IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN) **Reportable**

CASE NO. 1892/2011

In the matter between:

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

and

MICHAEL WHARTON RANDELL **Respondent**

JUDGMENT

ALKEMA J

[1] This is an application for an order that the respondent's name be struck off the roll of attorneys of this Court, together with certain ancillary relief. The application is opposed by the respondent.

[2] After the filing and service of the answering and replying affidavits, the respondent applied for leave to file and serve a further, additional affidavit. The applicant has filed and served a replying affidavit to such additional affidavit, and does not oppose the filing of the additional affidavit. We therefore granted, by agreement, the filing of the further set of affidavits.

[3] In the replying affidavit filed and served by the applicant, it dealt with certain criminal proceedings against the respondent and his co-accused, Mr *Patrick Shelver*. It annexed to the replying affidavit a copy of the indictment which includes a narrative prepared by the prosecution entitled *"Background Facts;"* a detailed Plea Explanation also including *"Background Facts"* prepared on behalf of the accused (*Shelver*) in terms of s.112 (2) of the Criminal Procedure Act 51 of 1977; and a copy of the Regional Magistrate's conviction and sentence of Mr *Shelver*.

[4] Mr *Shelver*'s plea explanation makes reference to the respondent and incriminates the respondent in criminal activity. The applicant has now applied for leave to file a further affidavit, annexing a *"statement"* of *Shelver* (not made under oath) in which he confirms the correctness of the allegations in his plea explanation. In such further affidavit the applicant contends that the content of the plea explanation is of fundamental importance in these proceedings. It is submitted by Mr *Ford* SC, on behalf of the applicant, that the hearsay evidence contained in the plea explanation of Mr *Shelver* should be admitted in evidence in terms of s. 3 (1) (c) of the Law of Evidence Amendment Act 45 of 1988 on the basis that this would be in the interest of justice. He submitted that Mr *Shelver* is presently not in the country to present such evidence under oath (it appears from his *"statement"* annexed to the applicant's affidavit sought to be admitted as a further affidavit in these proceedings, that Mr *Shelver* currently resides in Malaysia some 350 km from the nearest South African Embassy which is the only place at which he can depose to an affidavit or have his signature authenticated). The respondent opposes the admission of such further affidavit and the *"statement"* of Mr *Shelver.*

[5] Mr *Scott* SC, who together with Mr *Moorhouse* appeared for the respondent, submitted that if regard is had to those factors mentioned under s.3 (1) (c) of the Law of Evidence Amendment Act, then the admission of the further affidavit and *"statement"* of Mr *Shelver*

is not in the interest of justice as required by the section, and should not be admitted in evidence.

[6] If I understood Mr *Scott* SC correctly, he submitted that having regard to this Court's wide discretionary powers to admit evidence and/or further sets of affidavits, the respondent does not apply for any document or affidavit introduced by the applicant to be struck out. However, he submits that, for the reasons he advanced, no or very little weight should be attached to the content of the documents annexed to the replying affidavit and to the applicant's further affidavit, which includes *Shelver*'s plea explanation. Thus, on my understanding of the position taken by Mr *Scott* SC on behalf of the respondent, the latter effectively consents (or does not oppose) to the further affidavit of applicant being received in evidence, on the basis that no or very little weight can be attached thereto. The respondent takes the same position in regard to the content of the annexures to the applicant's replying affidavit which includes the plea explanation. He does not apply for the striking out of those documents or for a ruling that the content thereof is declared inadmissible hearsay evidence, but rather that this Court attaches little, or no weight thereto.

[7] In view of the stance taken by Mr *Scott* SC, we ruled that the further affidavit introduced by the applicant and reply thereto by the respondent including the annexures to the applicant's replying affidavit, be received in evidence, subject to a decision on the weight to be attached to the content thereof.

[8] Before dealing with the merits of the application, I believe it is necessary to first decide what, if any, weight should be attached to the content of the further affidavit delivered by the applicant, and to the content of the annexures to the replying affidavit.

[9] Not one of the aforesaid documents, including the content of the indictment, *Shelver*'s plea explanation and his "statement" annexed to the affidavit, are attested. This render the entire content of all the documents referred to above inadmissible hearsay evidence, and this is the point of departure. The question is whether such hearsay evidence may be admitted under s. 3 (1) (c) of the said Act.

[10] S. 3 (1) of the Law of Evidence Amendment Act 45 of 1988 provides:

> *"3. (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings unless-*
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> *(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
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> *(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
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> *(c) the court having regard to—*
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> *(i) the nature of the proceedings;*
>
> *(ii) the nature of the evidence;*
>
> *(iii) the purpose for which the evidence is tendered;*
>
> *(iv) the probative value of the evidence;*
>
> *(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
>
> *(vi) any prejudice to a party which the admission of such evidence might entail; and*
>
> *(vi) any other factor which should in the opinion of the court be taken into*

account,

is of the opinion that such evidence should be admitted in the interests of justice."

[11] Sub-sections (a) and (b) do not apply. The issue is whether the evidence should be admitted under (c).

[12] I am of the view that the answer should be in the negative.

[13] The documents attached to the replying affidavit were prepared in the criminal proceedings against *Shelver*. The purpose of the plea explanation was essentially to mitigate the role played by *Shelver* in the criminal conduct of the affairs of the trust and to mitigate any sentence he may receive. The nature of these proceedings is entirely different. The purpose of these proceedings is to enquire into whether or not the respondent is a fit and proper person to act as an attorney. Experience and common sense dictate that allegations in plea explanations are more often than not designed to shift blame to co-accused or to underplay the accused's own involvement and overemphasize the role played by others. The potential prejudice to the respondent if these documents are admitted in evidence, is self evident. I believe it is in the public interest that the content of all these documents should remain what they are; namely inadmissible hearsay evidence.

[14] In the exercise of this Court's discretion under s.3 (1) (c) I therefore believe that such evidence should be excluded in their entirety. I therefore propose that in the consideration of this application this Court should not have any regard to the documents annexed to the

replying affidavit or to the further affidavit introduced by the applicant, and I intend to approach this application on such basis.

[15] Applying the *Plascon* rule, the chronology of events leading to the institution of these proceedings (all of which are common cause) as gleaned from the founding and answering affidavits, may be described in summary as follows:

[16] During the beginning of 1999 the respondent was approached by the late Mr *Michel Lascot* (*Lascot*) and Mr *Patrick Shelver* (*Shelver*). At the time two of respondent's children were enrolled as learners at the Greenwood Primary School, Port Elizabeth (*the School*). The respondent served on the Governing Body of the School (GB) first as an ordinary member and by 1999 as its deputy chairman. *Lascot* was the Chairman of the GB, and *Shelver* was the principal of the School.

[17] *Lascon* and *Shelver* advised the respondent that *Lascot*'s aunt, Mrs *Schauder*, was the owner of certain immovable property which adjoined the property on which the school was situated. Mrs *Schauder*'s property was on the market for R750.000, 00. It was the last attractive development property within the central part of Port Elizabeth and it offered valuable development prospects. Both *Lascot* and *Shelver* wished to buy the property but neither had the necessary funds available to do so.

[18] *Lascot* explained to the respondent that he had established that Mrs *Schauder* would be prepared to reduce the price to R500.000,00 on condition that the School benefitted. He proposed that if the School were to be introduced to the transaction, this would serve to temper the price. He suggested that a Trust be formed as a vehicle for a joint business venture in which *Lascot*, *Shelver*, the respondent and the School would participate and have

an interest. Respondent saw the lucrative potential of the development and discussed it with his wife. He accepted the offer.

[19] As an attorney, the respondent was charged with the duty to prepare and register the Trust Deed and to deal with all legal issues concerning the development of the property and the conduct of the joint business venture. The Trust was registered on 21 April 1999 under the name Greenwood Property Trust (the Trust). *Lascot* was the founder and donor (a nominal amount); The Trustees were *Lascot*, *Shelver* and the respondent; and the School was reflected as the sole beneficiary. I will later in this judgment return in more detail to the terms of the Trust Deed.

[20] As said earlier, at the time of the formation of the Trust, the Trustees were also members of the GB of the School in the following capacities: *Lascot* was the Chairman of the GB; *Shelver* was the principal of the School and the respondent was the vice-chairman of the GB.

[21] A few days after registration of the Trust, on 28 April 1999, the Trust purchased the immovable property of 1.1 934 hectares adjoining the School from its owner *Skybridge Investments (Pty) Ltd*. represented by Mrs *Schauder* for the sum of R500.000,00.

[22] The purchase price of R500.000,00 was funded by a loan from Standard Bank secured by a first mortgage bond over the property. The property was leased by the Trust to the School at a monthly rental which was used by the Trust to fund the bond instalments owing by it to the Bank. The dwelling and out-buildings on the property were used by the School as a library and as an after school centre.

[23] It is thus clear that the business venture embarked upon by the Trustees was structured in such a manner that the School, effectively, paid for the purchase price of the property (via the payment of rentals) without the need for the trustees to make any financial contribution to the purchase price. Of course, in return for the payment of rentals, the School benefitted from the use of the property.

[24] Thereafter, the trust (acting through the Trustees) engaged the services of Architects *Balshaw and Associates* to prepare a plan for the development which envisaged a sub-division so as to separate the dwellings and the out-buildings (leased to the School) from the remainder which could then be developed in terms of the original conceived business venture to the exclusive benefit of the Trustees (the school would benefit from the existing dwelling and out-buildings).

[25] The development of the remainder of the sub-division intended to benefit the Trustees incorporated a series of Townhouses necessitating a total capital outlay of R11.395.512,68. The Trust instructed Land Surveyors *Hemsley* and *Myrdle* to proceed with the sub-division and apply for the necessary re-zoning of the land. It is common cause that the development plan prepared by *Blashaw and Associates* never intended that the School benefit from the residual portion. In regard to the remainder which would remain vested in the School, the plan reads:

> *"No development will take place on the remainder. The property will only be re-zoned in order for the school to operate the library on the property."*

[26] The Trustees then marketed the proposed sub-divided residual portion (the residual) subject to the sub-division, but without any immediate success.

[27] The next event in this narrative occurred six years later. On 2 March 2005 the Trustees passed a resolution in terms of clause 27 of the Trust Deed which empowers them to vary the provisions of the Deed by amending the definition of *"beneficiary"* in the preamble to the Trust Deed. As said earlier, before the amendment the definition of *"beneficiaries"* in the Trust Deed referred only to the school. The amendment was to add the following words *"... and/or any other beneficiaries which the Trustees may from time to time unanimously by resolution nominate ..."*

[28] On 2 August 2005 the Trustees resolved to appoint themselves as additional beneficiaries of the Trust. On the respondent's own version, *"... this was in accordance with the original intention."* In this regard I point out that when the Trust was formed, the School issued a letter to the Master (signed by *Lascot* and *Shelver* on behalf of the School) in terms of which the School consented in its capacity as the (then) sole beneficiary of the Trust, to the Master exempting the Trustees of the Trust from furnishing security. The stance taken by the new beneficiaries was presumably that since the Trustees were already exempted from furnishing security, the position remained unaffected.

[29] Eight months later, on 21 April 2006, the Trust sold the residual to a developer (Proud Heritage Properties 138 (Pty) Ltd.) for a purchase consideration of R3.5 million. In addition to the purchase consideration, the developer undertook to construct six classrooms and two garages on the grounds of the School (the remainder) at its cost of approximately R1.5 million. The purchase price of R3.5 million was payable in cash against registration of transfer of the property in the name of the developer.

[30] On 27 June 2006 the provision in the sale agreement regarding payment of the purchase price of R3.5 million was amended in an addendum. The amendment reads as follows:

> *"1.1 The purchase price is the sum of R3.500.000,00 which sum shall be paid and guaranteed in the following manner:*
>
> *"1.1.1. As to R2.300.000,00 (Two million one hundred thousand Rand),* (sic) *in cash against registration of transfer;*
>
> *1.1.2. As to the balance of R1,200,000,00 (One million four hundred thousand),* (sic) *by way of set off from the purchase price of units 3.8 and 3.9 in the development known as Echo Edge to be developed by the purchaser on the property in respect of which the Purchaser has furnished to the Seller or its nominees, options to purchase the said units upon completion thereof, alternatively, in respect of which agreements of sale have been signed;*
>
> *1.1.3. The Purchaser shall within 7 days hereof furnish a guarantee to the satisfaction of the Seller or its nominees, for the sum referred to in clause 1.1.1 above."*

[31] The residual was duly transferred into the name of the developer on 8 August 2006.

[32] The precise manner in which the proceeds of the above sale were distributed is unclear from the papers. What is, however, not disputed by the respondent, is the following:

1. The School received the value of 6 classrooms and 2 garages in the sum of R1.5 million, plus a further R50.000,00 in cash from the proceeds of the sale.

2. During May 2006 the Trust paid to each Trustee in their capacities as beneficiaries the sum of R10.000,00 each, and on 27 June 2006 the Trustees resolved to, and did, distribute R2.4 million to themselves in equal proportions in their capacities as beneficiaries of the Trust, making an aggregate sum of R2.43 million.

[33] At all material times hereto, the duly appointed auditors and accountants of the Trust were *Mazars Moores Rowland* (*MMR*) of Port Elizabeth. While auditing the Trust's books of account during February 2008, Mr *Steve Kapp* of *MMR* came across various perceived irregularities in relation to the Trust and the conduct of the Trustees. He reported these alleged irregularities to Mr *Nurse*, an attorney and director of the attorneys' firm *Padgens* in Port Elizabeth and instructed him to make further investigations. These investigations revealed, and this is common cause, that with the exception of *Shelver*, *Lascot* and the respondent, the other board members of the GB and staff and personnel of the School were all blissfully unaware of the manner in which the affairs of the Trust had been conducted over the years and of the events described above. The result of the investigations by *Padgens* was, *inter alia*, the institution of these proceedings and also of criminal proceedings against *Shelver*, *Lascot* and the respondent.

[34] When respondent became aware of the investigations by *MMR* into the affairs of the Trust, he purported to remove *MMR* as auditors of both the GB and the Trust. I do not believe anything turns on these events and nothing further need be said in this regard.

[35] As said, all of the aforesaid is common cause. The dispute between the parties centres around the construction to be placed on the events described above. The position taken by applicant is that respondent acted in serious breach of his fiduciary duty as Trustee and as member and vice-chairman of the GB of the School. Secondly, he was not entitled to place

himself in a position where his personal interest conflicted with his duties to the School and he was not entitled to make a secret profit at the expense of the School. In acting in the manner in which he did, the applicant contends that the respondent is not a fit and proper person to continue to practise as an attorney as contemplated by s.22 (1) (d) of the Attorneys Act 53 of 1979 (the Act). It submits that the element of dishonesty in the conduct of the respondent calls for his name to be struck from the Roll of Attorneys.

[36] The respondent, on the other hand, contends that the Trustees at all times acted honestly and lawfully. The terms of the Deed of Trust allowed them to take the resolutions which they did, and they were not, in terms of Deed, answerable to the School or its GB. Further, the conduct complained of does not relate to the conduct of respondent in his practice as an attorney. He acted in his personal capacity and his reputation in the conduct of his practice remain unblemished. It is common cause that it has never been suggested that he acted unlawfully or wrongfully in the conduct of his practice as an attorney. Finally, and even if it is found that he acted unprofessionally in relation to the Trust, he acted in the *bona fide* belief that he was legally entitled to act in the manner in which he did. In the circumstances, his blameworthiness falls to be reduced and a penalty of striking off would be disproportionate to his wrongdoing. A more proportionate and just penalty should be a reprimand; or worst, the imposition of a fine.

[37] A Court derives its power to strike an attorney from the Roll of Attorneys from section 22 (1) (d) of the Act. This section provides that if the attorney in question, in the discretion of the Court, is not a fit and proper person to continue to practise as an attorney, his name may be struck from the Roll of Attorneys. Thus, the essential question in this case is whether the respondent is a fit and proper person to continue to practise as an attorney.

[38] It is now trite law that the enquiry into whether a person is *"... a fit and proper person ..."* within the meaning of s.22 (1) (d) contemplates a three-stage enquiry; namely—

1. First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities; and if so,

2. whether in the discretion of the Court, the person is a fit and proper person to continue to practise as an attorney; and if not,

3. whether in all the circumstances the person in question is to be removed from the Roll of Attorneys, or whether an order suspending him from practice for a specified time will suffice.

See: *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at para 10; *Malan and Another v Law Society, Northern Province* 2009 (1) SA 216 (SCA) at para 4.

[39] I will deal with the three requirements in the same order.

1. Was the alleged offending conduct established?

[40] The alleged offending conduct relied upon by the applicant is that the respondent is guilty of dishonourable and disgraceful conduct in that he, whilst acting as Trustee of the Trust and in a dishonest and clandestine manner, breached his fiduciary duties as Trustee and placed himself in a position where his personal interests conflicted with his duties to the School.

[41] The material facts relied upon by the applicant are not disputed by the respondent. In short, the respondent contends that the Trustees were legally entitled to amend the Trust Deed in the manner in which they did, and that they at all material times acted lawfully and

in terms of the provisions of the Trust Deed. They lawfully and bona fide pursued a business venture to enrich themselves and which also benefitted the School.

[42] It is therefore not an issue of what the facts are, but rather what construction should be placed on the agreed facts. Put differently, the issue is whether the actions of the Trustees and that of the respondent particularly, amount, in law, to dishonest and disgraceful conduct which would render the respondent an unfit person to continue to practise as an attorney.

1.1. The nature of the Fiduciary Duty

[43] Having regard to the defence raised by the respondent, it is necessary to reflect briefly on the nature of the legal concept known as a fiduciary duty.

[44] A fiduciary duty can only arise in circumstances where the legal convictions of society recognize and give legal protection to a relationship between two or more persons in which one or more person/s stand in a position of trust to another person or class of persons. If such a person acts in breach of the trust placed in him or her by the other person, he or she acts in breach of his or her fiduciary duty and is in law held to have acted wrongfully or unlawfully. It follows that a fiduciary duty may arise in all branches of the law, be it criminal law, the law of contract, the law of persons and family or the law of delict. Examples are found in certain relationships between parent and child; teacher and learner; attorney and client; medical practitioner and patient; husband and wife; insurer and insured; employer and employee; trustee and beneficiary under a deed of trust or shareholders and board of directors in company law. The list is open and will depend on the nature of the relationship.

[45] As correctly submitted by Mr *Ford* SC, the fiduciary duty owed by the respondent arose from two grounds:

(a) In terms of s.16 (2) of the South African Schools Act, 84 of 1996, a Governing Body stands in a position of trust towards the School. See also: *Stutterheim High School v The MEC Dept. of Education ECP and Others* [2009] 4 All SA 364 E at para 44. The respondent served on the GB of the School for an extended period of time. At the time of the relevant events, he was the vice- chairman of the GB of the School. As such, he stood in a position of trust to the School.

(b) Secondly, in his capacity as Trustee of the Trust, he stood in a position of trust to the School which was a beneficiary of the Trust.

[46] It is now acknowledged that a trust is not a separate legal entity such as, for instance, a company. However, its assets and liabilities vest in the hands of its trustees who are required to keep trust assets separate from their personal assets and enjoyment. Trustees in their representative capacities are obliged to deal with trust assets to further the interest of the beneficiaries, and not to further their personal interests. Trustees may, however, also be beneficiaries under the trust. (See: *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 (3) SA 833 (A); *Braun and Botha NNO and Another* 1984 (2) SA 850 (A) at 859E-860A; *The Law of South Africa*, Joubert, (Second Ed.) Vol. 31 para 531).

> (See also s.9(1) of the Trust Property Control Act, 57 of 1988, which requires a Trustee to perform *"…his duties and exercise his powers with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another."*)

[47] Whether a fiduciary duty arises in any particular case, will depend on the facts of such case. For the reasons mentioned, I have no doubt that on the facts of this case the respondent at all material times had attracted a fiduciary duty to the School. Those in a position of trust who have such a fiduciary duty must act in the best interests of the

beneficiaries of that Trust and they may not act to their own advantage at the cost of the beneficiaries.

[48] The Supreme Court of Appeal in *Philips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) at para. 30 had what follows to say regarding the principles which govern the actions of a person who occupies a position of trust towards another:

> *"... The fullest exposition of our law remains that of Innes CJ in Robinson v Randfontein Estates Gold Mining Co. Ltd (supra) at 177-80). It is, no doubt, a tribute to its adequacy and a reflection of the importance of the principles which it sets out that it has stood unchallenged for 80 years and undergone so little refinement.*
>
> *Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflicts with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As pointed out in Aberdeen Railway Company v Blikie Bros (1) Macq 461 at 474, the doctrine is to be found in the civil law (Digest 18.1.34.7), and must of necessarily form part of every civilised system of jurisprudence. It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. There is only one way by which such transactions can be validated, and that is by free consent of the principal following upon a full disclosure by the agent. ... Whether a fiduciary relationship is established will depend upon the circumstances of each case ... But, so far as I am aware, it is nowhere laid down that in these transactions there can be no fiduciary relationship to let in the remedy*

without agency. And it seems hardly possible on principle to confine the relationship to agency cases."

[49] The learned authors in **Trusts Law and Practice** by Geach and Yeats at 89 state the following with regard to what is encompassed by fiduciary duty:

"There are certain fundamental fiduciary duties. Trustees may accordingly not do any of the following:

1. *exceed their powers;*
2. *exercise their powers for an improper purpose;*
3. *fetter their discretion;*
4. *place themselves in a position where their personal interests conflict with their duties to the beneficiaries;*
5. *make secret profit;*
6. *compete with any business of the Trust;*
7. *make personal use of or abuse confidential information; or*
8. *favour one beneficiary to the detriment of another or others.*"

[50] By appointing, or allowing himself to be appointed, as a beneficiary, the respondent placed his personal interests in conflict with his duties as Trustee. If he, in these circumstances, elected to be a beneficiary he could not, in law, remain a Trustee. And if he elected to remain a Trustee, he could not, in law, be appointed as a beneficiary. Although a Trustee may also be a beneficiary, it must always be subject to the principle that he may not put his personal interests in conflict with his duty as Trustee which is to deal with trust assets to further the interests of the beneficiaries, and not to further his own interests. (*Commissioner for Inland Revenue* (*supra*) ; LAWSA (*supra*). As *Innes* CJ remarked in *Robinson* (*supra*),

"... There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent ..."

Did respondent act in breach of such Fiduciary Duty?

[51] When the Trust was established on 15 April 1999 the sole beneficiary was the School. This was done to facilitate the purchase of the property from Mrs *Schauder* in the sum of R500.000,00. Unless the School was the sole beneficiary, Mrs *Schauder* would not have sold the property for R500.000,00. The asking price was R750.000,00 and she was only prepared to sell for R500.000,00 if the School benefitted.

[52] On respondent's own version, he, *Lascot* and *Shelver* decided to use the Trust as a vehicle to conduct their joint venture with the aim to benefit themselves financially. On the respondent's own version, when the Trust was established with the School as its sole beneficiary, the three trustees had already decided to amend the Trust Deed in the future by appointing themselves as further beneficiaries. This was part of the plan, and the only way in which they would benefit. Those intentions, however, were concealed from the School and the other members of the GB. They appointed themselves secretively and clandestinely without the knowledge or consent of the School or the GB members.

[53] The terms of the Deed of Trust, prepared by the respondent, were carefully framed to ensure the Trustees had the unfettered power to appoint themselves as beneficiaries without any interference from the School or the GB and without the obligation to even account to the School for the manner in which they intended to give effect to their planned business venture. In this regard I refer only to the following terms:

1. Notwithstanding that the Trust was established with the School as its sole beneficiary, "*Beneficiaries*" is defined in para.1.1.3 to include the beneficiaries' descendants, or

any Trust which may subsequently be established. Obviously, such definition could not be applicable to the School, but was intended to only apply to the Trustees once they appointed themselves as beneficiaries;

2. Notwithstanding that the object of the Trust was to undertake a private business venture, para.7 exempts the Trustees (who intended to also become beneficiaries) from the obligation to furnish security;

3. Para. 11.2 provide that any decision made by the Trustees shall be final and binding on the beneficiaries (including the decision to appoint themselves as beneficiaries) and further that:

   3.1 There shall be no right of appeal from such decision; and

   3.2 *"Such decision may not be challenged by such beneficiaries under any circumstances"*;

4. Para 12.1 is particularly draconian and contrary to the very essence of a Trust. It reads as follows:

   "12.1 Every discretion hereby conferred upon the Trustees shall be absolute and unfettered and the Trustees shall not be required to furnish to any Beneficiary hereunder any reasons or justification for the manner in which any such discretion be exercised."

5. Para 12.2 equally flies in the face of the common law principle that a trustee may not place himself in a position where his fiduciary duty to a beneficiary may be in conflict with his personal interests. It reads:

   "12.2 Any Trustee hereof may exercise or concur in exercising all powers and discretion hereby or by law given to him, notwithstanding that he may have a direct or other personal interest in the mode or result of exercising any such power or discretion, provided that he make a full

disclosure of his interests to his co-Trustees …" (In this case the co-trustees are all party to the same business venture).

6. Para 27 which gives a blanket power to the trustees to vary the terms of the Trust Deed, which include a variation of the definition of "*Beneficiaries*."

[54] The fiduciary duty which the respondent had to the School in his capacity as vice-chairman of the GB and as Trustee of the Trust, was to protect and advance the financial and other interests of the School, and not to place himself in a position where his own interests conflicted with that of the School.

[55] By appointing himself and the other two trustees as additional beneficiaries to the Trust; by structuring a business plan whereby the purchase price payable to Mrs *Schauder i*n respect of the property was effectively paid by the School through the payment of rentals, and in circumstances where it was intended that the trustees (as beneficiaries) would eventually be the major recipients of the profits; by failing to openly and truthfully inform the School and the GB of his true intentions and their private business venture; by hiding the manner and amounts of the distribution of the profits from the re-sale of the property from the GB and the School; and by personally benefiting to the detriment and to the prejudice of the School from the proceeds of the sale, the respondent was clearly in flagrant breach of the fiduciary duty he owed to the School.

[56] The contention of the respondent in para. 80 of his answering affidavit and advanced by Mr *Scott* SC in argument on his behalf, namely that the fiduciary duties borne by the Trustees could not have been violated for as long as the Trustees observed the provisions of the Trust Deed and acted in strict compliance therewith, is devoid of any merit. The fallacy of the argument is that the fiduciary duty does not arise from the terms of the Deed of Trust or from any contractual relationship, but from the peculiar nature of the relationship which existed between the respondent and the School, and which the law recognises as capable

and worthy of protection. The law recognises a breach of such duty, as I noted earlier, as wrongful and unlawful. The fact that the trustees may have acted strictly in accordance with the terms of the Trust Deed, is neither here nor there. It does not diminish, or negate, the fiduciary duties which the respondent owed, in law, to the School. It also does not excuse the respondent, in law, to observe such duty and act in accordance therewith. His failure to do so remain unlawful and wrongful, notwithstanding that he may have acted strictly in accordance with the terms of the Trust Deed.

[57] It is necessary to deal with one further submission made by Mr *Ford* SC. It is this: With reference to cases such as *Crookes NO v Watson and Others* 1956 (1) SA 277 (AD) at 285F-G and 299G; *Portgieter v Potgieter NO* 2012 (I) SA 637 (SCA) at 641F; and *Hofer & Others v Kevitt NO and Others* 1996 (2) SA 402 (C) at 405E-F, he submitted that once a beneficiary accepts the benefits of the Trust, the beneficiary also becomes a party to the contract. It follows that a trustee as a matter of law cannot thereafter unilaterally and without the consent of the beneficiary vary or amend the Trust Deed. By doing so, the Trustees, and in particular the respondent, acted unlawfully and in breach of his contractual duty to the School.

[58] Mr *Scott* SC countered the argument by conceding that the School (as beneficiary) became a party to the Trust Deed, but submitted that the Terms of the Trust Deed permitted the appointment of the Trustees as beneficiaries without notice to the School. He submitted that the principle relied on by Mr *Ford* SC applies only in circumstances where the Trust Deed makes no specific provision for any amendment thereto, and that the judgments relied on show that the Trustees in those cases did not permit the appointment of beneficiaries without notice to the existing beneficiary. When a beneficiary becomes a party to the Trust Deed, all the terms of the Deed apply to him,

including the terms excusing the Trustees to give notice to him when appointing further beneficiaries.

[59] Although I favour the argument of Mr *Scott* SC which seems dogmatically sound, it is unnecessary to deal with these issues, however interesting it may be. I believe the short answer to Mr *Ford*'s submission is that the real issue is whether or not the applicant acted in breach of his fiduciary duty to the School, and not whether he acted in breach of any contractual duty. It is conceivable that in particular circumstances an attorney may be found to have breached a contractual duty but nevertheless remain a fit and proper person to continue to practise as an attorney. However, if he acts in serious breach of a fiduciary duty he may be found not to be a fit and proper person to continue to practise as an attorney.

[60] Even if the applicant in this case did not act in breach of any term of the Trust Deed, I have no doubt that he acted in serious breach of his fiduciary duty to the School. The Trust was the registered owner of the property it purchased from Mrs *Schauder*, and it leased the existing improvements to the School which it used as a library and after-school centre. The duty of the Trustees was to deal with trust assets to further the interests of the beneficiary (the School) and not to further their own personal interests.

[61] The trust assets were not only the library and after-school centre leased to the School, but included the residual which was subsequently sub-divided and sold to Proud Heritage Properties 138 (Pty) Ltd for R3.5 million. Even if vesting of the residual had not yet occurred in the beneficiary at the time the Trustees appointed themselves as additional beneficiaries, there can be no doubt that the School as the sole beneficiary at all relevant times had the *spes* and reasonable expectation that it will be informed of the extent of all

Trust assets and that such assets will be held and managed by the Trustees for the exclusive benefit of the School as sole beneficiary. These circumstances created the fiduciary relationship between the Trustees and the School.

[62] The respondent acted in breach of this fiduciary duty by not only deliberately and intentionally withholding information from the School in regard to the extent and value of the trust assets, but by also concealing from the School that the Trustees had appointed themselves as beneficiaries and intended to benefit from the proceeds of the sale of the residual to the exclusion of the School.

[63] I reject as untrue the respondent's contention that he had little or no experience in Trust law and was unaware that a fiduciary relationship existed or that he acted in breach thereof. The terms of the Trust Deed were craftily drafted and designed to surreptitiously achieve the mischievous end of the Trustees. It does not require any knowledge of Trust law to realize that the scheme and business venture embarked upon by the respondent and the other two Trustees was inherently dishonest and fraudulent.

2. Is the respondent a fit and proper person to practise as an attorney as contemplated in s.22 (1)(d)

[64] The exercise of the discretion involves in reality a weighing up of the conduct complained of, against the conduct expected of an attorney and, to this extent, a value judgment (*Jasat* (*supra*) at para. 10).

[65] In this exercise, there are three aspects in the conduct of the respondent which call for comment. First, the conduct was pre-meditated; carefully planned and executed over a period of 8 years.

[66] Second, the conduct carries strong elements of deceit, dishonesty and disgracefulness. The School was appointed as the sole beneficiary with the only view to accommodate and facilitate the purchase of the property at a reduced price in circumstances where the respondent (as did the other two trustees) knew that at the appropriate time the Trust Deed would be amended to appoint the trustees as the major beneficiaries. The terms of the Trust Deed were specifically drafted to achieve this purpose. Notwithstanding that it was the intention that the trustees would be the major beneficiaries, the payment of the purchase price was structured so that they did not contribute one cent to the purchase price—the School effectively funded the bond instalments through the payment of rentals. The School and its GB were misled into believing that on the re-sale of the property the only profits were the six classrooms and two garages and the cash sum of R50.000,00 received by the School as the sole beneficiary.

[67] Mrs *Schauder*, the School and all the other members of the GB were deceived and misled for a period of 8 years.

[68] Third, when the deceit and dishonesty became known, the respondent continued to protest his innocence, hiding behind the terms of the Deed of Trust and claiming no understanding or knowledge of the fiduciary duty he owed to the School. He has not shown any remorse, has not offered to compensate the School and has not demonstrated any appreciation for his wrongful conduct which may lead to the conclusion that he has amended his ways and will not, in the future, repeat the conduct complained of.

[69] This conduct must be weighed against the conduct expected from an attorney of this Court.

[70] The Supreme Court of Appeal has repeatedly emphasised that the attorneys' profession is an honourable one which demands complete honesty, reliability and integrity from its members. In *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538 G-I the Supreme Court of Appeal remarked as follows:

> *"In this regard it must be borne in mind that the profession of an attorney, as of any other Officer of the Court, is an honourable profession which demands complete honesty, reliability and integrity from its members; and it is the duty of the respondent Society to ensure, as far as it is able, that its members measure up to the high standards demanded of them. A client who entrusts his affairs to an attorney must be able to rest assured that that attorney is an honourable man who can be trusted to manage his affairs meticulously and honestly. When money is entrusted to an attorney or when money comes to an attorney to be held in trust, the general public is entitled to expect that that money will not be used for any other purpose than that for which it is being held and that it will be available to be paid to the persons on whose behalf it is held whenever it is required."*

[71] In *General Council of the Bar of South Africa v Geach & Others* 2013 (2) SA 52 (SCA) at para. 87 the Supreme Court of Appeal (per *Wallis* JA) said in relation to lawyers:

> *"... After all they are the beneficiaries of a rich heritage and the mantle of responsibility that they bear as the protectors of our hard won freedoms is without parallel. As officers of our Courts, lawyers play a vital role in upholding the Constitution and ensuring that our system of justice is both efficient and effective. It therefore stands to reason that absolute personal integrity and scrupulous honesty*

are demanded of each of them. It follows that generally a practitioner who is found to be dishonest should in the absence of exceptional circumstances expect to have his name struck from the Roll."

[72] The High Standards of integrity and honesty expected from all lawyers seems to me to have its origin from two sources: first, South Africa is a Constitutional State in which the Rule of Law reigns supreme. Second, by the very nature of the attorney and client relationship, attorneys very often have a fiduciary duty towards their clients or any other parties to whom they owe a fiduciary duty.

[73] In regard to the first, as Officers of our Courts all lawyers are the protectors of the Constitution and the Rule of Law which at all times require absolute personal integrity and scrupulous honesty. See *General Council of the Bar of South Africa* (*supra*). In regard to the second, and in circumstances where the law establishes a fiduciary duty on an attorney, the attorney is required by such duty to all times act with scrupulous honesty and integrity to the party he owes such duty.

[74] If the conduct of an attorney demonstrates that he or she has failed the test of always acting honestly, he or she is not a fit and proper person to practise as an attorney. As I said, the respondent has with pre-meditation over a period of eight years acted dishonestly, and in a deceitful and disgraceful manner towards the School and to a lesser extent, Mrs *Schauder*. In my respectful view, he fails the test required by the law to be a fit and proper person as meant by s. 22 (1) (d).

Should the respondent be removed from the Roll of attorneys, or should he be penalised in a different form such as suspension from practise for a specified period?

[75] Logically, once a Court has found, as I have in this case, that a person is not a fit and proper person to continue to practise as an attorney, then it must follow as a matter of course that his name be removed from the Roll of Attorneys. A suspension from practise for a specified period of time, or a reprimand or imposition of a fine, can only be ordered if a Court has found the person is, or remains, a fit and proper person to continue to practise. This principle is enunciated in the following manner in *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) at para. [7]:

> *"... The suspension of his suspension from practice is entirely incompatible with the finding that he was not a fit and proper person to continue practising and resulted in the anomalous situation that a person who had explicitly been pronounced unfit to do so, was allowed to continue his practice. (Logically, a striking off order or an order of suspension from practice should be suspended only if the Court finds that the attorney concerned is a fit and proper person to continue to practice but still wishes to penalise him.)"*

[76] In view of the finding that the respondent is not a fit and proper person to continue to practise, it is not open to this Court to either suspend the order or to impose a fine or merely to reprimand him. In my view, there are no exceptional circumstances not to have his name struck from the Roll.

[77] In all the circumstances I propose the following order:

1. The respondent's name be and is hereby struck off the Roll of Attorneys of this Court;

2. An order is made in terms of paras. 2 to 12 (inclusive) of the Notice of Motion dated 10 April 2011.

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ALKEMA J

I agree :

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ROBERSON J

It is so ordered:

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ALKEMA J

Heard on 8 June 2015

Delivered on 14 August 2015

Counsel for the Applicant:	E A S Ford SC	
Instructed by	:	Neville Borman & Botha
Counsel for the Respondent	:	P W A Scotts SC with
		A C Moorhouse
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