) of Act 23 of 1934.

Second Contravention.

That the appellants failed to keep their trust banking account as a separate banking account for the deposit therein only of trust moneys save for possible "composite" amounts,

i.e. ...../21

i.e. payments containing both trust and business moneys.

The appellants explained that all moneys banked to the credit of their trust banking account were either trust moneys or composite amounts.

The court a quo found that there was not sufficient evidence to gainsay the affidavit of the second appellant refuting this charge, and the court found that the alleged contravention had not been established.

Third Contravention.

That the appellants failed to ensure that certain fixed deposits invested with sundry building societies from moneys drawn from their trust banking account contained a reference to section 33(2) of Act 23 of 1934 as required by section 33(2) (b) of the Act.

The appellants' response to this charge was that they were unaware of the provisions of section 33(2) (b).

The court a quo found that the fact that appellants

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were unaware of the provisions of the sub-section was no excuse and pointed out that, in terms of Rule 47(1) of the Rules of the Law Society, any contravention of the provisions of Act 23 of 1934 constitutes unprofessional or dishonourable or unworthy conduct on the part of the practitioner. The court also found that there was no question that the appellants acted dishonestly with the trust moneys invested by them. Although agreeing with counsels' submission that, viewed in isolation, this charge was not of a serious nature, the court said

> "The respondents' transgression in this regard is one of the aspects of their slipshod and improper approach to the keeping of proper books of account and records in regard to trust moneys and will be taken into account in assessing the penalty to be imposed on all their wrongdoings."

Fourth Contravention.

That the appellants had contravened section 33(4) of Act no.23

of 1934 in that they did not keep proper books of account of their trust moneys and made false entries in such books.

The appellants agreed that in certain respects proper books of account were not kept but it was denied that there were any deliberate falsifications in their books.

The court a quo found

> "that the respondents (appellants) failed to keep proper books of account as required by section 33(4), but wish to record simultaneously that there is no sign of deliberate falsification of the books or any system of falsification in their books."

Fifth Contravention.

That the appellants contravened Rule 47.1(1) of the Rules of the Law Society in touting for work of a professional nature or that they acted for or in association with any organisation or person in contravention of Rule 47 quat of the said Rules.

As already stated, the appellants admitted that they were for some years involved in the practice of

making...../24

making use of touts and the court a quo found that the contravention had been proved.

Sixth Contravention.

That the appellants had contravened Rule 47.1 (5) of the Rules of the Law Society in that -

(a) their business books of account contained no record of the payments made by them from the banking account opened by them with the Standard Bank, nor was a separate cash book maintained to record the receipts of moneys deposited to such banking account, and

(b) their business books of account were in arrear for a greater period than one month.

The appellants admitted that they were guilty of the contravention charged.

The court a quo found that they were guilty.

Seventh Contravention.

That, in contravention of Rule 47.1 (14) of the Rules of the Law Society, the appellants had recovered from one Malabe an attorney and client fee of R250 and by so doing, received a fee in excess of that approved by the Legal Aid Board.

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The appellants explained that the matter had been referred to them by the Legal Aid Bureau, and not by the Legal Aid Board.

The court a quo found that it had not been shown that the appellants were guilty of a breach of Rule 47.1(14). The court however said

> "The recovery of a R250 attorney and client fee in a matter referred to respondents (appellants) by the Legal Aid Bureau does not reflect favourably upon the respondents(appellants)."

Eighth Contravention.

That the appellants contravened Rule 64(2) of the Rules of the Law Society which required them, if they claimed any amounts contained in their trust banking account to be owing to them and withdrawn therefrom, to be deposited in their business banking account.

The appellants admitted this contravention and the court a quo found accordingly.

Ninth...../26

Ninth Contravention.

That the appellants devised and entered upon a scheme of tax evasion which was subsequently abandoned by them.

In this regard I refer to the explanations given by the appellants as mentioned earlier in this judgment.

The finding of the court a quo was as follows:

> "It is debatable whether the scheme to evade tax had been implemented by merely opening the Standard Bank Account and operating it without making any return to the Receiver of Revenue by which means the payment of tax was evaded by excluding all amounts transferred to the Standard Bank Account. The Law Society did not cite any pertinent authority that evasion of income tax would be unprofessional or unworthy conduct of an attorney, and I make no finding on this point. In all circumstances I do not think it is necessary to make a finding in connection with the respondents account at the Standard Bank relative to a scheme of tax evasion."

Tenth Contravention.

That the appellants failed to act in the best interests of a client, one Anna Mapolisa; that they did not take proper

precautions..../27

precautions to protect her interests; and that they invested certain moneys on her behalf without security.

The appellants explained that they invested the moneys in question by lending it to a company controlled by them which company furnished an acknowledgement of debt in favour of their client Anna Mapolisa.

The court a quo found as follows:

> "Taking into account the difficulty of investing funds for Non-White clients on bond and the important fact that no prejudice was caused to Mrs. Mapolisa or any other Non-White client, I do not think that the conduct of respondents in this matter was unprofessional or unworthy except for debiting Mrs. Mapolisa with a R125 handling charge in the circumstances of the investment."

With regard to the punishment called for by the Law Society on account of the said contraventions, namely, the striking of the names of the appellants off the respective rolls of attorneys, notaries and conveyancers upon which they were enrolled, the court a quo , after discussing the serious-

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ness of the different contraventions with which the appellants were charged, concluded as follows:

> "After careful consideration of all factors in favour of the respondents, I have come to the conclusion that their names should be struck off the roll on account of their large-scale and persistent touting, apart from any other contraventions of the Act or rules of the Law Society ."

And later

> "Weighing the contravention of Section 33(1) of Act 23 of 1934 (having a deficiency of Trust funds on three given dates) in conjunction with the minor contravention of Section 33(2), the contravention of Section 33(4) by the operation of the Standard Bank Account in addition to their Business Account, as well as their failure (under Section 33(4)) to keep proper books of account, I have also arrived at the conclusion that respondents should be struck from the roll for these contraventions considered collectively."

The above quotations concerning the findings of the court a quo are from the judgment of F.S.STEYN,J., which was concurred

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in by KIRK-COHEN,A.J. Having come to the above conclusions, the court a quo ordered that the names of the appellants be struck off and the court also made certain ancillary orders.

It is against the said orders that the appellants are now before this court on appeal.

The basic contentions advanced by counsel for the appellants on appeal were the following:

(a) that the court a quo erred in its finding that the first alleged contravention had been proved, namely, that there was an actual deficiency in the appellants' trust account,

(b) that the court a quo misdirected itself in material respects on the facts in regard to matters germane to the making of an appropriate disciplinary order,

and

(c) that the court a quo should not have imposed the

ultimate...../30

ultimate penalty which can be inflicted on an attorney, viz. striking the names of the appellants off the roll of practitioners.

Counsel for the Law Society, on his part, supported the finding of the court a quo with regard to the first alleged contravention but he contended that the court a quo erred in finding that certain other alleged contraventions had not been proved. He also submitted that, in the circumstances of the present case, the striking off of the names of the appellants from the roll of practitioners was an appropriate punishment.

Before dealing with the aforementioned contentions advanced by counsel for the parties it will be convenient to refer to a matter of procedure which was raised on appeal. The point, raised by counsel for the appellants, concerned the fact that there was no cross-appeal on the part of the Law Society. Relying thereon counsel for the appellants contended that counsel for the Law Society, in arguing in

support...../31

support of the striking off order, was not entitled to rely on alleged contraventions which the court a quo found had not been proved. The Law Society, so it was submitted, was therefore not entitled to invite this court, as it did, to hold that the court a quo erred in finding that the appellants were not guilty of certain of the contraventions alleged against them.

Counsel for the Law Society, on the other hand, submitted that Rule 5(3) of the Rules of the Appellate Division, relating to cross-appeals, did not apply to the present proceedings and that this court could reverse findings of the court a quo acquitting the appellants on certain charges even though there was no cross-appeal.

The argument advanced by counsel for the appellants was that Rule 5, which prescribes the procedure that should be followed in appeals to this division, distinguishes between civil cases (see Rule 5(1)) and criminal cases (see

Rule...../32

Rule 5 (5)). He submitted that the present case is clearly not a criminal case and that there was no good reason why the provisions of Rule 5 (3) concerning cross-appeals in civil cases should not apply in the instant case. Therefore, so the argument proceeded, the Law Society was not entitled, in the absence of a cross-appeal, to ask this court to reverse the findings of the court a quo in respect of any of these contraventions which the said court held had not been proved.

I cannot agree with counsel's contention. It is abundantly clear that the instant case cannot be regarded as a criminal case. (See in this regard Olivier v. Die Kaapse Balieraad, 1972(3) S.A. 485 (A.D.) at p. 496 and Rheeder v. Ingelyfde Wetsgenootskap van die Oranje-Vrystaat, 1972(3) 502 (A.D.) at p. 507 B, with regard to the degree of proof required in applications of this nature.) But from that it does not necessarily follow that the instant

case...../33

case must for the purposes of Rule 5(3) be regarded as an ordinary civil case.

This court has already stated that applications to court for the striking off of the names of attorneys from the roll of practitioners are not ordinary civil proceedings. They are proceedings of a disciplinary nature and sui generis. (See Solomon v. Law Society of the Cape of Good Hope, 1934 (A.D.) 401 at p. 408, and Hassim v. Incorporated Law Society of Natal, 1977(2) S.A. 757 (A.D.) at p. 767/8.)

The issue in the instant case, as indeed in all cases of this nature, is whether the practitioner concerned has been guilty of unprofessional or dishonourable or unworthy conduct and is therefore unfit to continue in practice as an attorney. The finding of the court a quo on an alleged contravention should, in the circumstances, I think, be regarded merely as a finding in the process of reasoning of the court in arriving at the ultimate decision, namely, whether the attorney concerned is or is not unfit to continue

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in practice as such. (See Bay Passenger Transport Ltd. v. Franzen, 1975(1) S.A. 267 (A.D.) at p. 277 H - 278 A.) Indeed in the instant case the Law Society does not seek any variation of the judgment or order of the court a quo. It is satisfied with the order made. But it seeks to persuade this court that the judgment and order should be upheld on other or additional grounds or reasons which were rejected by the court a quo. (See the Bay Passenger Transport case, supra, at p. 278 C and Standard Bank of S.A. Ltd. v. Stama (Pty.) Ltd., 1975(1) S.A. 730 (A.D.) at p. 749 H - 750 A.)

Counsel for the appellants also argued that if the Law Society could, without noting a cross-appeal, seek to rely on alleged contraventions which the court a quo found had not been proved, the appellants could be prejudiced. The prejudice he forsaw was described as follows in his heads of argument:

> "Even if Appellants are unsuccesful in this Appeal in varying the orders

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made by the Court a quo, it is nevertheless submitted that it is of importance to them that the findings in respect of the charges on which they were 'acquitted' are not altered to 'convictions', for this may have an important bearing on their chances of re-admission. To this extent it is submitted that Appellants would suffer prejudice if the Respondent, in the absence of a cross-appeal, were allowed to argue that Appellants are guilty on these particular charges."

I think that all that need be said on this aspect is that copies of the heads of argument of the Law Society were served on the attorneys for the appellants some ten days before the appeal was heard. In the circumstances I do not think that the appellants can with any justification say that they were prejudiced because they were ~~caught~~ taken by surprise with regard to the contentions which the Law Society intended to advance on appeal.

I come now to deal with the findings of the court a quo which were assailed on appeal by counsel for the appellants. The first of these was the finding that the

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first alleged contravention had been proved, namely, that there was an actual deficiensy in the appellants' trust banking account. Counsel contended that the finding was not justified on the papers before the court. I agree with that contention. To establish the charge proof of two facts was essential, namely, the total amount of trust moneys that appellant ought to have held in their trust banking account on a particular date and the amount in fact held by them in the account on that date. That was not the method which the auditors of the Law Society employed in seeking to establish this charge. As already stated, they relied on the lists of trust balances extracted by the appellants as at 31 May 1976, 30 June 1976 and 31 August 1976.

The appellants however explained in their opposing affidavits that the said lists could not be relied upon inasmuch as their books of account did not reflect the correct position. In this regard I have already mentioned that

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the appellants submitted certificates by their own auditors indicating that on the dates aforestated there were in fact excesses of moneys in the trust banking account.

The approach of the court a quo to this matter is illustrated by the following passage in the judgment of F.S. STEYN,J. :

> " On the evidence submitted by the respondents (appellants) it is clear that the deficiency in Trust moneys at the relevant dates was not so gross that it could not be eliminated by passing certain debits for fees which apparently were due to the respondents and by certain adjustments in the books which could apparently be validly made. The Court has not considered nor did it have the evidence to consider whether all the debits and adjustments claimed by the respondents with the view to the elimination of the deficiency in their holding of Trust moneys in their Trust Banking Account were justified, nor is that an enquiry which the Court was called upon to make."

The court therefore found that

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"-----in terms of the lists of trust balances prepared by the respondents (appellants) themselves, they were deficient in their holding of trust moneys and are guilty of a contravention of the Act."

There is no provision, statutory or otherwise, in terms of which a legal presumption is created in respect of the lists of trust balances or in terms of which a legal onus is cast upon the appellants in this regard.

In the circumstances I am of the opinion that, in view of the explanation offered by the appellants, which explanation was confirmed by their auditors, the court a quo should have found that this alleged contravention had not been proved.

In conclusion on this aspect of the case I must state that, with regard to the gravity of the contravention which the court a quo found to have been established, the following was stated in the judgment of F.S.STEYN,J. :

"-----the...../39

> "-----the seriousness of this contravention is substantially ameliorated by the fact that the deficiency could apparently have been eliminated by debits and adjustments in the books of the partnership without the introduction of fresh capital from sources outside the assets of the partnership------"

Counsel for the appellants, as I have already stated, also relied on what they described as misdirections by the court a quo in material respects on the facts in regard to matters germane to the making of an appropriate disciplinary order. In this regard counsel referred to several passages in the judgment of F.S.STEYN,J. They are the following:

> "Furthermore the father of the first respondent (first appellant) who was a member of the firm when the system of touting commenced, objected to the practice and his departure from the firm was partly motivated by this fact."

and

"The...../40

> "The objections of Cirota snr. to the practice of touting, leading to his withdrawal from the firm, must have been known to both partners but, despite his resignation, the touting continued as before."

It was argued by counsel for the appellants that there was no justification for the finding that touting led to the withdrawal of Cirota snr. from the firm.

Regard being had to the explanation given in the memorandum prepared by counsel on behalf of the appellants (quotations from which appear earlier in this judgment) and to the explanations offered by the appellants in their opposing affidavits (quotations from which also appear earlier in this judgment) the following is clear:

(i) Cirota snr., the senior partner in the firm, got to know of the fact that the firm was involved in the practice of touting,

(ii) he objected thereto, and

(iii) the carrying on by the firm of a third-party practice was a factor which, according to the

memorandum..../41

memorandum propared by counsel for the appellants, " precipitated" his retirement from the practice. From the above it appears to me logical to conclude that the retirement of Cirota snr. was precipitated by the fact that in respect of its third-party practice the firm relied on touting. He could have had no objection to a third-party practice which was conducted without relying on touting. In my view the finding of the learned Judge, as recorded in the above quoted passages, although perhaps badly worded, is not without justification.

Counsel for the second appellant also drew attention to the following passage in the judgment:

> "Second respondent (appellant), in his answering affidavit, concedes some knowledge of the touting but attempts to minimise his involvement. On the probabilities I reject this evidence and find that second respondent was well aware of the fact that the partnership's big practice in third-party claims depended on the employment of touts."

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It was argued by counsel that the conclusion of the court a quo expressed in the second part of this passage was not justified. I disagree. Second appellant knew that, in respect of the third-party practice use was made of touts. It is very unlikely that second appellant would not in the course of time have realised that the substantial increase in the volume of third-party work was attributable to the employment of touts. Indeed second appellant, the partner concerned with the bookkeeping and administrative side of the partnership, must necessarily have known that the reason for opening the Standard Bank account, into which large sums of money were from time to time transferred from the trust banking account, was specifically to facilitate payment of moneys to touts.

Another passage in the judgment referred to by counsel for the second appellant was the following:

> "Although the second respondent (second appellant) knew of this practice of touting, he had no active

part...../43

> part in it and handled a very small number of third-party cases which were procured by the action of touts."

Counsel submitted that there was no justification for the statement that third-party cases handled by the second appellant were procured by the action of touts. This submission is sound.

Counsel also referred to the following passage in the judgment:

> "It is admitted that the firm had on hand about 1 000 uncompleted third-party claims when the investigation commenced of which about 70% had come to the firm from touts. If a favourable estimate for the respondents is made, that would indicate that something like 200 to 250 third-party matters per annum which had come from touts must have been completed and debited in each year, representing a fee income in the order of R100 000,00 annually."

Counsels' submission was that there is no evidence at all to justify a finding that the fee income derived by the

partnership..../44

partnership from work that had been touted for, was of the order of R100 000-00 per annum. The answer to this is that it is clear from the judgment that the learned judge did not in this respect intend to make a finding of fact. He merely, as I read the judgment, intended to illustrate that, if certain assumptions are made, a substantial income would have accrued to the partnership from work that had been touted for.

Also with regard to the practice of touting, counsel for the second appellant, after drawing attention to the following passage in the judgment,

> "On the charge of touting I hold that the second respondent (second appellant) could not be distinguished from that of the first respondent."

argued that the court a quo had misdirected itself. In this regard counsel mentioned several respects in which the position of second appellant in fact differed from that of the first appellant, for example that he did not himself

conceive..../45

conceive of, or introduce the practice of touting, that the touting had in all probability commenced before he joined the firm, that the first appellant did virtually all the third-party work and that second appellant never used a tout or handled work that had been touted for etc., etc.

The court a quo was of course aware of the differences between the positions of the first appellant and that of the second appellant. As I read the judgment, what the court meant when it said that the position of the one could not be distinguished from that of the other was that, for the purposes of imposing appropriate disciplinary punishment, no distinction could be made. I agree with that view. Although, as already stated, second appellant himself did not make use of touts nor handled work that had been touted for, he was aware that his firm was involved in the practice of touting and, for reasons already stated, he must have known that a large volume of work was brought to the firm by touts.

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He should have taken immediate steps to put a stop to that practice or should have dissolved the partnership. Instead he condoned the practice and knowingly accepted his share of fees that accrued as a result thereof.

Finally, with regard to the so-called misdirections on the part of the court a quo, counsel for the appellants drew attention to remarks made by F.S.STEYN,J., in his judgment concerning the conduct of the appellants with regard to the matters raised in the alleged seventh and tenth contravention. It will be recalled that, as indicated above, the court a quo found that the alleged seventh contravention had not been proved but certain remarks were made by F.S. STEYN,J., concerning the fact that the appellants had charged an attorney and client fee of R250. Likewise, in connection with the alleged tenth contravention, the learned Judge made certain remarks concerning the fact that the appellants had debited their client with a handling fee

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of R125. I agree with counsel for the appellants that, inasmuch as the appellants were not, in terms of the contraventions as charged, called upon to advance any argument in justification of debiting an attorney and client fee in the one case and a handling fee in the other, the remarks made by the learned Judge were not justified. It seems to me, however, that except for stating that the fact that these fees were charged (considered together with other facts) indicates

> "-------a frame of mind on the part of the respondents (appellants) that the code of honourable professional conduct required from them as officers of the court, weighed but little with them, and that cupidity, rather than professional discipline, was their guiding star."

the court a quo did not specifically rely on such fact in coming to the decision that the names of the appellants should be struck off the roll of practitioners.

I come next to the third and final contention advanced by counsel for the appellants and that was that

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the striking off order was not an appropriate disciplinary order in view of the particular circumstances of the case, and that a lesser form of punishment should have been imposed, suspending the appellants from practice. This matter can conveniently be discussed under two separate headings namely, the touting contravention and the bookkeeping contraventions.

With regard to touting, F.S.STEYN,J., mentioned in his judgment the fact that the Rules of the Law Society (Rule 47 (1) (i) and Rule 47 quat) specifically deal with and prohibit the type of touting which was carried on by the appellants. The learned Judge referred to an unreported judgment of CILLIE,J.P., concurred in by MARAIS,J., in the Transvaal Provincial Division on 3 September 1975 in the matter of Incorporated Law Society of the Transvaal v. Friedlander and Heyman in which CILLIE,J.P., said

> "The Court was referred to certain cases in this country, and also one overseas, where statements have been

made...../49

made by Courts about the undesirable practice of having a tout or touts. This Court cannot look upon a transgression of this nature as being unimportant. It is a practice which should be eradicated. It is a practice which cannot be leniently dealt with by this Court."

And F.S.STEYN,J., stated

"I hold that the practice of touting is the most disloyal and despicable conduct towards other members of the profession that can be conceived. The fact that the clients, who were introduced by touts, were fairly treated is a substantial factor in favour of respondents, but the unworthy and dishonourable conduct of procuring professional work through a tout is not diminished by the absence of the usually aggravating result that clients procured by touts, are overcharged."

A number of cases were cited to us by counsel for the Law Society in which our courts have over a period of many years held that touting by legal practitioners is a serious contravention. I share that view and do not consider it necessary

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to refer to the cases cited to us.

Counsel for the appellants submitted that, in the instant case, there are a number of mitigating features. Admittedly there are, for example, the fact that the appellants did not debit their clients with the fees paid to touts; that none of their clients suffered a loss; that the appellants were scrupulous in their conduct of the affairs of their clients and that they were able to produce testimonials from insurance companies, attorneys and advocates wherein it is stated that they were always scrupulous, fair and honest in their dealings with others. I do not think that it is necessary to repeat here all the mitigating factors relied on by counsel. There is however one so-called mitigating feature in regard whereto I wish to say something. Counsel for the appellants argued that a factor which should weigh heavily in favour of the appellants is the fact that, so

he...../51

he contended, the appellants mero motu revealed to the Law Society their involvement in touting. Counsel referred in this regard to Law Society ,Cape v. Els 1976 (3) S.A. 402 (E.C.D.). I cannot agree with counsels' contention. The appellants did not mero motu reveal to the Law Society that they were practicing a system of touting. The fact that they did was brought to the notice of the Law Society only after the society had commenced investigations and after the auditors of the society had discovered that the appellants had for some devious purpose opened an account with the Standard Bank.

As against the mitigating features relied upon by counsel for the appellants there are, in my opinion, also aggravating features. They are the following:

(a) the appellants were involved in the practice of touting for a lengthy period, i.e. for six to seven years,

(b)...../52

(b) they continued to be so involved despite the objections of Cirota snr., the then senior partner in the firm, and

(c) they devised a scheme whereby money could be channelled from their trust banking account to a secret banking account with the Standard Bank in order to facilitate payment of fees and other moneys to touts.

The scheme which they devised brought about a situation in which their bookkeeping system was in a deplorable state. No record was kept of moneys transferred from the trust banking account to the Standard Bank account. Nor was there any record of moneys paid out of the last-mentioned account. No wonder then that that situation led to a contemplation on the part of the appellants that they could conveniently make use of the existing system also for tax evasion. It seems that it was only because the Law Society made investi-

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gations that the contemplated scheme of tax evasion was not carried into effect.

Finally there are the bookkeeping contraventions. They are the following:

(i) The appellants' failure, in contravention of section 33(2) (b) of Act no. 23 of 1934, to ensure that certain fixed deposits made with moneys from the trust banking account contained a reference to such sub-section. (Third Contravention)

(ii) Their failure, in contravention of section 33(4) of the Act, to keep proper books of account of their trust moneys. (Fourth Contravention)

(iii) A contravention of Rule 47.1 (5) of the Rules of the Law Society, in that their business books of account contained no record of payments made by them from the Standard Bank account. (Sixth Contravention)

(iv)...../54

(iv) The contravention by them of Rule 64(2) of the Rules of the Law Society which requires payment of amounts due to an attorney to be made to his business banking account.(Eighth Contravention)

The failure to keep proper books of account as required by section 33 of 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) S.A. 15 (C.P.D.) at p. 17/18, Incorporated Law Society, Transvaal v. S., 1958(1) S.A. 669 (T.P.D.) at p. 675 and Incorporated Law Society, Transvaal v. Goldberg, 1964(4) S.A. 301 (T.P.D.) at p. 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.

Also in regard to this aspect of the case

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(the bookkeeping contraventions) counsel for the appellants drew our attention to a number of mitigating features, for example, that there was no evidence of deliberate falsification of the books of account; that not one of the clients of the appellants suffered any financial loss; that the appellants co-operated fully with the auditors of the Law Society in their examination of the books etc., etc. That there are such mitigating features is true. But, also in regard to this aspect of the case there are aggravating features. Not only were the books of account kept in a very slipshod and disorderly manner but the appellants deliberately channelled moneys from the trust banking account to the Standard Bank account with the object of facilitating payment of moneys to touts. No record was kept of moneys so transferred nor of moneys paid out of the Standard Bank account, with the result that, by the time that the Law Society started its investigations, there was an hiatus in the books of the

firm...../56

firm. One wonders what would have happened eventually if the Law Society had not ordered an investigation.

For the reasons aforestated I am of the view that the court a quo was justified in striking the names of both the appellants off the roll of practitioners. In saying so I have not lost sight of the fact that, as held above, the court a quo erred in finding that the first contravention had been proved.

In arguing that the court a quo should rather, in view of the mitigating features in the case, have suspended the appellants from practice, counsel referred to the following statement of MILLER,J., in Incorporated Law Society, Natal v. Roux, 1972(3) S.A. 146 (N.P.D.) at p. 150 :

> "The implications of an unconditional order removing an attorney from the roll for misconduct are serious and far-reaching. Prima facie, the Court which makes such an order visualises that the offender will never again be permitted to practice his profession because ordinarily such an order

is...../57

> is not made unless the Court is of the opinion that the misconduct in question is of so serious a nature that it manifests character defects and lack of integrity rendering the person unfit to be on the roll. If such a person should in later years apply for re-admission, he will be required to satisfy the Court that he is 'a completely reformed character' (Ex parte Wilcocks, 1920 T.P.D. 243 at p. 245) and that his
>
> 'reformation or rehabilitation is, in all the known circumstances, of a permanent nature'.
>
> (Ex parte Knox, 1962 (1) S.A.778 (N) at p. 784). The very stringency of the test for re-admission is an index to the degree of gravity of the misconduct which gave rise to disbarment."

I agree with the learned Judge's statement. But, having regard to what I have said concerning the seriousness of the appellants' contraventions in both the respects mentioned above, viz. touting and not keeping proper books, I am of the view that they indeed displayed a lack of integrity thus rendering them unfit to be on the roll. It follows that,

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in my judgment, the court a quo made an appropriate disciplinary order in the circumstances.

The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

G.V.R.MULLER,J.A.

MILLER,J.A.)
DIEMONT,J.A.) Concur.
VILJOEN,A.J.A.)
HOEXTER,A.J.A.)