

**SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

**Case no: 141/2001
Reportable**

In the matter between

LAW SOCIETY OF THE CAPE OF GOOD HOPE

Appellant

and

FRANCOIS JOHANNES BUDRICKS

Respondent

**Coram: HEFER AP, NIENABER, HARMS, CAMERON,
NUGENT JJA**

Heard: 2 May 2002

Delivered: 24 May 2002

Summary: Attorney-misappropriation of trust funds-striking from the roll.

JUDGMENT

HEFER AP

HEFER AP:

[1] The respondent practised as an attorney in Port Elizabeth until December 1996 when, by order of the Eastern Cape Division of the High Court, he was interdicted from doing so pending the decision of an application for the removal of his name from the roll. The removal application was filed not much later in the same court but, for reasons which are not relevant at present, three and a half years went by before it was eventually heard. Instead of striking the respondent's name from the roll the court (Jennett and Froneman JJ) ordered his suspension from practice for two years, which order was itself conditionally suspended for three years. The appellant has now appealed to this court. Its contention is that the respondent was treated too leniently.

[2] In terms of s 22(1)(d) of the Attorneys Act 53 of 1979 an attorney may be struck from the roll or suspended from practice "if he, in the discretion of the Court, is not a fit and proper person to continue to practice as an attorney." The practical manner in which the courts exercise their disciplinary powers is trite. As explained in cases like *Jasat v Natal Law Society* 2000(3) SA 44 (SCA) at 51B-I and *Law Society of the Cape of Good Hope v C* 1986(1) SA 616 (A) at 637E-G the enquiry is three-fold. The court first decides as a matter of fact whether the alleged offending conduct has been established. If the answer is yes, a value judgment is required to decide whether the person concerned is not a fit and proper person as envisaged in s 22(1). And if the answer is again in the affirmative, the court must decide in the exercise of its discretion whether, in all the circumstances of the case, the person in question is to be removed from the roll or merely suspended from practice. Since the second and third legs of the enquiry involve the lower court's discretion the power of a court of appeal to interfere is not unlimited.

[3] The proceedings against the respondent arose from the way in which he dealt with funds received from the National Housing Board in terms of an agreement he had concluded with the Board as part of the latter's implementation of a state-subsidised housing scheme for indigent persons. The money was received in monthly instalments over a period of thirteen months and earmarked for the acquisition of land and the provision of housing for successful applicants for subsidies. The respondent was expressly instructed to pay the amount due in each case only upon the registration of transfer. In the meantime he had to invest the money in a separate interest bearing account and to pay the monthly interest to the Provincial Board. In return for "attending to the transfer of the property acquired by any particular applicant, and in return for assisting the National Housing Board in the administration of payment of any particular subsidy" he was entitled to an inclusive fee of R250 per application.

[4] The court *a quo* found that the following allegations against the respondent had been established:

- (a) For about nine months he failed to open a separate investment account and simply paid the money received monthly from the Housing Board into his general trust account. Interest from that source accrues to the Attorneys' Fidelity Fund but the respondent paid it the Board.
- (b) He appropriated part of each subsidy towards fees he had debited in excess of the agreed R250. His *modus operandi* and the extent of this practice are described as follows in the court *a quo*'s judgment: "... immediately or very shortly after the receipt of subsidy funds substantial fees were debited and transferred to respondent's business account ... respondent received 437 subsidy amounts in respect of which, at the agreed administration fee of R250,00 per transaction, fees totalling R109 250,00 could properly have been debited and transferred when respondent became entitled to do so, whereas in fact respondent had debited and transferred fees totalling R701 373,17.

Respondent's answer to the foregoing is that the actual implementation of the housing

subsidy scheme was not straight forward and that work extraneous to the actual transfer of title in property was often and, indeed, usually required by the prospective buyers and sellers ... In order to cater for this extraneous work respondent would obtain the express instructions of the prospective purchasers and sellers that respondent's fees therefor be debited to them and respondent would debit fees against the subsidies. In other words, despite the terms of respondent's mandate from the National Housing Board and in particular clause 6 thereof ... respondent administered the subsidy funds on the basis that he was entitled to apply the subsidies in the manner instructed by his clients which of course he was not entitled to do as the subsidy funds remained held for the benefit of the National Housing Board until respondent became entitled to disburse them in terms of his mandate."

- (c) He credited an amount of R379 000,00 received from the Housing Board, not to the latter's account, but to the account of a company in which he had an interest. His explanation was that undebited fees due to him in respect of Housing Board matters more than covered the amount of the cheque.
- (d) He issued two trust cheques for a total amount of R71 728,97 for payment of his personal commitments but debited the amounts to the Housing Board's account. His only explanation was that more than the amount in question was due to him in respect of undebited fees in subsidy matters.
- (e) He made further payments totalling R214 397,10 from the Housing Board's account to repay loans made to his firm. Again his explanation was that a larger amount was due to him in respect of undebited fees.
- (f) In some of the dealings already referred to the respondent committed breaches of the appellant's Rules.

[5] The court *a quo*'s assessment of the irregularities was expressed as follows in the judgment:

"On what has been placed before us I am not satisfied that any shortfall in any particular amount has been shown to exist in respondent's trust banking accounts. I am,

however, satisfied that respondent has committed theft of trust monies, and that to that extent there must in consequence have been at the time a shortfall in his trust banking accounts, and that he has administered trust funds in a reckless and cavalier manner and without any regard for his duties as an attorney ... Respondent, patently, did not administer trust funds received from the Housing Board in accordance with his instructions or in accordance with his obligations as an attorney. Apart from what has already been set out above, section 78(4) of the Attorneys Act No 53 of 1979 requires the following ... The records kept by respondent fall short of this requirement and the ‘method employed in debiting fees as disbursements’ is more than simply ‘unorthodox’ as euphemistically described by Mr Greeff. (Mr Greeff was a forensic accountant employed by the respondent).

I am satisfied further that respondent has by his conduct shown himself to be not a fit and proper person to continue to practise as an attorney.”

[6] The reasons for not striking the respondent off or suspending him outright appear from the following passages from the court’s judgment:

“Turning then to the third inquiry ie whether respondent’s name should be removed from the roll of attorneys or whether an order suspending him from practice for a specific period will suffice, it is important to note that, whatever suspicions one may have, the misappropriations which took place and the accounting methods adopted have not been shown to have caused any actual ultimate loss to clients nor does it appear that there was a real risk of loss to clients. To quote from a comparable situation which prevailed in *Cape Law Society v Parker* [2000 (1) SA 582 (C)] at p 587 I:

“Although respondent must have known that his conduct in misappropriating trust monies was unlawful, it can be accepted that he did not harbour the intention of committing theft in its ordinary common law connotation.”

... After much consideration we have come to the conclusion that the proved circumstances do not require of us an order that respondent’s name be struck off the roll of attorneys and that an order suspending him from practice as an attorney will suffice. However, respondent has been interdicted from practising as an attorney since 12 December 1996 and for all practical purposes he has thus been suspended from practice as an attorney for some three and a half years. In these circumstances it is appropriate that any suspension of respondent from practice as an attorney be itself suspended for a period.”

[7] Counsel for the appellant submitted, and I agree, that this is a case in which a reconsideration of the order is justified. Reading the court *a quo*'s judgment as a whole leaves one with no doubt that, in considering an appropriate order, the court was more concerned with the personal circumstances of the respondent than with the protection of the public. 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 only be suspended if the court finds that the attorney concerned is a fit and proper person to continue to practice but still wishes to penalize him.) Moreover, as appears *inter alia* from the judgment in *Jasat*'s case at 51H-I, the courts exercise supervisory powers over the conduct of attorneys, not only in order to discipline and punish errant practitioners, but also, and more importantly (particularly in cases like the present one where trust money was misappropriated), in order to protect the public. This is mainly why the possibility of a repetition of the conduct complained of must be taken into account when it comes to deciding upon an appropriate penalty for proven misconduct. In the present case the court found that the respondent had misappropriated trust moneys and had administered trust funds in a reckless and cavalier manner without any regard for his duties as an attorney. The respondent, on the other hand, insisted all along that he had only done what he was entitled to do. The nature of his conduct and his protestations of innocence rendered a repetition a distinct possibility. Yet there is no indication in the judgment that this and the interests of the public were ever considered. In my judgment there is ample reason for reconsidering the court's decision and I proceed to do so.

[8] In this court the respondent challenged neither the court *a quo*'s factual findings nor its assessment of his conduct or its conclusion that he was not a fit and proper person to continue practising as an attorney. His counsel submitted, however, that the penalty imposed was quite appropriate. I do not agree; but before I furnish the reasons for my disagreement the reasons advanced by the court *a quo* for not striking the respondent from the roll or at least suspending him outright have to be dealt with. Apart from the fact that he had already been interdicted from practising for three and a half years (with which I have dealt) those reasons are (1) that none of his clients had suffered a loss and there was no real risk of that happening, and (2) that he did not harbour the intention of committing theft "in its ordinary common law connotation".

[9] While it is correct that none of the respondent's clients have been shown to have suffered an actual loss, it is patently incorrect to say that there was no real risk of that occurring. The Housing Board was at risk from the first day when a debit was passed in respect of work done on behalf of a subsidy buyer or seller and the amount transferred to the business account. Each of these debits was passed in the expectation that the client in question would become entitled to payment of the subsidy on registration of transfer. But what if the anticipated transfer did not go through after the debit had been passed and the amount transferred? And what if the respondent's estate had been sequestrated? Cases in which no fees were actually debited but trust cheques issued and the Housing Board account debited, and the one instance where money due to the Board was credited to a private account, were even worse. It is obvious, as the court *a quo* itself found, that there must have been a shortfall in the funds which in effect belonged to the Board.

[10] The reference to the absence of an intention to commit theft "in the ordinary common law connotation" was unfortunate, to say the least. It is

difficult to avoid the impression that the court in *Parker's* case (whence the notion of this rare species of the intention to steal derived), was at pains to let the offending attorney off lightly. None of the factors used in mitigation in that case can really impress anyone (such as the fact that Parker had stolen, not for his personal benefit, but rather for the benefit of members of his family, and that the stolen trust money had been used to finance loans against post-dated cheques which Parker believed would be met). And to construe a less than real intention to steal on the facts of the case was equally generous. To say that Parker did not strictly commit theft because he “merely anticipated the time for payment of fees” misses the point: what was really offensive about Parker’s conduct was that he used trust money not authorised for that purpose to pay those fees. As the court itself observed elsewhere (at 587G-H),

“the principle, as it emerges from the cases, is that the utilisation of the funds in a trust account without the authority of the person on whose behalf the funds are held for purposes which do not benefit him and in circumstances where he has not authorised such use, amounts to misappropriation of trust money, which in turn is a form of theft.”

Citing this very passage the court *a quo* said in the present case:

“Until such time as any particular subsidy money was paid over to a seller in terms of such seller’s entitlement thereto the subsidy remained Housing Board money, ie money held by the respondent for the benefit of the Housing Board and the respondent was not entitled to use such money to pay himself fees due to him by either the prospective purchasers or sellers.”

[11] Neither of the court’s reasons can accordingly be supported and, in any event, I take a much more serious view of the respondent’s conduct. Not only did he treat the Board’s instructions with disdain but in the process committed about the worst professional sin that an attorney can commit by misappropriating trust funds. He did so methodically over a

substantial period of time and in respect of large sums of money. It does not avail him to say that he merely misused the Housing Board's money to pay fees he had earned or in anticipation of fees he would still have earned; for it is quite clear that he regarded his agreement with the Board as a stroke of good fortune enabling him to establish a lucrative practice amongst a large group of people entirely free of risk by using the Board's money as a handy source for the prompt payment of his fees. Moreover, we must not lose sight of the fact that he misused public money earmarked for the upliftment of the poor; nor that he maintained all along that he had done no wrong until he accepted the court *a quo*'s findings in opposing the application for leave to appeal, and that there was not a word of contrition in his opposing affidavit. Bearing in mind further that the possibility of a repetition of his conduct if he were to be allowed to continue practising has not been excluded, the only appropriate penalty will in my view be to strike him from the roll despite the dire consequences of such a step to him.

[12] The appellant's counsel asked for attorney and client costs if the appeal were to be upheld. Since this is the usual order in cases where an attorney's name is struck from the roll and the respondent's counsel raised no objection, such an order will be made. I may mention that the court *a quo* made a similar order against the respondent in respect of the proceedings in that court.

[13] The appellant has also asked that our order - including the usual order appointing a curator to administer and control the respondent's trust account(s) and listing the curator's powers and duties - be made applicable to both the practice he conducted at the time when the interdict was granted and to any practice conducted by him after the date of the court *a quo*'s suspended order of suspension. The respondent's contention is that such an order will be inappropriate since there is no suggestion that there is anything untoward in his present practice and no reason why his present

clients should be handled by the curator and not by other attorneys. His request is that he be allowed to appoint an attorney of his choice to wind up his present practice. I do not think his request should be granted. The curator must obviously wind up what may conveniently be called the old practice and I know of no reason why the winding up of the present practice should be entrusted to someone else. Present clients' rights will be protected in the order proposed by the appellant.

[14] I accordingly make the following order:

- I. The appeal is upheld with costs on the attorney and client scale.
- II. The court *a quo*'s order is set aside and replaced with the following order:
 1. The respondent's name is struck from the roll of attorneys of the High Court of South Africa (Eastern Cape Division).
 2. (a) The respondent is ordered to surrender and deliver to the Registrar of the High Court of South Africa (Eastern Cape Division) his certificate of enrolment as an Attorney.
(b) Should the respondent fail to comply with the provisions of the preceding paragraph of this Order within two weeks from date hereof, the Sheriff for the district in which such certificate of enrolment is, is empowered and directed to take possession of and deliver the same to the Registrar of the High Court of South Africa (Eastern Cape Division).
 3. The respondent is ordered to deliver his books of account, records, files and documents containing particulars and information relevant to-
 - 3.1 any moneys received, held or paid by the respondent for or on account of any person;
 - 3.2 any moneys invested by the respondent in terms of section

78(2) and/or section 78(2A) of Act No 53 of 1979;

- 3.3 any interest on moneys so invested which was paid over or credited to the respondent;
 - 3.4 any estate of a deceased person, or any insolvent estate, or any estate placed under curatorship of which the respondent is the executor, trustee or curator or which the respondent is administering on behalf of the executor, trustee or curator of such estate; and
 - 3.5 the respondent's practice as an Attorney,
to the curator appointed in terms of paragraph 9 hereof, provided that as far as such books of account, records, files and documents are concerned the respondent shall be entitled to have access to them, but always subject to the supervision of such curator or a nominee of such curator.
4. Should the respondent fail to comply with the provisions of the preceding paragraph of this Order within one week after service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on the respondent, as the case may be, the sheriff for the district in which such books of account, records, files and documents are, is empowered to take possession of and deliver them to such curator.
 5. Such curator shall be entitled to hand over to the persons entitled thereto all such records, files and documents as soon as he has satisfied himself that the fees and disbursements in connection therewith have been paid or satisfactorily secured or that same are no longer required by the curator.
 6. A written undertaking by a person to whom the records, files and documents referred to in paragraph 5 above are handed to pay such amount as may be due to the respondent, either on taxation or by

agreement, shall be deemed to be satisfactory security for the purposes of the preceding paragraph hereof provided that such written undertaking incorporates a *domicilium citandi et executandi* of such person.

7. Such curator is empowered to require that any such file, the contents of which he may consider to be relevant to a claim, or possible or anticipated claim, against him and/or the respondent and/or the respondent's clients and/or the Attorneys' Fidelity Fund (herein referred to as "the Fund") in respect of money and/or other property entrusted to the respondent, be re-delivered to such curator.
8. The respondent is interdicted and prohibited from operating on his trust account(s) as defined in paragraph 9 hereof.
9. The Director, failing whom the Deputy Director, for the time being of the Applicant, is appointed as curator to administer and control the trust accounts of the respondent comprising the separate banking accounts opened and kept by the respondent at a bank in terms of section 78(1) of the said Act No 53 of 1979 and/or any separate savings or interest-bearing accounts as contemplated by section 78(2) and/or section 78(2A) of the said Act No 53 of 1979, in which moneys from such trust banking accounts have been invested by virtue of the provisions of the said sub-section or in which moneys in any manner have been deposited or credited (the said account(s) being herein referred to as "trust accounts") with the following powers and duties:
 - 9.1 subject to the approval of the Board of Control of the Fund, to sign and endorse cheques and/or withdrawal forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which the respondent was

acting at the date of this Order;

- 9.2 subject to the approval and control of the Board of Control of the Fund to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust accounts(s) and/or against the respondent in respect of money held, received and/or invested by the respondent in terms of section 78(1) and/or 78(2) and/or section 78(2A) of the said Act No 53 of 1979 (hereinafter referred to as “trust moneys”), to take legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions in which the respondent may have been concerned and which may have been wrongfully and unlawfully paid from the trust account(s) and to receive such moneys and to pay the same to the credit of the trust account(s);
- 9.3 to ascertain from the respondent’s books of account the names of all persons on whose account the respondent appears to hold or to have received trust moneys (hereinafter referred to as “trust creditors”) and to call upon the respondent to furnish him, within thirty days of the date of this Order or such further period as he may agree to in writing, with the names, addresses of and amounts due to all trust creditors;
- 9.4 to call upon such trust creditors to furnish such proof, information and affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of the Board of Control of the Fund, to determine whether any such trust creditor has a claim in respect of money in the trust account(s) and, if so, the amount of such claim;
- 9.5 to admit or reject, in whole or in part, subject to the approval of

the Board of Control of the Fund, the claims of any such trust creditor, without prejudice to such trust creditor's right to access to the civil courts;

- 9.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full, but subject always to the approval of the Board of Control of the Fund;
- 9.7 in the event of there being any surplus in the trust account(s) after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce, as the case may be firstly, any claim of the Fund in terms of section 78(3) of the said Act No 53 of 1979, in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of the respondent, the costs, fees and expenses referred to in paragraphs I, 10 and 12 of this Order, or such portion thereof as has not already been separately paid by the respondent to the applicant, and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the Board of Control of the Fund, to the respondent, if he is solvent, or, if the respondent is insolvent, to the trustee(s) of the respondent's estate;
- 9.8 in the event of there being insufficient trust moneys in the trust account(s) to pay the claims of trust creditors reflected in the books of account of the respondent in full;
 - 9.8.1 subject to the approval of the Board of Control of the Fund, to close the trust account(s) and pay the credit balance(s) to the Fund and to require the credit balance(s) to be placed to the credit of a special trust suspense account in the name of the respondent in the Fund's books;

- 9.8.2 to refer the claims of all trust creditors to the Board of Control of the Fund to be dealt with in terms of the provisions of the said Act No 53 of 1979; and
- 9.8.3 to authorise the Board of Control of the Fund to credit the credit balance(s) referred to in 9.8.1 above to its “Paid Claims Account” when the Fund has paid, in terms of section 26 of the said Act No 53 of 1979, admitted claims of the trust creditors in excess of such credit balance(s), provided that, notwithstanding the foregoing, the said Board shall be entitled, in its discretion, to transfer to its “Paid Claims Account” the amount or amounts of any claim or claims as and when admitted and paid by it;
- 9.9 subject to the approval of the Chairman of the Board of Control of the Fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys and/or counsel, and/or accountants and/or other persons, where considered necessary, to assist such curator in carrying out the duties of curator; and
- 9.10 to render from time to time, as curator, returns to the Board of Control of the Fund showing how the trust account(s) has (have) been dealt with, until such time as the said Board notifies him that he may regard his duties as terminated.
10. The respondent is hereby directed-
- 10.1 to pay the fees and expenses of the curator, such fees to be assessed at the rate of R300 per hour, including travelling time;
- 10.2 to pay the reasonable fees and expenses charged by any person(s) consulted and/or engaged by the curator as aforesaid;
- 10.3 within one year of him having been requested to do so by the curator, or within such longer period as the curator may agree

to in writing, to satisfy the curator, by means of the submission of taxed bills of costs, or otherwise, of the amount of the fees and disbursements due (to the respondent) in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights, if any, as he may have against the trust creditor(s) concerned for payment or recovery thereof.

11. The respondent is ordered to pay the costs of the application on the attorney and client scale.
- III. The terms of this order shall apply both to the practice conducted by the respondent at the time of his being interdicted from practice, namely 12 December 1996, and any practice conducted by him subsequently to the date of the judgment of the court *a quo*, namely 20 June 2000.

JJF HEFER
Acting President

Concur:
Nienaber JA
Harms JA
Cameron JA
Nugent JA