REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number 126/05
Reportable

In the matter between:

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

and

HENRIETTA PETER **RESPONDENT**

CORAM: Harms, Scott, Farlam, Nugent et Heher JJA

HEARD: 28 FEBRUARY 2006

DELIVERED: 28 MARCH 2006

SUMMARY: Attorney – misappropriation of trust moneys – whether court *a quo* should have struck the name of the attorney concerned from the roll rather than suspending her for a period and subjecting her to certain restrictions for a further period.

Neutral citation: This judgment may be referred to as Law Society, Cape *v* Peter [2006] SCA 37 (RSA).

JUDGMENT

FARLAM JA

INTRODUCTION

[1] The appellant applied to the Cape High Court for, amongst other things, an order striking the name of the respondent from the roll of attorneys. Instead of granting that relief the High Court suspended the respondent from practice for a year and ordered further that she be precluded from practising for her own account, either as a principal or in partnership or in association or as a director of a private company conducting an attorneys' practice for a period of one year from the expiry of the suspension. It further ordered that the restrictions applicable after the year of suspension expired would only fall away once she had satisfied the appellant, after the restrictions had been in operation for a year, that she has the necessary skills and expertise to conduct a conventional legal practice and manage trust accounts. It gave certain further orders dealing with such matters as the appointment of a curator to administer and control the respondent's trust account and to take possession of her books of account, records, files and other documents relating to her practice and ordered her to pay the costs of the application on the attorney and client scale and to pay the fees and expenses of the curator. The appellant has appealed, with the leave of this Court, against the High Court's decision not to strike the respondent's name from the roll.

FACTS

[2] The respondent obtained an LLB degree from the University of the Western Cape at the end of 1999. She sought articles of clerkship from various firms of attorneys in Cape Town but was unable to obtain them. From January to July 2000 she attended the University of Cape Town School for Legal Practice, after which she obtained the Diploma in Legal Practice. From July 2000 to August 2001 she served

under articles for a period of one year at the Centre for Justice in Athlone. From September 2001 to January 2002 she was employed as a para-legal, working for an attorney who practises in Pelican Park. In February 2002 she successfully wrote the attorneys admission examination and was admitted as an attorney on 2 August 2002. She was unable to obtain employment as a professional assistant with a firm of attorneys and had no capital with which to start a practice. Shortly after her admission she met an executive member of a trade union and became involved in a relationship with him. He informed her that the union required an attorney's assistance with some of its matters and that she would be able to assist it in this regard.

[3] She decided to set up practice as a sole practitioner in an office in the building occupied by the union, which lent her a desk and a chair. She used its computer and paid half the salary of two of its employees who acted as her typist/secretary and messenger. She borrowed the money to pay the first two months rental for her office, which was payable in advance.

[4] As I have said, she had no capital at all with which to begin her practice. She also did not have any clients: those who came to her were members of the union, sent by it. They were unable to pay any fees or deposit money in advance for work to be done or in progress. She took work from them on a contingency basis, hoping to be paid, as she put in her affidavit, if the matters were successful. In her affidavit she stated that she had believed that on commencing practice she would earn and be paid sufficient to meet the basic minimum expenses to keep her office open, particularly in the light of the promises of the union, but this did not happen. Although she had done work for a number of clients the fee income actually received was utterly insufficient to meet the basic monthly expenses needed to keep her office open. By the end of December 2002 she found herself in a desperate position unable to pay the expenses of her practice. In addition she was obliged to leave the place where she was staying and to obtain other accommodation for which it was

necessary for her to pay rental and a deposit in advance.

[5] During December 2002 the respondent received various amounts of money in trust which she proceeded to transfer to her business account. She used these amounts to pay her outstanding practice expenses, and the advance payment for her accommodation. In January and February 2003 she wrongly transferred further sums from her trust account to her business account and used them to pay practice expenses and what she called in her opposing affidavit her essential personal living costs. Initially trust funds owing to a client named Ajam were misappropriated but these amounts were later retransferred to Ajam's account and paid over to him. Further amounts, including those required for the repayment of Ajam, were misappropriated from trust funds owed to two other clients of the respondent's, FJ Solomons and his brother M Solomons.

[6] The consequence of the respondent's having paid business expenses and living costs was that by 28 February 2003 she only had R13 284.36 available in trust, when she ought to have had at least on her own calculations R22 805.28, the amount then owing to the Solomons brothers. Further sums totalling R11 437.98 were debited to her trust account in March 2003, with the result that at the end of March 2003 she only held a total amount of R2 272.22 in trust. She admitted that she continued the practice of paying her expenses directly from trust during March.

[7] After March 2003, she committed no further irregularities in relation to money held in trust on behalf of other clients, despite the fact that she had received moneys on their behalf.

[8] On 27 May 2003 FJ Solomons complained to the appellant that he had not received a full accounting from the respondent regarding the amounts she had received on his behalf pursuant to a settlement between the Solomons brothers and their employer Electrotech Industries (Pty) Ltd. The appellant sent a copy of the complaint to the respondent on 4 June 2003 and requested her to provide it with a full report.

[9] In her reply, dated 2 July 2003, the respondent stated that she pleaded guilty to professional misconduct in that at the end of February and March 2003 she had used the aforementioned balance [ie, the moneys due to the Solomons brothers] that ought to have remained in trust. She set out certain factors to be considered by the appellant, as she put it, in 'mitigation of sentence' and submitted that the appellant should impose a warning.

[10] The appellant's response was to apply to the High Court for an order interdicting the respondent from practising, pending the decision of the court in an application to be brought against the respondent for the striking off of her name from the roll. On 25 November 2003 Thring J granted the appellant's application for an interdict and the respondent has in consequence not practised as an attorney since that date. The reason that the appellant applied initially for an interdict and did not immediately launch a striking off application was its belief that a full investigation might disclose further misappropriations. In the result no further misappropriations were discovered and the appellant's president, Mr Taswell Papier, in his replying affidavit, stated that the appellant did not dispute the respondent's allegation that apart from the misappropriations during the period December 2002 to March 2003, with which the respondent dealt fully in her answering affidavit, she had been guilty of no other irregularities in respect of trust moneys.

[11] In his founding affidavit Mr Papier submitted that the respondent had manifested character defects that demonstrated that she is not a fit and proper person to continue to practise as an attorney.

[12] In her answering affidavit the respondent repeated the admission she had made in her reply to the complaint received by the appellant. She stated that it had been her intention at all times to replace the sums she had misappropriated once the fee income from completed matters became available. In her affidavit she set out her personal circumstances, which may be summarized as follows:

(a) She was 29 years old when she made her affidavit. (In fact she was born on 8

January 1975 so that the misappropriations took place on either side of her 28th birthday.)

(b) She spent seven years studying towards her LLB degree and her studies were achieved through substantial sacrifice from her parents, both of whom worked hard to give their children tertiary education, something they themselves did not have.

(c) She was never exposed to practice in a conventional law firm and was not in any way exposed to bookkeeping, management of trust accounts or the practical business aspects of running an attorney's practice. (As her counsel submitted this does not excuse her conduct but does explain how she could naïvely start up a practice in the way she did, without funds or backing and in a position where she was unable to pay the basic expenses for the first few months.)

(d) She did not make use of the moneys received into trust for personal luxuries or high living.

(e) She did not attempt to hide the misappropriations by false book entries or some elaborate scheme.

(f) She stated that she deeply regretted what she did.

(g) In February 2003 she attempted suicide because she was suffering from depression and stress due, *inter alia,* to her realisation that she had misappropriated trust funds, work related stress with which she was unable to cope and the fact that she was involved in an abusive and physical relationship with the executive member of the trade union to whom I have referred earlier.

JUDGMENT IN COURT *A QUO*

[13] In his judgment in the court *a quo* Moosa J said that the respondent's conduct 'manifested a character defect that warrants the conclusion that she is not a fit and proper person to continue to practise'. In deciding whether to strike her name from the roll or to suspend her from practice the learned judge stated that he did not think that this case 'warrants a striking off'. He continued:

'In my view there are exceptional circumstances not to impose such a penalty. What counts in respondent's favour is her frank and full disclosure, accepting responsibility for her conduct, the short duration and limited nature of her misconduct, her expression of contrition and her willingness to

effect restitution and her limited exposure to the running of a conventional legal practice and management of trust accounts'.

He accordingly made the order summarized in para 1 above.

SUBMISSIONS IN THIS COURT

[14] It was argued on behalf of the appellant that the court *a quo* erred in not striking the respondent's name from the roll of attorneys. It was contended that in view of the court *a quo's* finding that the respondent had misappropriated trust moneys because of a character defect, which it did not find had been cured, she should not merely have been suspended. In principle, so it was argued, once a court has found an attorney to have an unreformed character defect that renders that person not a fit and proper person to practise, the court should strike his or her name from the roll.

[15] Counsel for the respondent submitted on the other hand that the court *a quo,* after considering all the facts, correctly exercised its discretion in making the order it did.

DISCUSSION

[16] I cannot agree with the court *a quo* that the respondent's actions in stealing trust moneys resulted from a character defect. In my opinion they can more readily be seen as a moral lapse brought about by the pressure that she was under at the time. The fact that she succumbed to that pressure in the way she did leads to the conclusion that she is not a fit and proper person to continue practising as an attorney but not necessarily to the further conclusion that her name must be struck from the roll. Because I do not agree with the court *a quo* that the respondent suffered from a character defect this court is, in my view, at large itself to exercise

the power conferred on the court by s 22(1)(d) of the Act to decide whether to strike from the roll the name of an attorney found to be not a fit and proper person to continue to practise or merely to suspend the attorney concerned from practice.

[17] Section 22(1)(d), which confers on the court the alternative powers of removal or suspension in the case of attorneys who have been found, in the court's discretion, not to be fit and proper to continue practising, does not provide any guidance as to when the power of suspension rather than the power of removal should be used. It is clear that a court which is called upon to decide which of these two powers to use exercises a discretion: see, *Nyembezi v Law Society, Natal* 1981 (2) SA 752 (A) at 758, *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 637 and *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 851E.

[18] In exercising this discretion the courts have sought, as it was put by Hefer AP in *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) at 16E-F, not only 'to discipline and punish errant practitioners, but also, and more importantly (particularly in cases … where trust money was misappropriated), in order to protect the public.' Hefer AP continued: 'This is mainly why the possibility of a repetition of the conduct complained of must be taken into account when it comes to deciding upon an appropriate penalty for proven misconduct.'

[19] The approach of the courts down the years has been as a general rule to remove the names of attorneys guilty of misappropriation of trust funds from the roll: see, eg, *Incorporated Law Society v Salinger and Wolmarans* 1917 TPD 660 at 670. But that case itself illustrates that the rule laid down was not an invariable one: where mitigating factors were present the courts could and did deviate from the general rule and merely suspended the delinquent attorney. Thus Salinger, the first respondent, was suspended for five years and Wolmarans, the second respondent, had his name struck from the roll. Another case where a suspension was ordered rather than removal is *Law Society of Cape of Good Hope v McLaren* 1938 CPD 93.

[20] A suspension order can be for a determinate period or an indeterminate one: *A v Law Society of Cape of Good Hope, supra,* at 852E-F. Examples of suspension orders operating for indeterminate periods can be found in cases where the reason that the practitioners concerned were not fit and proper persons to practise was a condition such as a personality disorder. The suspension orders in such cases were framed so that they operated until such time as the practitioners concerned satisfied the court that the cause of unfitness in question had been removed: see, eg, *A v Law Society of Cape of Good Hope, supra,* and *Incorporated Law Society v Zimmerman* 1940 TPD 84.

[21] Cases where a suspension for a determinate period is ordered tend to be more difficult because before the court can allow the practitioner concerned, who *ex hypothesi* is not a fit and proper person at the time the suspension is imposed, to practise again at the expiry of the suspension, it must be satisfied on a balance of probabilities that when practice is resumed the unfitness which led to the order will no longer exist. This is because before any person is allowed to practise or resume practice his or her fitness to practise must be established to the satisfaction of the court.

[22] In the present case I am satisfied that the respondent is not an inherently dishonest person: her conduct from April 2003 onwards, particularly after she received Mr Solomons's complaint from the appellant, demonstrates this. She has clearly learnt a hard and painful lesson. By the time the court *a quo's* order was delivered she had in effect already been suspended from practice for almost a year because of the interdict granted by Thring J on 25 November 2003. I am satisfied that at the expiry of the period of suspension imposed by the court *a quo* the factors rendering her unfit to practise would no longer be operative. In doing so I have had particular regard to the factor mentioned in *Budricks's* case, *supra,* at 16F-G, which I quoted in para 18 above, namely the possibility of a repetition of the conduct complained of. I am also of the view that it was appropriate for the court *a quo* to impose a further restriction on the respondent after the expiry of the period of suspension, namely that for a minimum period of a year she should not practise for her own account.

[23] At first blush it may appear illogical to impose such a restriction on a person as to whose fitness to practise one is satisfied but this is in my opinion a case where it is preferable to err on the side of caution. Although a repetition is unlikely there is always, by the very nature of things, uncertainty. The respondent has shown herself to be naïve and immature, lacking in experience and insight. It therefore seems to have been a wise precaution for the court *a quo* to have restricted her from practising for her own account for a further period after the expiry of her suspension so that she has the opportunity to gain the necessary insight and maturity the lack of which led to her present predicament.

[24] There are, however, two respects in which I think that the court *a quo's* order on this part of the case should be amended. First I think it more appropriate that the decision as to whether and when the restriction is to be lifted be made by the court and not the appellant. Secondly, the question for consideration when the respondent applies for leave to practise for her own account will not be whether she has the necessary skills and expertise to conduct a conventional legal practice and manage trust accounts but whether in the light of her past history it is appropriate for the restriction to fall away. This she will establish by producing affidavits from those who will have had sufficient contact with her once she resumes practice to be able to satisfy the court that she has the skills and maturity required to run a practice on her own.

[25] The amendments to clause 3 of the order of the court *a quo* are not of such a nature that one can say that the appellant has enjoyed substantial success in the appeal. In the result I am satisfied that justice would be served in this case if no order were made as to the costs on appeal.

ORDER

[26] The following order is made:

1. The appeal is allowed to the extent that clause 3 of the order of the court *a quo* is replaced by the following:

‘3. Should the respondent, after the expiry of the period referred to in clause 2 above, elect to practise in the manner set out in that clause, she shall satisfy the court that it is appropriate that she be permitted to practise for her own account.’

2. Subject to paragraph 1 above, the appeal is dismissed.

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IG FARLAM
JUDGE OF APPEAL

CONCURRING

SCOTT JA
HEHER JA

NUGENT JA:

[27] I regret that I cannot agree with the order that is proposed by my colleague Farlam JA.

[28] The power that is given to a court to remove or suspend an attorney from the roll is aimed at protecting the public from being led to believe erroneously that the attorney concerned has the attributes for the proper performance of that function. The enquiry before a court that is called upon to exercise that power is not what constitutes an appropriate punishment for a past transgression but rather what is required for the protection of the public in the future. Some cases will require nothing less than the removal of the attorney from the roll forthwith. In other cases,

where a court is satisfied that a period of suspension will be sufficiently corrective to avoid a recurrence of the offensive conduct, an order of suspension might suffice. But the proper approach in each case is not to weigh the various factors for the purpose of finding an appropriate punishment – as a criminal court would do when sentencing an offender – but to determine whether, or if appropriate when, an attorney should be permitted to continue in practice.

[29] The court below approached the matter by weighing various factors against one another, as a criminal court would do when imposing a sentence, and then determining what it referred to as an appropriate penalty, and in my view that approach was misdirected. (A similar misdirection is also to be found in some of the decided cases.) Furthermore, the terms upon which it suspended the respondent – in particular those contained in paragraph 3 of the order – were also misdirected because the complaint was not that the respondent lacks the skills and expertise to conduct a legal practice and to manage trust accounts. The sole complaint was that she has shown herself to be dishonest.

[30] By being placed on the roll of attorneys a person is held out to the public as being worthy of their trust. It hardly needs saying that the theft of trust moneys, in whatever circumstances, is altogether inconsistent with that trust, and will usually justify the removal of the attorney from the roll forthwith lest others might also be exposed to the same abuse.

[31] If by a ‘character defect’ the court below meant to convey that the respondent lacked the strength of character to resist the temptation to steal moneys that had been entrusted to her then I agree. But I do not think the evidence goes so far as to show that her character is so inherently flawed that she will necessarily continue to succumb if she returns to practice. Like my colleague I see her conduct rather as a lapse that will not necessarily recur. I am by no means sure – her expressions of contrition notwithstanding – that the respondent fully understands the extent to which her conduct fell short of the high standards that are expected of an attorney. But I am of the view that, with a period of suspension that is sufficient to drive that point home, it is likely that there will be no recurrence, and in those circumstances it is not necessary that she be struck from the roll.

[32] Where I part company with my colleague – apart from on the question of the period of suspension – is in relation to the terms that he proposes to attach once the period of suspension expires. The order proposed by my colleague will permit the

respondent to return to practice as an attorney but not for her own account until she satisfies a court that it is appropriate to lift that restriction.

[33] The affidavits that my colleague envisages as being required to satisfy a court in the future that it is appropriate to lift the restriction – affidavits attesting to her skill and maturity – do not seem to me to meet the point of the complaint. I see no purpose in a future enquiry as to her skills and maturity when in truth the problem lies elsewhere. Perhaps those were factors that led her to succumb to temptation but no doubt there will be other temptations during the remainder of her career. The solution does not lie in removing the causes for temptation but rather in being satisfied that she will act honestly in whatever circumstances.

[34] Honesty and integrity are so fundamental to the functions of an attorney – whether the attorney practises on his or her account or under supervision – that where a court is not satisfied that the attorney is possessed of them in sufficient measure in my view the attorney ought not to be permitted to practise in any form at all. I do not think a court should invite the public to again place their trust in an attorney on the basis that they will be protected by some unspecific form of supervision. I am alive to the fact that a court can never be sure that an attorney will indeed act honestly in the future. But where there is lingering doubt on that score in my view the attorney should not be permitted to return to practice until the doubt is removed.

[35] The conclusion I have reached after considering the nature of the respondent's conduct, and her explanations, is that after a period of suspension that is sufficient to bring home to the respondent the seriousness of her lapse, it is unlikely that the lapse will recur. In those circumstances I see no basis for imposing a restriction on the form in which she may practise when the period of the suspension expires. Had I retained sufficient doubt concerning her future honesty as to warrant extra caution I would have required that doubt to be removed before permitting her to return to practice at all. For those reasons I would substitute for paragraphs 1, 2 and 3 of the order of the court below an order suspending the respondent from practice for a period of three years.

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R W NUGENT
JUDGE OF APPEAL

HARMS JA : CONCURS