IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE Date: 2007-07-25

Case Number: 21706/2003

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES
(Incorporated as the Law Society of Transvaal) Applicant

and

LUGISANI DANIEL MANTSHA Respondent

JUDGMENT

SOUTHWOOD J

[1] The applicant, The Law Society of the Northern Provinces, applies for an order in terms of section 22(1)(d) of the Attorneys Act 53 of 1979 ('the Act') striking the name of the respondent from the roll of attorneys. In August 2003 the applicant launched this application as an urgent application for the suspension of the respondent pending the final determination of this application. On 12 March 2004 this court made an order suspending the respondent from practice. That order is still in operation.

[2] On 28 August 2003 the respondent gave notice of his intention to oppose the application but failed to file an answering affidavit until 9 March 2004; i.e. three days before the hearing on 12 March 2004. In a short replying affidavit the applicant objected to the late filing of the respondent's answering affidavit but it was received in evidence by the court. On 25 February 2005 the applicant filed a Supplementary Affidavit. The application was then enrolled for hearing on 30 October 2006.

[3] Shortly before the hearing on 30 October 2006 the respondent consulted an attorney to represent him at the hearing. After perusing the papers filed, the attorney concluded that the respondent's answering affidavit did not properly deal with the complaints against him. The attorney then unsuccessfully attempted to arrange a postponement with the applicant so that the respondent could file a supplementary answering affidavit.

[4] On 30 October 2006 the court postponed the application *sine die,* directed that the order of 12 March 2004 remain in force and ordered the respondent to file any further answering affidavit on or before 5 December 2006. For the purpose of seeking that postponement the respondent filed an affidavit on about 27 October 2006. Pursuant to

the order made on 30 October 2006 the respondent filed a further supplementary answering affidavit on about 26 November 2006. The applicant has filed a Supplementary Replying Affidavit to the respondent's further affidavits.

[5] In the heads of argument filed by the respondent's attorney, no attempt is made to show that he is not guilty of the many instances of misconduct alleged against him. In the heads of argument the respondent concedes the many errors and transgressions and that the transgressions and omissions were of such a nature that the applicant was justified in launching this application for relief. Despite these broad concessions the respondent contends, without any reference to the record or any attempt to identify the complaints concerned, that certain of the complaints were not justified. The thrust of the respondent's argument is that while his conduct justifies his continued suspension it does not justify his striking from the roll. The applicant still contends that the court should make an order that the name of the respondent be struck from the roll of attorneys. The principal issue is therefore whether an order of suspension will be appropriate or whether the respondent should be struck from the roll.

[6] The application of section 22(1)(d) of the Act involves a threefold inquiry:

(1) It must be determined whether the Law Society has established

the offending conduct upon which it relies, on a balance of probabilities;

(2) It must be decided whether, in the light of the misconduct thus established, the attorney is not a 'fit and proper person to continue to practise as an attorney'. The determination of this issue requires that the court exercise its discretion and this involves 'a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment'; and

(3) A decision by the court whether the person who has been found not to be a fit and proper person to practise as an attorney deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice.

See ***Jasat v Natal Law Society*** **2000 (3) SA 44 (SCA)** para 10; ***Law Society of the Cape of Good Hope v Budricks*** **2003 (2) SA 11 (SCA)** para 2; ***Summerly v Law Society of Northern Provinces*** **2006 (5) SA 613 (SCA)** para 2; ***A v Law Society of the Cape of Good Hope*** **1989 (1) SA 849 (A)** at 851C-E.

[7] It must be pointed out that despite having had a further opportunity to

file another answering affidavit (the respondent has filed two other affidavits after the answering affidavit filed on 9 March 2004) the respondent has not dealt in detail with the complaints set out in the applicant's founding affidavit or annexed all the relevant documents necessary to support his factual allegations. It is striking that he has made bald and general statements in answer to the very detailed complaints made against him. His answers fall far short of the full and frank disclosure of all the relevant facts referred to in ***Prokureursorde van Transvaal v Kleynhans*** **1995 (1) SA 839 (T)** at 853E-H. In ***Kleynhans*** the court emphasised that in these proceedings, which are disciplinary in nature and *sui generis,* it is required of the practitioner to provide the necessary elucidation so that the full facts are before the court to enable the court to arrive at the correct and just decision.

[8] The stance now adopted by the respondent is also radically different from that in his initial answering affidavit. There he took a number of points *in limine* and contended that the launching of the application against him was a violation of his rights (his right to fair administrative action; his right to a fair trial; his right to practise his trade; his right not to be discriminated against; his right to equality before the law; his right to be afforded an opportunity to state his case and his right to a fair hearing) and that the sole reason for the launching of this application was his failure to attend a disciplinary inquiry on 7

November 2002. He also contended that there was a non-joinder because his co-director had not been joined and that the applicant should not have launched this application because there was a foreseeable dispute of fact.

[9] Although the respondent does not persist in any of these points it is a matter for comment that a legal practitioner of some six to seven years standing is so ignorant of the procedures used to bring disciplinary matters before the court. These allegations demonstrate a singular ignorance and lack of understanding of the applicant's powers and duties regarding practitioners which could have been rectified by a reference to the Act, the rules and decided cases which are easily accessible to practitioners.

[10] A further matter for comment is that the respondent does not pertinently identify the misconduct which he concedes in his heads of argument. The submission that he should be suspended rather than struck off the roll is not made with reference to his misconduct. It is made simply with reference to his personal circumstances and in particular the difficulties that he experienced in qualifying himself to be an attorney. To accede to the respondent's contention without giving proper consideration to the misconduct established would be to give undue weight to the respondent's personal circumstances. As pointed

out in ***Law Society of the Cape of Good Hope v Budricks*** **2003 (2) SA 11 (SCA)** para 7 it is a wrong approach to take into account the personal circumstances of the practitioner without considering the necessity for protecting the public. The courts exercise supervisory powers over the conduct of attorneys, not only to discipline and punish errant practitioners but also, and more importantly (particularly where trust money is misappropriated) to protect the public. This is the main reason why the possibility of a repetition of the misconduct complained of must be taken into account when it comes to deciding upon an appropriate penalty for proven misconduct.

[11] The evidence establishes the following misconduct by the respondent in relation to his accounting records and the requirements of the Act and rules:

(1) In about November 2000 the respondent refused to allow the applicant's auditor Mr Faris, to conduct an inspection of his accounting records. This was a contravention of the provisions of sections 70 and 71 of the Act. The respondent's explanation that he first needed to be informed of the reasons for the inspection is no answer and reflects an ignorance of and lack of insight into the applicant's powers and his duty to co-operate;

(2) When the applicant's auditor, Mr Swart, did investigate the respondent's accounting records during May 2004 he found the

following in respect of the period May 2001 to January 2004 –

(i) The trust accounting records had not been written up from 1 March 2003. The respondent thereby contravened section 78(4) of the Act and Rules 68.1, 68.2 and 68.5;

(ii) The respondent's external accountant only prepared accounting records annually. The respondent thereby contravened section 78(4) of the Act and Rule 69.7;

(iii) There were no trust receipt books and no record that trust money received by the respondent after 17 February 2003 had been deposited into the trust account. There was also no trust cash book. The respondent thereby contravened section 78(4) read with section 78(6)(d) of the Act and Rule 68.1;

(iv) There was no business cash book. The respondent thereby contravened section 78(4) read with section 78(6)(d) of the Act and Rule 68.1;

(v) Lists of trust creditors were available only for the periods

ending 28 February 2001 and 28 February 2002. The respondent thereby contravened Rule 69.7 which requires that lists be prepared every three months;

(vi) Trust shortages existed as at 28 February 2002 in the amount of R595,69 and as at 28 February 2003 in the amount of R392,19. These shortages indicate that the respondent thereby contravened section 78(1) of the Act and Rule 69.3;

(vii) Swart was not able to determine the claims of the two trust creditors as at 28 February 2003 because of the lack of records. This indicates that the respondent contravened section 78(4) of the Act and Rule 68.1.

Swart's investigation reveals that generally the respondent failed to keep books of account and records in accordance with the Act and Rules in respect of all financial transactions relating to the respondent's practice.

(3) When the respondent ceased practising for his own account under the name Mantsha Attorneys he did not file a closing certificate in respect of that practice. In the absence of the

certificate allegedly filed by the respondent the respondent's denial that he failed to comply with Rule 76 cannot be accepted;

(4) The respondent failed to file an opening certificate for the new practice known as Mantsha Nentswuni Inc within six months after the commencement of the practice. After alleging that the applicant was in possession of the certificate in his answering affidavit the respondent admits that he did not file the certificate as required in terms of Rule 70.1 and the applicant's council's resolution;

(5) The respondent practised during 2002 and 2003 without being in possession of a fidelity fund certificate thereby contravening the peremptory provisions of section 41(1) of the Act. The respondent failed to lodge a Rule 70 auditor's certificate in respect of his trust account for the year ending February 2001. The respondent filed a qualified Rule 70 auditor's certificate for the year ending February 2002. Because the auditor's certificate was qualified a fidelity fund certificate was not issued.

In his answering affidavit the respondent attacks the *bona fides* of the applicant in respect of this contravention. He states that the reason why he does not have a fidelity fund certificate is

simply because the applicant is abusing its power and discriminating against him for reasons known to itself.

In his supplementary answering affidavit the respondent admits that he did not have the necessary fidelity fund certificates and that he erred in practising without them.

It is clear that the respondent practised in blatant disregard of the requirements of section 41(1) of the Act and his knowledge thereof;

(6) As appears from the Rule 70 auditor's certificate for the year ending February 2002 (dated 3 October 2002) the respondent contravened the rules relating to the proper keeping of books of account in that –

(i) the respondent's accounting records had only been written up to 30 June 2002;

(ii) the respondent's trust account had last been balanced on 28 February 2002, a contravention of Rule 68.5;

(iii) the respondent's trust banking account was in debit as

bank charges on the trust account had not been refunded from the respondent's business account, a contravention of section 78(1) of the Act and Rule 69.3.

The respondent's denial is not clear and does not relate to the facts. Significantly it is not supported by any documents. There is therefore no proper explanation for these contraventions.

The complaints of misconduct against the respondent will now be considered.

[12] Shirt Bar

(1) The applicant received a complaint from attorneys Nathanson, Bowman & Nathan, Johannesburg on behalf of their client, the Shirt Bar. According to the complaint the respondent purchased clothing from the Shirt Bar but did not pay for his purchases. Action was then instituted by the Shirt Bar against the respondent. The respondent thereafter attempted to pay for the purchases and did so by issuing seven cheques drawn in favour of the Shirt Bar during 2001. Five of the cheques which were drawn on his trust account were dishonoured when they were presented for payment.

(2) The applicant contends that the respondent's explanation involves two serious contraventions:

(i) He attempted to use trust money for personal purchases;

(ii) Cheques drawn on his trust account were dishonoured when presented for payment. The applicant contends that this implies fraud because the respondent drew cheques while knowing that there were insufficient funds to meet payment of the cheques.

(3) The respondent states that the account on which the 'trust cheques' were drawn was in fact a business account which he operated with one Soller, his previous principal and later partner, under the guise of it being a trust account. This was done because Soller was insolvent and persuaded the respondent to open the business account so that they could practise together and create the impression that they were operating a trust account.

(4) This explanation also demonstrates unprofessional conduct on the part of the respondent. The respondent was admitted as an attorney during 1997. As an attorney of four years standing he clearly knew what he was doing. His explanation illustrates that

he conspired with Soller to mislead the bank where the account was opened and the public to whom it was represented that they were operating a trust account.

(5) In his supplementary answering affidavit the respondent does not deal with the facts and in particular the drawing of cheques which were dishonoured. He admits that he made a gross error but ascribes this to the role played by Peter Soller in his life. He says he was young and inexperienced and allowed himself to be persuaded to use the account as a trust account. There is no proper explanation for the dishonoured cheques. In particular the respondent does not allege that when he drew the cheques he knew there were funds in the account to meet the cheques.

[13] Hoffmann AJ

(1) During October 2002 Hoffman AJ directed a complaint to the applicant in connection with the respondent's conduct in the matter of ***EPDS Silva v The South African Revenue Service*** Case No 27576/1999 in which the respondent acted as Silva's attorney.

(2) Hoffmann AJ heard an application for rescission of judgment which Silva obtained against the South African Revenue

Services ('SARS'). The founding affidavit indicated that the respondent had acted in a most unprofessional and dishonest manner in that –

(i) He applied for default judgment notwithstanding the fact that a notice of intention to defend was delivered by the State Attorney on behalf of SARS and a notice of exception to the plaintiff's particulars of claim was filed. The respondent also exchanged correspondence with the State Attorney relating to the matter. The State Attorney was of the view that the court did not have jurisdiction;

(ii) The application for default judgment was lodged with the Registrar on 30 June 2000 and stated that the defendant had failed to enter an appearance to defend. Judgment was prayed for R1.5 million together with interest and costs;

(iii) The notice of intention to defend was delivered on 13 December 1999 and the notice of exception on 11 February 2000;

(iv) The applicant contends that it is apparent from the

application for rescission of the default judgment that the respondent's actions were dishonest, unprofessional, dishonourable and unworthy to a very high degree. The applicant contends that the respondent should not have applied for judgment by default when he knew that the matter was defended. The applicant also contends that the notice of intention to defend and other pleadings had to be removed from the court file before the registrar would grant judgment by default;

(v) After failing to reply to a number of letters from the applicant relating to the complaint the respondent advised the applicant on 19 November 2001 that he was making inquiries and he then wrote to the applicant on 11 December 2001 and stated that:

(a) a 'Mr Abrahams' of the Registrar's office was the person who processed the application for default judgment;

(b) the application was made by his client, Silva, and he, the respondent, was not aware of the application for default judgment.

(3) The applicant's further investigations revealed that a Mr Abrahams had never been employed by the Registrar's office and that the application for default judgment was granted by one Moaka. The respondent was summoned to appear before a disciplinary committee of the applicant on 7 November 2000 but failed to attend the hearing because he apparently was suffering from depression;

(4) In his answering affidavit the respondent states that he had an arrangement with his client, Silva, that Silva would type the documents for the matter and that the respondent would consider and approve them. However, when he received the application for rescission, he made enquiries and discovered that Silva had prepared and filed the application for judgment by default. In short, he said that he was not responsible for the application. He says that after service of the application for rescission he immediately telephoned Mr. Cassim of the State Attorney's office and explained to him what had happened. He alleges that Cassim was satisfied with this explanation. He confirms that this explanation was not before the court when the application for rescission was heard;

(5) The applicant points out that the application for rescission of the judgment by default appears to have been signed by the respondent and that the respondent does not testify to the contrary;

(6) In his supplementary answering affidavit the respondent pertinently denies that he signed the application for default judgment, that he prepared it and that he removed any documents from the court file. He alleges that the documents were signed by Silva and that Silva told him that he, Silva, had thought that he was entitled to sign it because he was the plaintiff. He alleges that Silva admitted this but has failed to provide him with an affidavit to support these allegations;

(7) The applicant contends that the respondent's version of events is improbable for the following reasons:

(a) A prudent attorney will not allow a lay client to type and prepare pleadings and correspondence relating to a matter dealt with by the attorney;

(b) The respondent received the application for rescission of the default judgment but failed to place his version of

events before the court as one would expect of a prudent (and innocent) attorney.

(8) The question is whether the respondent's version is so improbable that it must be rejected on the papers – see ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 620 (A)** at 635B-C. When he received the application for rescission the implications for the respondent were obvious. Cassim, who deposed to the founding affidavit on behalf of SARS, pertinently alleged that the respondent's conduct was fraudulent because he had represented to the registrar that the applicant had failed to enter an appearance to defend. He had done this to mislead the registrar into granting judgment by default. Cassim also requested the court to award costs against the respondent on the scale as between attorney and own client. Any attorney in that position, if he was innocent of the misconduct alleged, would have placed the true facts on record immediately either in a letter or in an affidavit to ensure that the matter was rectified and that his good name did not suffer. The respondent did not do either and his explanation that there was no forum in which to do this is simply nonsensical. It is inconceivable that Cassim would have failed to refer to the telephone conversation if it had taken place,

particularly if he was satisfied with the explanation, and proceeded to obtain a costs order against the respondent on the scale as between attorney and own client. The respondent has not produced any document to support his explanation that Silva prepared documents in his office. In these circumstances the respondent's version is so improbable that it must be rejected.

[14] Summersgill

(1) In February 2001 Vivian Rose Summersgill addressed a complaint to the Law Society. Summersgill stated that she instructed the respondent during February 1999 to institute an action for damages in respect of an injury she sustained while employed by International Systems 1998 (Pty) Ltd t/a Twinlock Manufacturing. She paid a deposit of R8 080 to the respondent but the respondent failed to provide her with any progress reports. She alleged that the respondent was avoiding her calls.

(2) In answer to the applicant's inquiries the respondent indicated in letters dated 26 September 2001 and 10 December 2001 that the action instituted on behalf of Summersgill was defended and that he was in the process of applying for default judgment.

After a number of requests by the applicant on 26 February 2002 the respondent provided the applicant with a notice of bar and a notice of application for default judgment. The notice of bar was dated 17 October 2001 and the application for default judgment 6 October 2001. There was no explanation why the application is dated before the notice of bar;

(3) During the period that the respondent addressed his answers to the applicant i.e. December 2001 to May 2002 a special plea and plea had already been filed by the defendant's attorneys. The applicant determined this by its own investigation. The special plea and plea were served on the respondent and filed in the court file on 23 October 2001;

(4) The applicant contends that the respondent was deliberately trying to mislead it in respect of the progress of the matter when he reported to the applicant in May to June 2002 that he was enrolling the application for default judgment when he was already in possession of a special plea and plea. It also contends that the respondent acted unprofessionally in that –

(a) he did not act with the degree of skill, care and attention expected of a practitioner;

(b) he acted in a dishonest and deceitful manner;

(c) he gave the applicant information which he knew to be untruthful and false.

(5) The respondent was summoned to appear before a disciplinary committee of the applicant on 7 November 2002 but failed to do so;

(6) In his answering affidavit the respondent alleges that the notice of bar was served on 18 October 2001 and the application for default judgment was made on 16 November 2001. The respondent contends that the defendant's plea was only filed on 23 April 2002 and not 23 October 2001 as the applicant contends;

(7) The respondent's answer is most unsatisfactory. A copy of the defendant's plea obtained by the applicant bears the Registrar's date stamp for 23 October 2001. The copy attached to the respondent's answering affidavit does not have a clear stamp yet it does indicate that it was served on 23 October 2001. There also appears to be a faint date stamp on the plea reflecting 2002. Where this stamp comes from and why it conflicts with the date on the copy obtained by the applicant

from the court is not explained by the respondent;

(8) The applicant's contentions are therefore borne out by the record;

(9) The applicant contends further that the respondent's answer shows that he acted unprofessionally and without the care and skill required of an attorney. The applicant points out the following:

(a) The respondent issued a summons where the cause of action was not supported by the evidence (in this case, a medical expert). The medical expert, Dr Hossy, confirmed that Summergill's medical condition was not the result of her work situation. This was essential for the cause of action;

(b) The respondent applied for default judgment in an action for damages where such application is not normally allowed. The respondent should have applied to court for judgment based on expert evidence to substantiate the amount of damages claimed;

(c) Irrespective of the fact that Summergill's condition was not medically proved the respondent proceeded to issue the summons and charged his client for services rendered. He also failed to provide the court with any statements of account.

(10) These contentions are also borne out by the record.

(11) In his supplementary answering affidavit the respondent now raises as a defence that when he issued a summons Mrs Summergill's claim had already prescribed. He concedes that he erred in law by instituting the action. He also admits that he did not respond timeously to the applicant's letters. Significantly, the respondent does not deal with the problems outlined by the applicant.

[15] Mbeki Sibiya_

The following facts are common cause or are not disputed –

(1) In May 2001 Mbeki Sibiya submitted a complaint about the respondent's conduct to the applicant. The complaint is contained in an affidavit and supporting documents;

(2) According to Sibiya, on 21 February 1997 he had an argument with his wife who informed her employer that he had assaulted her. On 22 February 1997 the SA Police arrested Sibiya and detained him at the Cleveland Police Station. On 23 February 1997 Sibiya complained to a police officer that he had been wrongfully arrested. Later, on the same day, the SAPS charged Sibiya with attempted housebreaking. On 24 February 1997 the police took Sibiya to Jeppe magistrates' court which fixed bail at R4 000. Sibiya was not able to post bail and was detained further. While in prison Sibiya became ill and was taken to the Rand Clinic where he was admitted to the Intensive Care Unit. He was treated there for two or three days and then in a general ward for a short period. On 7 July 1997 Sibiya appeared in court again and the charges of housebreaking and assault were withdrawn and Sibiya was released. Sibiya provided the applicant with his prison reference number and his reference number at the Rand Clinic. Sibiya obtained copies of the SAPS documents relating to his detention and release and his treatment at the Rand Clinic.

(3) After his release from prison, Sibiya applied to the Legal Aid Board for assistance to institute a claim for damages for

unlawful arrest. The Legal Aid Board referred Sibiya to the respondent. Sibiya consulted the respondent who reported to the Legal Aid Board on 14 October 1998 that Sibiya had been unlawfully arrested and that his claim against the Minister of Safety and Security could succeed. The respondent requested the Legal Aid Board to assist Sibiya in the litigation. On 10 September 1999 the Legal Aid Board informed the respondent that his merit report did not comply with the Legal Aid guide and that it was unable to assess whether there was a reasonable prospect of success. Accordingly, legal aid was refused at that stage pending compliance with the Legal Aid Board's requirements;

(4) On 8 November 1999 the respondent issued summons on behalf of Sibiya against the Minister of Safety and Security claiming damages of R500 000 for unlawful arrest. The respondent signed the particulars of claim. On 9 December 1999 the defendant gave notice of intention to defend and after the respondent delivered a notice of bar on about 14 February 2000 filed a special plea and plea. The special plea alleged that the plaintiff's claim arose more than 12 months before the date of service of the summons and had accordingly become prescribed in terms of section 5(7) of Act 68 of 1995. The

respondent states that he has been advised that the special plea is good;

(5) After Sibiya's complaint was referred to the respondent in about May 2001 the respondent advised the applicant in August 2001 that the Legal Aid Board had requested him to assess the merits of Sibiya's claim and submit a report which he, the respondent, did. The Legal Aid Board then declined to assist Sibiya which the respondent conveyed to Sibiya. He also informed the applicant that he had not been able to proceed with Sibiya's action because he, the respondent, had not been able to obtain proof of Sibiya's arrest, either from Sibiya or the police station. He told the Legal Aid Board that he would be prepared to assist Sibiya further if Sibiya could provide proof that he had been unlawfully arrested. All these statements were untrue. As already mentioned, the Legal Aid Board had not finally decided not to assist Sibiya. The police records reflected that Sibiya had been arrested and on what charge and this information was readily available. The respondent did not mention the fact that the summons had been served and the special plea and plea filed;

(6) From these facts, it is clear that the respondent failed to handle

the matter with the required skill, care and attention expected of an attorney; allowed the claim to prescribe and furnished information to the applicant which to his knowledge was not true.

[16] Senyatsi

There is no dispute about this complaint. The respondent's client Nellie Senyatsi instructed him to collect an amount of R4 200 representing wages from her employer. The respondent recovered the amount of R4 200. However he failed to account to Senyatsi for this within a reasonable time or pay over the recovered funds to her.

[17] McIntyre & Van der Post

The following facts are common cause or are not disputed -

(1) On 15 November 2001 the applicant received a complaint from McIntyre & Van der Post, attorneys in Bloemfontein. The attorneys stated that they were instructed by the respondent to act as his correspondent in an application for leave to appeal in the Supreme Court of Appeal. Subsequent to the dismissal of the application for leave to appeal McIntyre & Van der Post rendered an account in respect of fees and disbursements in the

amount of R1 371,70. The respondent failed to pay the account;

(2) McIntyre & Van der Post then instituted action against the respondent for payment of their fees and on 20 June 2001 obtained judgment against him;

(3) The respondent then undertook to pay the full outstanding amount which now amounted to R2 558,15. Once again the respondent failed to pay the amount owing. The failure to pay a correspondent's account is a contravention of Rule 68.9 of the applicant's rules;

(4) The respondent does not dispute the failure to pay his correspondent. His excuse is that he was unable to obtain payment from his client;

(5) Of particular concern is the respondent's answer to the complaint in which he misrepresented the nature and extent of the work done by McIntyre & Van der Post and the repeated breach of his undertakings to pay the amount owing.

[18] Ankuda

The following facts are common cause or are not disputed –

(1) In May 2000 Gary Ankuda submitted a complaint about the respondent to the applicant. The complaint is set out in detail in a four page affidavit signed by Ankuda on 18 May 2000 and is supported by a number of documents referred to in the affidavit and an affidavit by Michael Sand also dated 18 May 2000;

(2) Ankuda instructed the respondent to act on his behalf in two matters –

(a) A claim for R800 000 for commissions due to Ankuda by Holcom Futures (Pty) Ltd ('Holcom');

(b) A claim for unfair dismissal against Rand Merchant Bank;

(3) On 19 November 1998 the respondent issued summons against Holcom in the Johannesburg High Court claiming payment of the sum of R800 000. The respondent told Ankuda that the Legal Aid Board would pay the fees. However, shortly afterwards, the respondent informed Ankuda that the Legal Aid Board had not granted him legal aid. On 15 January 1999 Ankuda and the respondent entered into a written Contingency Fee Agreement which provides –

(a) that Ankuda would pay whichever is the greater, 10 % of settlement or R300 per hour for all work which Daniel Mantsha would do in the matter;

(b) payment would be made by Ankuda only in the event of him succeeding in his claim;

(c) Ankuda would pay costs not exceeding R3 500 in respect of the conduct of his labour case with RMB;

(4) In about March 1999 the respondent informed Ankuda that he had obtained judgment on Ankuda's behalf against Holcom for R800 000, interest and costs. The respondent then informed Ankuda that he, the respondent, was negotiating a settlement with Holcom's attorneys, Deneys Reitz, and that an advocate was involved. In support of this statement that the respondent had obtained judgment Ankuda annexes to his affidavit a copy of a writ of execution dated 28 April 1999 for payment of the sum of R800 000, interest and costs. The writ reflects that interest is to run from 25 March 1999;

(5) Thereafter, offers of settlement were made and during the period March 2000 to April 2000 Ankuda sent a number of faxes

to the respondent relating to the offers. On 24 March 2000 Ankuda requested information regarding an offer of R800 000. On the same date Ankuda confirmed that Deneys Reitz on behalf of Holcom offered to pay R800 000 and interest at 14 % and that he accepted the offer. He instructed the respondent to advise Deneys Reitz that the offer was accepted. On 27 March 2000 Ankuda instructed the respondent to accept the offer as the respondent had explained it to him: i.e. payment of R800 000 and interest at 14 % from date of judgment. On 28 March 2000 Ankuda confirmed that he had instructed the respondent to accept the offer and that the respondent had faxed acceptance of the offer to Deneys Reitz and asked for copies of the faxes sent by the respondent to Deneys Reitz. On 31 March 2000 Ankuda expressed surprise that a year after judgment against Holcom the respondent had not received a written offer. Ankuda also expressed concern about the fact that no CCMA court date had been obtained despite the respondent requesting one in December 1998. Ankuda also says that despite both cases being contingency cases he believes that he is entitled to know the status of his cases. He therefore requested sight of the files in the respondent's office and a meeting with the advocate to clarify the position regarding the cases. Ankuda requested the respondent to respond by fax. On 11 April 2000 Ankuda again

referred to the urgency of the Holcom matter which had gone on for over a year from the date of the judgment against Holcom. He asked the respondent to explain why the matter had been postponed again and asked the respondent to respond by fax. On 13 April 2000 Ankuda referred to a meeting with the respondent on 12 April 2000 and confirmed that the following four items were discussed:

> ’1) You withdrew your application for a court order due to be heard on 11 April 2000 as Deneys Reitz promised to furnish you with the relevant documents by Friday 14 April 2000;
>
> 2) You would prepare a settlement agreement in the Holcom case along the information that you have given to me and that I have confirmed to you by fax regarding what you have informed me that Deneys Reitz has offered. I instruct you that I want sight and approval before this agreement is sent to Deneys Reitz.
>
> 3) You will furnish me with an update of all negotiations by fax as I remain uninformed and confused over the details of the negotiations.
>
> 4) You have stated that my Judgement for R800 000 plus interest and costs has been put in abeyance. This is the first time that I was informed of this – in the meeting on 12 April 2000. At that meeting you

stated that the Judgement is still in force.'

(6) The respondent did not reply to Ankuda's faxes;

(7) On 12 April 2000 Ankuda visited the respondent in the company of Michael Sand to inspect the file. The respondent would not permit Sand to inspect the file and Ankuda and Sand then left the office without inspecting it;

(8) After the meeting on 12 April 2000 Ankuda telephoned the advocate who the respondent had alleged was attending to the negotiations with Deneys Reitz to settle the matter. The advocate denied that he had received instructions to settle the matter or negotiate with Deneys Reitz;

(9) Regarding the CCMA matter against RMB the respondent informed Ankuda that he, the respondent, had not applied for a hearing date because he had not received specific instructions to do so;

(10) The respondent requested Ankuda to cash two cheques each for R1 000 drawn on the respondent's business account. Ankuda handed the cash to the respondent in return for the cheques. Both cheques were dishonoured on representation. On 12 July 2001 Ankuda obtained judgment against the

respondent in the Small Claims Court for payment of R2 000, interest and costs;

(11) The applicant referred Ankuda's complaint to the respondent who replied on 24 May 2000. In his letter the respondent did not deal with the detail of the complaint and attacked Ankuda for his demands on the respondent. The respondent pertinently denied that any contingency arrangement had been entered into between Ankuda and the respondent;

(12) Ankuda and the respondent were requested to appear before an investigation committee of the applicant on 4 September 2000 to investigate Ankuda's complaint. At this hearing the respondent alleged that in the Holcom matter the plea had been filed and the pleadings were closed. The applicant has inspected the court file and was not able to find the plea. The applicant also found a draft order in the court file indicating that the plaintiff's particulars of claim had been set aside as an irregular step;

(13) After considering the information provided at the inquiry the investigating committee concluded that there was *prima facie* evidence that the respondent was guilty of the following –

(a) That the respondent failed to attend properly to the affairs of his client in the matter of Holcom;

(b) The respondent acted unprofessionally in advising the complainant that an offer had been received from Holcom through its attorneys Deneys Reitz in the sum of R800 000, when no such offer had been received;

(c) The respondent acted unprofessionally in advising his client that Holcom had through its attorneys, Deneys Reitz, made an offer of settlement of R410 000, when no such offer had been made;

(d) The respondent acted unprofessionally in advising the complainant in about March 1999 that judgment had been obtained against Holcom for R800 000, interest and costs, when in fact no such judgment had been obtained;

(e) The respondent acted unprofessionally in representing to the complainant on or about 28 April 1999 that a warrant of execution had been prepared pursuant to the judgment allegedly obtained and that it was to be processed the following day;

(f) The respondent acted unprofessionally in borrowing money from his client and repaying that money by way of a cheque drawn on his firm's business account which was dishonoured on presentation;

(g) The respondent acted unprofessionally in representing to the Law Society in his letter dated 24 May 2000 that there 'has never been any contingency arrangement between the writer and Mr Ankuda' whereas there clearly was such an agreement as reflected in the papers before the investigating committee;

(h) The respondent acted unprofessionally in failing to account to Mr Ankuda.

[19] Despite filing two substantive answering affidavits the respondent has not dealt with the detail of the complaints made by Ankuda or attached any documents in support of his general denials. His failure to dispute the correctness of the facts as addressed to him by Ankuda justifies an adverse inference. In ***McWilliams v First Consolidated Holdings (Pty) Ltd*** **1982 (2) SA 1 (A)** at 10E-G the court said –

> 'I accept that "quiescence is not necessarily acquiescence" (see ***Collen v Rietfontein Engineering Works*** **1948 (1) SA 413 (A)** at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the insertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will be more readily drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion.'

[20] In addition, with regard to the writ of execution attached to Ankuda's affidavit the respondent offers a bizarre, hearsay explanation: that Ankuda told his secretary, Rutzi, to type the writ and gave her the amount of the claim and the date of the interest and that because she was weary of Ankuda she had done what he asked. According to the respondent Rutzi left his employment in 2000 and he has yet to establish her whereabouts. The respondent does not say when Rutzi conveyed this information to him and it does not appear to have been mentioned to the applicant's investigating committee on 4 September 2002. The committee pertinently found that the respondent acted

unprofessionally in representing to Ankuda on or about 28 April 1999 that a warrant of execution had been prepared pursuant to the judgment allegedly obtained and that it was to be processed the following day. Furthermore, the respondent clearly contradicted himself about the contingency fee arrangement. In his letter to the applicant dated 24 May 2000 he said –

> 'There has never been any contingency arrangement between the writer and Mr Ankuda'.

In his first answering affidavit he said he signed a contingency fee agreement in respect of the labour matter.

The respondent does not explain this contradiction. He is also not truthful about the contingency fee arrangement. It clearly provides for two different matters. In respect of the labour matter the fee was not to exceed R3 500 and in respect of the Holcom matter Ankuda was to pay him the greater of 10 % of the settlement or R300 per hour in the event of Akuda succeeding in his claim. In his fax dated 31 March 2000 Ankuda refers to the fact that both matters are contingency cases and this was not immediately denied by the respondent.

[21] It is therefore found that the applicant has established the conduct referred to by the investigating committee and set out above. In

addition the applicant has established that the respondent deliberately misstated the facts in alleging that there was no contingency agreement in respect of the Holcom matter and that the arrangement was concluded in respect of the labour matter only and that the respondent deliberately misstated the facts when he informed the investigating committee that a plea had been filed in the Holcom matter.

[22] Wreckers Dismantling (Pty) Ltd ('Wreckers')

The following facts are either common cause or are not disputed by the respondent:

(1) On 17 July 2003 attorney Brian Kahn ('Kahn') addressed a letter to the applicant to complain about the respondent's unprofessional conduct. The letter related to two cases where the respondent had acted on behalf of Wreckers and the respondent's conduct was dealt with in detail;

(2) In 1997 Security Force (Pty) Ltd t/a Metro Security Services ('Metro') instituted an action against Wreckers in the Randburg magistrates' court. Wreckers instructed the respondent to act on its behalf and the action was dismissed with costs. The

respondent did not recover the costs for Wreckers and in March 2002 Wreckers instructed Kahn to take over the matter;

(3) Thereafter Kahn addressed a number of letters to the respondent to obtain the file. All these attempts were unsuccessful and eventually Kahn reconstructed a new file from the file at the Randburg magistrates' court. In the file Kahn found an untaxed bill of costs and a notice of taxation. Kahn ascertained from the note on the file and Metro's attorney that the taxation did not take place because the respondent failed to attend the taxation. When Kahn attempted to arrange a new date for the taxation of the bill Kahn discovered that the bill had been drawn according to the High Court tariff.

[23] The respondent baldly denies that he failed to hand over the file to Kahn and that he is in possession of the file. He does not deal with the detailed complaints set out in Kahn's letter dated 17 July 2003. He does not dispute that the bill was drawn in accordance with the wrong tariff and blames the costs consultant. Significantly, the respondent does not annex any documents that would support his contention that he handed the file to Kahn. There is clearly no *bona fide* dispute of fact regarding this complaint.

[24] It is therefore established that the respondent –

(i) failed to hand over the file to Kahn;

(ii) failed to give proper attention to the case of Wreckers, a contravention of Rule 89.15;

(iii) failed to reply to correspondence requiring a response, a contravention of Rule 89.23;

(iv) failed to act with the degree of care, skill and attention expected of an attorney, a contravention of Rule 89.30.

[25] Wreckers' second complaint

-

The following facts are either common cause or are not disputed by the respondent –

(1) In its letter dated 17 July 2003 Kahn furnished the details of the second case where the respondent acted;

(2) In 1998 the Technical Workers Union ('TWU') instituted an action against Wreckers in the Johannesburg magistrates' court for payment of R11 722,43. Attorneys Deneys Reitz acted on behalf of TWU and Wreckers instructed the respondent to act on

its behalf;

(3) Deneys Reitz made an offer of settlement to the respondent: that Wreckers pay R6 000 in full settlement of the claim. Wreckers accepted the offer of settlement and furnished the respondent with a cheque for R6 000 to be delivered to Deneys Reitz. On 17 May 1999 the respondent wrote to Wreckers advising that the matter had been settled and that the cheque had been deposited and paid;

(4) On 25 May 2001 the sheriff arrived at Wreckers' premises with a writ of execution issued in the matter for payment of R11 759,33. Wreckers immediately communicated with Deneys Reitz who told them that the cheque for R6 000 had not been paid to them;

(5) Wreckers then discovered that when the R6 000 was not paid TWU had proceeded with the case. The respondent had continued to act on its behalf and had filed pleadings without instructions to do so. Eventually TWU requested Wreckers to file a discovery affidavit. When Wreckers failed to do so TWU obtained an order for compliance and when that did not happen TWU successfully applied for judgment by default and issued a

writ of execution;

(6) Wreckers then communicated with the respondent and demanded that the respondent –

(a) pay the R6 000 to Deneys Reitz (TWU was prepared to accept this);

(b) pay the costs occasioned by his failure to act;

(c) apply for rescission of judgment.

The respondent agreed to do this and paid R6 000 to Deneys Reitz. This was some two years after he was supposed to have done so.

(7) The respondent prepared an abortive application for rescission which was rectified by Wreckers.

[26] The respondent claims that no settlement was reached because of a change of attorneys in TWU's office and that he paid over the R6 000 as soon as the settlement was achieved. It is clear from the respondent's own version that he received the cheque for R6 000 and held it for more than two years. He claims that it could not have been deposited into his personal business account and denies that he

misappropriated the funds. However he attaches no documents to show what happened to the cheque or how he had R6 000 to pay Deneys Reitz more than two years later. By then the cheque would be stale. In his supplementary answering affidavit the respondent simply admits that he paid the amount late. There is no answer to the applicant's contentions.

[27] The applicant has therefore established that the respondent –

(a) did not give proper attention to the case of his client, a contravention of Rule 89.15;

(b) did not act with the skill, care and attention expected of an attorney, a contravention of Rule 89.30;

(c) failed to carry out his client's instructions to deliver the cheque for R6 000 to Deneys Reitz and retained the funds for himself;

(d) deposited the cheque into his own account, obtained payment and retained the amount of R6 000;

(e) misrepresented to Wreckers that the matter had been settled and the cheque for R6 000 deposited and paid.

[28] Advocate D.J. van Sittert

The facts relating to this complaint are not in dispute. During 1999 Advocate Van Sittert was briefed by the respondent in a number of High Court matters. They expressly agreed that the respondent would be responsible personally for the accounts and that he would settle the statements of account within 97 days. A total amount of R28 283,80 was due to Advocate Van Sittert. The respondent failed to pay him and the advocate was unsuccessful in his attempt to recover this amount from him. The respondent thereby contravened Rule 68.9 of the applicant's rules.

[29] As already mentioned the respondent's attorney does not dispute that the respondent is guilty of misconduct and that he is not a fit and proper person to continue to practise as an attorney. He contends that in the light of the acknowledged misconduct – which he does not identify – the respondent should be suspended from practice rather than struck off the roll. He suggests that the period and the conditions of suspension be determined by the court. In support of this contention the respondent's attorney relies on ***Law Society, Cape of Good Hope v Peter*** **[2006] All SA 37 (SCA)** paras 12 and 13 and ***Summerly v Law Society, Northern Provinces*** **2006 (5) SA 613 (SCA)** para 21.

The respondent's attorney emphasises that theft or misappropriation of trust funds has not been established because no-one has come forward to claim and therefore no permanent loss of funds has been proved. However he concedes that if the court finds misconduct involving dishonesty other considerations arise. He also agrees that disciplinary matters against attorneys must be decided on their own facts – see ***Summerly*** para 21.

[30] It is clear that the case cannot be decided on the narrow basis contended for by the respondent's attorney. Apart from the misconduct established against the respondent, which has already been referred to, the respondent's attitude towards and conduct regarding the applicant and the court must be taken into account. Deliberately misstating the facts to the applicant and the court is very serious and is a dramatic deviation from the standard of conduct expected from an attorney.

[31] Before considering the established misconduct it would be useful to review the relevant general principles concerning an attorney, his profession and the conduct of his profession. These are set out by the President of the applicant in its founding affidavit. None of them is disputed by the respondent:

(1) The profession is not a mere calling or occupation by which a person earns his living. An attorney is a member of a learned, respected and honourable profession, and, by entering, he pledges himself with total and unquestionable integrity to society at large, the courts and to the profession. Only the very highest standard of conduct and repute and good faith are consistent with membership of the profession which can only function effectively if it inspires the unconditional confidence and trust of the public. The image and standard of the profession are judged by the conduct and reputation of all of its members and, to maintain this confidence and trust, all members of the profession must exhibit the qualities referred to at all times;

(2) It is required of an attorney that he observe scrupulously and comply with the provisions of the Attorneys Act and the rules;

(3) It is of particular importance that an attorney complies with the provisions of the Attorneys Act and the rules in relation to the money of the client which is placed into its custody and control. Such money, generally known as trust money, does not form part of the assets of an attorney. The very essence of a trust fund is the absence of risk and the confidence created thereby. The Law Society has always adopted the view that there can be

no excuse for an attorney not to comply with each and every one of the requirements which directly or indirectly relate to trust money. The unjustifiable handling of trust money is totally untenable and not only frustrates the legal requirements relating to trust money but also undermines the principle that a trust account is completely safe in respect of money held therein by an attorney on behalf of another person;

(4) The law exacts from an attorney *uberrima fides* – the highest possible degree of good faith – in his dealings with his client, that implies that at all times his submissions and representations to his client must be accurate, honest and frank;

(5) In pecuniary matters the attorney must be most punctual and diligent. He must not retain money belonging to his client longer than is absolutely necessary and must account to his client for monies received by him in a proper and diligent manner;

(6) An attorney must not appropriate for his own use monies received on behalf of a client for whom he is acting, without the permission or authority of the client to do so;

(7) An attorney must never abuse the position of trust and the

fiduciary relationship that should exist between an attorney and his client.

[32] The applicant has established the following misconduct by the respondent –

(1) The respondent failed to keep proper accounting records relating to money received and held by him in trust. This is a contravention of section 78(4) of the Act, unprofessional conduct and renders the respondent liable in terms of section 83(13) of the Act to be struck off the roll or suspended from practice. See ***Law Society, Transvaal v Matthews*** **1989 (4) SA 389 (T)** at 394B-E;

(2) The respondent failed to keep proper books of account generally as required by Rule 68.1.1. As pointed out in ***Cirota and Another v Law Society, Transvaal*** **1979 (1) SA 172 (A)** at 193F-G and ***Law Society, Transvaal v Matthews supra*** at 395D-E the failure to keep proper books of account is a serious contravention and renders an attorney liable to be struck off the roll of practitioners or suspended;

(3) The respondent failed to produce his accounting records for

inspection by Mr Faris, the applicant's auditor. This was a contravention of section 70(1) of the Act and constitutes unprofessional conduct in terms of section 70(2) of the Act;

(4) The respondent failed to comply with Rule 76.3 when he ceased to practise as Mantsha Attorneys on 31 May 2001. This is a contravention of Rule 89 read with Rule 89.11 and constitutes unprofessional conduct;

The respondent first wrongly denied that he had defaulted and then admitted that he had;

(5) The respondent failed to comply with Rule 70 when he commenced practising as Mantsha Nuntsweni Inc. This is a contravention of Rule 89 read with Rule 89.11 and constitutes unprofessional conduct.

The respondent first wrongly denied that he had defaulted and then admitted that he had;

(6) The respondent practised for two years without being in possession of a fidelity fund certificate as required by section 41(1) of the Act. This is a contravention of Rule 89 read with

Rule 89.11 and constitutes unprofessional conduct. The respondent's attack on the applicant's *bona fides* was unjustified and unfounded;

(7) Apart from not keeping proper books of account the respondent allowed his trust banking account to go into debit. This is a contravention of section 78(1) of the Act and Rule 69.3;

(8) Shirt Bar. The respondent attempted to pay his indebtedness to the Shirt Bar by means of cheques drawn on his trust account, five of which were dishonoured. By handing the creditors these cheques the respondent represented to the creditors that they were trust cheques which, according to the respondent they were not. He also represented to the creditor that he would be paid. There is no proper explanation for the fact that the cheques were dishonoured and in view of the respondent's financial position the inference is justified that he drew the cheques knowing that there were insufficient funds to meet the cheques;

(9) Hoffmann J.

(a) The respondent applied for judgment by default for his client Silva against SARS for payment of R1.5 million

when he knew that SARS had already delivered a notice of intention of defend and a notice of exception.

(b) The respondent repeatedly failed to reply to letters addressed to him by the applicant in connection with the complaint.

(c) The respondent tendered an explanation to the applicant and this court that his client had applied for the judgment by default. That explanation has been found to be so inherently improbable that it cannot be believed and it has been rejected.

(10) Summersgill.

(a) When replying to the applicant's inquiries on behalf of Summersgill the respondent indicated that Summersgill's action was not defended but that he was in the process of applying for judgment by default. He provided the applicant with a notice of bar and the application for judgment by default. He did this well-knowing that the defendant had filed a special plea and a plea. The respondent was clearly attempting to mislead the applicant in connection with the progress of the matter.

(b) The respondent issued a summons after being told by the medical expert that Summersgill's condition was not caused by her work situation. To his knowledge therefore there was no cause of action. Despite this the respondent charged his client for services rendered.

(c) The respondent issued the summons when the claim had prescribed. The respondent admits this and admits that he erred in issuing the summons.

(11) Sibiya.

(a) The respondent informed the applicant that the Legal Aid Board refused to support the litigation when that was not so.

(b) The respondent informed the applicant that he had not been able to proceed with the case because Sibiya had not been able to obtain proof of his arrest. This was not the truth. Sibiya obtained copies of the relevant police record and handed them to the applicant. The true explanation must be that the respondent did not request the information from Sibiya or go to the police station to inspect the records.

(c) The respondent allowed Sibiya's claim to prescribe and withheld the fact that the action was opposed and that a plea of prescription raised which he has been advised would be successful.

(d) The respondent acted unprofessionally in not attending to Sibiya's case with the required skill, care and attention.

(12) Ankuda

(a) The respondent's statement to the applicant that there was no contingency fee arrangement entered into between him and Ankuda was a deliberate untruth. The respondent contradicted this statement in his answering affidavit without any attempt to explain the contradiction.

(b) The respondent's statements in his answering affidavit that the contingency fee arrangement related only to the CCMA matter were deliberately untruthful. The document itself clearly distinguishes between the claim for commission for which the respondent would receive the greater of 10 % of any amount recovered or R300 per hour and the maximum fee of R3 500 for the CCMA matter. In addition the finding above based on the respondent's failure to answer and deny Ankuda's statement in his fax that the arrangement governs both

matters, puts the matter beyond doubt.

(c) The respondent failed to attend properly to the affairs of Ankuda in regard to the claim against Holcom;

(d) The respondent was untruthful when he advised Ankuda that an offer had been received from Holcom, through its attorneys Deneys Reitz, in the sum of R800 000, when no such offer had in fact been received;

(e) The respondent was untruthful in advising Ankuda that Holcom had through its attorneys, Deneys Reitz, made an offer of settlement of R410 000, when no such offer had been made;

(f) The respondent was untruthful in advising Ankuda, in about March 1999, that judgment had been obtained against Holcom for R800 000, interest and costs, when in fact no such judgment had been obtained;

(g) The respondent was untruthful in representing to Ankuda, on or about 28 April 1999, that a warrant of execution had been prepared pursuant to the judgment allegedly

obtained and that it was to be processed the following day;

(h) The respondent acted unprofessionally borrowing money from his client and repaying that money by way of cheque drawn on his firm's business account which was dishonoured on presentation;

(i) The respondent was untruthful in informing the investigation committee that a plea had been filed in the Holcom matter.

(13) Wreckers

In respect of the first complaint the respondent acted un-professionally:

(a) in failing to hand over the file to Brian Kahn;

(b) in failing to act in the best interests of his client;

(c) in failing to reply to correspondence and in failing to act with the care, skill and attention expected of an attorney;

In respect of the second complaint the respondent:

(d) misrepresented to Wreckers that their case had been

settled and the cheque for R6 000 deposited and paid when this was not so;

(e) deposited the cheque into his account, obtained payment and retained the amount paid for more than two years;

(f) failed to carry out his client's instructions to deliver the cheque to Deneys Reitz and retain the funds himself;

(g) did not act in the interests of his client and did not act with the skill, care and attention expected of an attorney.

(14) Sinyatsi. The respondent recovered R4 200 for his client and failed within a reasonable time to account to her and pay over the money.

(15) McIntyre & Van der Post

(a) The respondent failed to pay his correspondent as required by the rules. The respondent failed to pay despite repeated undertakings to do so.

(b) The respondent misrepresented the nature and extent of the work done by McIntyre & Van der Post to the applicant.

(16) Advocate Van Sittert.

The respondent failed to pay advocate Van Sittert's fees totalling R28 283,20 despite an agreement that the respondent would be personally liable for these fees and settle the advocate's accounts within 97 days. Advocate van Sittert has not been able to recover this amount from the respondent. This constitutes a contravention of Rule 68.9 and unprofessional conduct in terms of Rules 89 read with 89.11.

(17) The respondent's persistent failure to reply promptly to letters from his clients and from the applicant and sometimes his failure to reply at all.

[33] The respondent's personal circumstances set out in his answering affidavits may be summarised as follows: He comes from a poor family and it was a struggle to be admitted to the profession. He entered into articles of clerkship with attorney Peter Soller of Johannesburg who himself was struck off the roll of attorneys. The respondent now knows that Mr. Soller did not give him the solid grounding in professional ethics and the general conduct and administration of attorneys' practice that he should have. On completing his articles the respondent was offered a partnership by Mr. Soller who had been sequestrated. Mr. Soller was conducting a practice with a business account and he

persuaded the respondent to continue with this practice. The respondent says he was too inexperienced to resist. He was overwhelmed by the offer of a partnership and did not appreciate the pitfalls. When the bank was not prepared to allow them to conduct a business account only Mr Soller suggested that they operate two trust accounts: one as a genuine trust account and the other as a business account. The respondent says that he got carried away by the prospect of a partnership which he considered to be a wonderful achievement. The respondent states that since his suspension he has had the benefit of hindsight and has appreciated his errors and taken steps to remedy them. He has studied all the available literature on attorneys' professional ethics and given attention to the rules and the attorneys' practice manual. He has studied the requirements of the Act and rules regarding the keeping of attorneys' books and all associated matters. For ten months he worked as a manager for David Letsie Electrical CC, electrical contractors. His responsibilities included general office management; staff supervision; payment of salaries; receipts and deposit of money; payment of debtors; submitting tenders; correspondence and generally dealing with problems. According to his employer he has meticulously dealt with money and is regarded as honest and reliable. In this position he has become involved in dispute resolution and his employer has placed faith and trust in him. He has also started coaching an under 12 soccer team.

[34] The respondent's attorney submits that the court should not strike the respondent from the roll for the following reasons:

(1) There has been no financial loss to any creditor or client;

(2) The Fidelity Fund has not incurred any liability in respect of the respondent following his suspension;

(3) The respondent has been suspended for a fairly lengthy period, which, in itself, is a severe punishment. The suspension had grave financial consequences and brought social disgrace to the respondent, his wife, children and family;

(4) The respondent has found it extremely difficult to generate other income but nevertheless he has been able to put his skills and knowledge to good use which indicates that the respondent has the will to continue with his life;

(5) The respondent has admitted his faults and has been able to identify the causes thereof. Not only has he been able to identify such character defects but he gives the court an assurance that there will never be a recurrence and that he will not shame the profession again;

(6) The respondent has done an in-depth analysis of his short

professional career and what caused him to fall foul of the rules of the applicant. He has broadened his knowledge of bookkeeping and the other administrative skills required of an attorney. He has had other employment where he handled large sums of money without there being a shortfall. He has established goodwill and trust in others and has given of himself to benefit younger people. The respondent considers that he has rehabilitated himself and will not commit these errors again.

[35] While it is true that no loss by the Fidelity Fund has been established it is clear that a misappropriation of funds occurred in the case of Wreckers (R6 000). It has also been established that the respondent is untruthful when dealing with his clients, the applicant and the court. His professional conduct and his conduct in this case also demonstrate a lack of insight into the attorneys' profession and the role which the applicant plays in supervising attorneys' conduct. The factors mentioned above do not show that the respondent has insight into his character defects and that he has rehabilitated himself. Taken cumulatively the respondent's conduct referred to in this judgment demonstrates not only that he is not a fit and proper person to continue to practise as an attorney but that the only proper sanction is that of striking from the roll. While I have sympathy with the difficulties which the respondent experienced in qualifying as an attorney his conduct

indicates that the public must be protected from him.

[36] The following order is made:

(1) The name of the respondent is struck off the roll of attorneys;

(2) Paragraphs 2 up to and including 12 of the court order dated 12 March 2004 is incorporated in this order;

(3) The respondent is ordered to pay the costs of this application on the scale as between attorney and client.

_____

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

_____

T. CONRADIE
ACTING JUDGE OF THE HIGH COURT

CASE NO: 21706/2003

HEARD ON: 28 May 2007

FOR THE APPLICANT: Mr A.T. Lamey

INSTRUCTED BY: Mr A. Bloem of Rooth & Wessels Inc

FOR THE RESPONDENT: MR K.M. RÖNTGEN (SNR)

INSTRUCTED BY: Röntgen & Röntgen

DATE OF JUDGMENT: 25 July 2007