IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN CASE NO. 2042/2020

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL **Applicant**

and

ANDREW SHAUN MASIMLA **Respondent**

JUDGMENT

Bloem J.

1. This is an application by the South African Legal Practice Council for an order that the respondent be struck off the roll of attorneys and ancillary relief. The respondent was admitted and enrolled as an attorney on 20 December 2001. On 28 August 2018 this court (Roberson J with Pickering J concurring) interdicted and prohibited the respondent from practising as an attorney pending the outcome of this application. The respondent's applications for leave to appeal against that interdict was dismissed, initially by this court and subsequently the Supreme Court of Appeal.

2. Edison Cunningham sustained serious injuries in a motor vehicle accident that occurred on 28 April 2000. As a result of the accident he lost the use of his legs. His wife, Berenice Cunningham, takes care of him. Mr Cunningham instituted an

action against the Road Accident Fund (the RAF) wherein he claimed compensation for the damage that he suffered as a result of the bodily injuries caused by or arising from the accident. During 2011 Mr and Mrs Cunningham (the Cunninghams) approached the respondent to take over the prosecution of the claim from another attorney. It is undisputed that, in settlement of Mr Cunningham's claim, the RAF paid the total sum of R3 531 119.36 into the respondent's trust account. Payment of that sum was made in three instalments, namely R173 515.20 on 6 January 2012; R960 000.00 on 15 February 2012; and R2 397 604.16 on 23 April 2013.

3. The respondent admitted that he paid the Cunninghams the amounts reflected in a list that Mrs Cunningham had been keeping in what she described as a black book. That list was attached to the founding affidavit. According to that list the total sum paid by the respondent to the Cunninghams between 2011[1] and August 2017 was R1 139 880.00. He accordingly paid 32.28% of the capital that he received from the RAF to the Cunninghams. The question is what happened to the remaining sum of R2 391 239.36. The respondent's version was that he borrowed money from the Cunninghams. The applicant's contention was that he stole the money from them.

4. In her judgment Roberson J summarised Mrs Cunningham's evidence as follows insofar as it dealt with the loan agreement that the respondent alleged he concluded with Mr Cunningham:

[1] Before the RAF made the first payment on 6 January 2012, the respondent had paid the sum of R3 100.00 to the Cunninghams.

"[11] One evening [the respondent] arrived at [the Cunninghams] home and reported that he had financial problems and that his office had been raided. He did not have the money to pay them and was not able to say what had happened to the money received from the Fund. He told Mrs Cunningham that she should help him as he had helped her and her husband. She told him that they were struggling financially and needed the money. He said he wanted to borrow money and would make regular payments to them.

[12] On 23 July 2015 the respondent arrived at their home with a document which reflected that he would pay them R810 218.00 in instalments of R6 500.00 per month and R50 000.00 every quarter. Mrs Cunningham told him that this amount was too little and that according to her the correct amount was R1 396 602.00. She reached this amount by deducting 25% from the two payments paid to the respondent by the Fund, and further deducting the payments he had made into the bank account and in cash.

[13] The next evening the respondent came to their home with two acknowledgements of debt, one for R1 396 603.00 and the other for R810 218.00. He told her that she should sign both agreements and that the one for the lesser amount was for accounting purposes only. Mrs Cunningham agreed to sign both agreements because she and her husband were in dire financial need. Both agreements were annexed to the applicant's founding affidavit. They were identical in their terms except for the amount for which the respondent was indebted. They recorded that the agreement was between the respondent as debtor and Mrs Cunningham as creditor. They provided for nil interest on the debt and repayment was to be made in monthly instalments of R6 500.00 and quarterly instalments of R50 000.00. The one for the lesser amount was dated 24 July 2015 (the pre-typed year 2012 was deleted and replaced with 2015) and the one for the greater amount was undated but the year was pre-typed as 2012. The signature of the creditor on both agreements was

"E Cunningham". Mrs Cunningham said that the respondent told her to sign as E Cunningham. Mrs Cunningham said that at no time prior to signing the agreements had she or her husband agreed orally or in writing to lend any money to the respondent.

[14] According to Mrs Cunningham the respondent did not pay in terms of the agreement and during October 2015 she learned from the Fund precisely what it had paid to the respondent. She discovered that in addition to the two amounts of which they had been informed by the respondent, the Fund had also paid to the respondent the sum of R173 515.20. The respondent had not told them of this payment.

[15] Mrs Cunningham eventually served a "notice of breach of contract" on the respondent, putting him on terms to pay the balance of the September 2015 instalment and the October 2015 instalment, failing which the full amount would be called up, as provided for in the acknowledgement of debt.

[16] Mrs Cunningham estimated that by deducting 25% from the total payment from the Fund for the respondent's fees, as well as deducting the total payments received from him, the respondent still owed R1 508 459.52. Mrs Cunningham stated that the respondent had never accounted to them for the payments he received from the Fund, his disbursements or his fees."

5. The same affidavit by Mrs Cunningham, from which Roberson J extracted the above evidence, was placed before this court. The respondent denied that he concluded a loan agreement with the Cunninghams during 2015. According to him he concluded a verbal loan agreement with Mr Cunningham at the beginning of 2012 in terms whereof Mr Cunningham agreed to lend and advance money to him as and when he required it. He would sign an acknowledgement of debt when money was lent to him.

6. The difficulty I have with the respondent's version is that he created a loan facility in 2012 but used it for the first time during July 2015. That facility would have been created during 2012 only if there was a need therefor. In my view the reason that the respondent claimed that he concluded a verbal loan agreement with Mr Cunningham during 2012 is because that is when he started using the money that the RAF paid into his trust account. That view is supported by the fact that, as at 19 November 2012, the respondent only had R318 535.23 in his trust account despite the fact that the RAF had by then paid R1 133 515.20 into that account. According to Mrs Cunningham's list the respondent had by then paid the total sum of R106 200.00 to them. It accordingly means that, as at 19 November 2012, the respondent should have had the sum of R1 027 315.20 in his trust account in respect of the money that he had received from the RAF on behalf of Mr Cunningham. He failed to explain the huge shortfall in his trust account, other than to state that he had a loan agreement with Mr Cunningham. He failed to produce an acknowledgment of debt in respect of any money that he lent from the Cunninghams which could have caused the shortfall as at 19 November 2012. The reason for such failure is that there was no loan agreement at that stage. Absent a reasonable explanation for the shortfall, the applicant's contention that the money was taken without the Cunninghams' consent, and therefore stolen, must be correct.

7. The respondent's trust account reflected that as at 11 June 2013 there was a balance of -R35.00. It must be remembered that two months earlier the RAF had paid R2 397 604.16 into that same account. The respondent failed to explain why he had not paid most of the capital to the Cunninghams.

8. The trust account also reflected that on 24 June, 6 September and 1 October 2013, a period of four months, the sums of R500 000.00, R3 500.00 and R10 000.00 respectively were transferred from another of the respondent's banking accounts into his trust account and that during that same period the total sum of R487 000.00 was transferred from his trust account as fees. The sum of R487 000.00 consisted of three payments of R100 000.00 each, one of R50 000.00, two of R30 000.00 respectively, two of R25 000.00 respectively, one of R20 000.00, one of R3 500.00, one of R2 500.00 and one of R1 000.00, curiously all rounded off amounts.

9. As at 8 October 2013 there was a balance of R2 844.24 in the respondent's trust account.

10. Regarding the acknowledgment of debt agreements which were signed during July 2015, the respondent did not dispute that he met the Cunninghams on two consecutive days before those agreements were signed.[2] He admitted that this was after he had acknowledged to them that he experienced financial difficulties, that he was unable to make payment to them and that he wanted to borrow money from them. Despite having received large sums of money from the RAF on behalf of Mr Cunningham, the respondent was unable to make any substantial payment to the Cunninghams. He made payment to them of R10 000.00 on 22 December 2014, no payment during January 2015, two payments of R6 000.00 each in February 2015, R10 000.00 on 30 April 2015, R550.00 and R6 500.00

[2] It is immaterial whether they met at the Cunninghams' home, as alleged by Mrs Cunningham, or at the respondent's office, as he alleged. If it was necessary to make a finding in that regard, I probably would have found that the meeting took place at the Cunninghams' home, if regard is had to Mr Cunningham's physical condition and their perilous financial position.

during May 2015, R6500.00 and R500.00 during June 2015 and R6 500.00 and R12 500.00 in July 2015.[3]

11. Mrs Cunningham said that at no stage prior to the signing of the acknowledgement of debt agreements did she or her husband agree, either orally or in writing, to lend money to the respondent. She said that she signed those agreements so that the respondent could make payment to them as they were in dire need of money. Given the circumstances in which the Cunninghams found themselves, she had no choice but to sign the acknowledgment of debt agreements so as to ensure that the respondent would pay some money to them. The respondent exploited their financial vulnerability when he made Mrs Cunningham to sign those agreements.

12. Even if it could be said that those agreements were valid, which they were not, the problem for the respondent is that "*it is irregular and unethical for an attorney to conclude a loan agreement with his or her client*".[4]

13. I respectfully agree with the finding made by Roberson J in the interdict proceedings that the respondent's version that the Cunninghams agreed to lend him money can be, in fact must be, rejected as far-fetched and palpably implausible. Because of their personal impecunious circumstances, they could not afford to lend money to him. His version that the Cunninghams agreed to lend him such large sums of money under those circumstances, was respectfully correctly rejected by Roberson J.

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[3] For the sake of completeness, the respondent paid the following further sums to the Cunninghams: R5 500.00 in September 2015, R7 500.00 on 2 November 2015, no payments during 2016; R6 500.00 each during March and June 2017, R500.00 on 27 July 2017 and the last payment of R130.00 on 20 August 2017.

[4] *Law Society of the Northern Provinces v Dube* [2012] 4 All SA 251 (SCA) at par 21.

14. In all the circumstances, the respondent has been unable to place a satisfactory explanation before the court as to why he has to date paid only R1 139 880.00 of the R3 531 119.36 that he received from the RAF to the Cunninghams. The only reasonable inference to be drawn from all the evidence is that, without the Cunninghams' consent, he used the money for his own purpose and at their expense. Simply put, he stole their money and attempted to cover up that theft with an allegation of a loan agreement.

15. The applicant seeks an order that the respondent's name be struck off the roll of attorneys. To secure such an order, the facts that the applicant placed before the court must establish that the respondent has made himself guilty of offending conduct. That is a factual enquiry. Once the offending conduct has been established, the court must consider whether the respondent is a fit and proper person to continue to practise as an attorney. In this regard the court must weigh up the circumstances under which the respondent committed the offending conduct against the conduct expected of an attorney. If the court finds that he is not a fit and proper person to continue to practise as an attorney, it must enquire into whether or not he deserves the ultimate penalty of being struck off the roll of attorneys or whether an order of suspension for a period from practice as an attorney will suffice.[5]

16. The facts placed before the court by the applicant established, on a balance of probabilities, that the respondent stole a substantial sum of the money that he received from the RAF on behalf of Mr Cunningham from him. He then attempted

[5] *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) at par 2.

to cover up the theft by relying on a loan agreement, which in itself constitutes unethical conduct. Those facts established offending conduct on the part of the respondent.

17. On the basis of that finding, I now consider whether or not the respondent is a fit and proper person to practise as an attorney. Mr Thysse, counsel for the respondent, submitted that the respondent's unethical conduct, when he allegedly borrowed money from the Cunninghams, was not dishonest or unlawful, but "*rather indicative of the converse*". That submission is devoid of substance and misses the point. The respondent stole money from Mr Cunningham. That conduct involved dishonesty. What aggravated that conduct was that the respondent attempted to cover it up by hiding behind unethical conduct, namely that he had concluded a loan agreement with Mr Cunningham. An attorney who steals money from his client is not a fit and proper person to continue to practise as an attorney. That dishonest conduct was aggravated when the respondent attempted to conceal the theft by hiding behind unethical conduct.

18. To be struck off the roll of attorneys has dire consequences for any attorney. In the light of the finding that the respondent stole money from the Cunninghams, his allegation that his entire "*career is based on honesty, respect and trust*" cannot be true. The Cunninghams engaged him because they trusted him. His conduct shows that he was dishonest, showed no respect to the Cunninghams and the financial position in which they found themselves at the relevant time and he abused his position of trust.

19. The respondent alleged that, despite his dishonest and unethical conduct, the Cunninghams nevertheless thanked him for the manner in which he dealt with the

claim. That cannot be true if regard is had to the fact that not much happened in 2011 after the respondent took over the prosecution of the claim until January 2012 when he received the first payment from the RAF. His conduct thereafter did not cover the respondent in glory.

20. The respondent made the bold allegation that his "*character and perspective have been transformed*". It is impossible to assess whether there was indeed a transformation of his character and perspective without any objective facts to substantiate such a claim.

21. The respondent alleged that even before, but more specifically after he had been interdicted from practising as an attorney, he has been advising and assisting individuals and organisations with legal matters without charging a fee. I find it difficult to accept that claim without any proof thereof. It would certainly not have been difficult to obtain confirmatory affidavits from those who allegedly benefitted from the respondent's free services. There was no confirmation of his allegation in that regard.

22. The respondent made the above claims to bolster his contention that he should be suspended from practice for a period of no more than twelve months, rather than be struck off the roll of attorneys. Mr Thysse went further when he submitted that the respondent's suspension should be retrospective for three years because he has not been in practice for that period.

23. The respondent's contention and his counsel's submission ignored public policy and the prejudice suffered by the Cunninghams as a result of his conduct. There was a duty on the respondent to explain the substantial shortfall between the

amount of money that he received from the RAF on behalf of Mr Cunningham and what he paid to the Cunninghams. His reliance on the loan agreement has been rejected as misplaced. He accordingly failed to give a satisfactory explanation for that shortfall. At the hearing Mr Thysse was requested, on more than one occasion, to explain what happened to the above shortfall. Like the respondent, counsel elected to ignore the request.

24. The respondent's dishonesty, when he used the Cunninghams' money for his own purpose, his unethical conduct, when he entered into invalid acknowledgment of debt agreements with Mrs Cunningham, and the lack of openness in respect thereof, create the impression that he does not appreciate the severity of his offending conduct. Unsuspecting members of society need to be protected against attorneys who, without consent, use the money that they placed in the care of such attorneys. In my view, a suspension would, in the circumstances of this case, be wholly inappropriate.

25. The respondent's conduct indicates his dishonesty and lack of integrity. The practice of an attorney demands complete honesty and integrity. Since the respondent has been dishonest by using money entrusted to him for his own purposes, he is not a fit and proper person to continue to practise. In my view, striking him off the roll of attorneys is an appropriate order.

26. No submission was made on behalf of the respondent in respect of the applicant's prayer that, should the respondent be struck off the roll of attorneys, he be ordered to pay the applicant's costs on the scale as between attorney and client. In my view, that customary order would be appropriate in the circumstances.

27. In the result, it is ordered that:

27.1. The respondent's name be and is hereby struck from the roll of attorneys.

27.2. The applicant shall cancel the enrolment of the respondent as an attorney.

27.3. If he has not yet done so, the respondent shall surrender and deliver to the Registrar of this Court his certificate of enrolment as an attorney.

27.4. 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, shall be empowered to take possession of and deliver the same to the aforesaid Registrar.

27.5. The respondent shall deliver his books of account, records, files and documents containing particulars and information relevant to:

27.5.1. any moneys received, held or paid by the respondent from or on account of any person;

27.5.2. any moneys invested by the respondent in terms of section 78(1), 78(2) and/or section 78(2A) of the Attorneys Act[6] (the Attorneys Act) and section 86(2), 86(3) and section 86(4) of the Legal Practice Act[7] (the LPA);

27.5.3. any interest or moneys so invested which was paid over or credited to the respondent;

[6] Attorneys Act, 1979 (Act 53 of 1979).

[7] Legal Practice Act, 2014 (Act 28 of 2014).

27.5.4. 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

27.5.5. the respondent's practice as an attorney; to the curator appointed hereunder, 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 and provided that such curator shall be and is authorized and directed to release such books of account, records, files and documents upon production to him of the certificate referred to in paragraph 27.3 above.

27.6. 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, shall be empowered to take possession of and deliver them to such curator.

27.7. The curator shall be entitled and is directed to:

27.7.1. hand over to the persons entitled thereto all such records, files and

documents;

27.7.2. hand over all such records, files and documents over which the respondent exercised a lien, to the persons entitled thereto as soon as he has satisfied himself that the fees and disbursements in connection therewith, if any, have been paid or secured, or in the event of any dispute as to the provision of security, in his discretion.

27.8. A written undertaking by a person to whom the records, files and documents referred to in paragraph 27.5 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.

27.9. Such curator is authorised 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 Legal Practitioners Fidelity Fund (hereinafter referred to as "*the Fund*") in respect of money and/or other property entrusted to the respondent, be re-delivered to such curator.

27.10. The respondent shall be interdicted and prohibited from operating on his trust account(s).

27.11. The applicant's Director, failing whom, the Acting Director, failing whom, the Deputy Director, failing whom, the Acting Deputy Director, failing

whom, the Assistant Director, failing whom, the Acting Assistant Director for the time being, be and is hereby appointed as curator to administer and control the respondent's trust account comprising the separate banking accounts opened and kept by the respondent at a bank in terms of section 86(2) of the LPA and/or any separate savings or interest-bearing accounts as contemplated by section 86(3) and/or 86(4) of the LPA, in which money from such trust banking accounts have been invested by virtue of the provisions of the said subsection/s or in which moneys in any manner have been deposited or credited (the said account(s)) being herein referred to as "*trust account(s)*"), with the following powers and duties:

27.11.1. subject to the approval of the Legal Practitioners' Fidelity Fund Board (hereinafter referred to as "*the Board*"), 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;

27.11.2. subject to the approval and control of the Board, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against the respondent in respect of money held, received and/or invested by the respondent in terms of section 78(1), 78(2) and/or section 78(2A) of the Attorneys Act and sections 86(2), 86(3) and 86(4) of the LPA (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);

27.11.3. 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;

27.11.4. 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, 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;

27.11.5. to admit or reject, in whole or in part, subject to the approval of the Board, the claims of any such trust creditor, without prejudice to such trust creditor's right to access to the civil courts;

27.11.6. 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;

27.11.7. 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 86(5)(a) of the LPA in respect of any interest therein referred to and, secondly, without prejudice to the rights of the respondent's creditors, the costs, fees and expenses as envisaged in 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 such claims, costs, fees and expenses, to pay such balance, subject to the approval of the Board, to the respondent, if he is solvent, or, if the respondent is insolvent, to the trustee(s) of the respondent's insolvent estate;

27.11.8. in the event of there being insufficient moneys in the trust banking account(s) opened by the respondent, as referred to above, from which to pay the claims of trust creditors in full and after taking reasonable steps to ascertain the identities of such creditors and the amounts due to them to distribute *pro rata* amongst creditors whose claims have been proved or admitted, the amount(s) reflected by the credit balance(s) in the said account(s), provided that the curator shall pay to trust creditors

whose funds are held in separate accounts in terms of section 86(2) and/or 86(3) and/or 86(4) of the LPA who satisfy him that they are entitled to such funds, the amounts due to such creditors:

27.11.8.1. subject to the approval of the Board, 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;

27.11.8.2. to refer the claims of all trust creditors to the Board to be dealt with in terms of the provisions of the LPA;

27.11.8.3. to authorise the Board to credit the credit balance(s) referred to in paragraph 27.11.8.1 above to its "*Paid Claims Account*" when the Fund has paid, in terms of section 55 of the LPA, admitted claims of the trust creditors in excess of such credit balance(s), provided that, notwithstanding the aforegoing, the said Board shall be entitled, in its discretion, to transfer to its "*Paid Claims Account*" the amount of moneys of any claim or claims as and when admitted and paid by it;

27.11.9. subject to the approval of the Chairman of the Board, 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 to render from time to time, as curator, returns to the Board 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.

27.12. The respondent shall:

27.12.1. pay the fees and expenses of the curator, such fees to be assessed at the rate of R1 000.00 per hour, including travelling time;

27.12.2. pay the reasonable fees and expenses charged by any person(s) consulted and/or engaged by the curator, as aforesaid;

27.12.3. pay the costs of and incidental to this application on the scale as between attorney and client, such costs to include those costs previously reserved;

27.12.4. 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.

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G H BLOEM
Judge of the High Court

I agree

Kruger AJ

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R Kruger
Acting Judge of the High Court

For the applicant:	Ms K L Watt, instructed by NN Dullabh & Co, Grahamstown.
For the respondent:	Mr J N Thysse, instructed by D Gouws Inc, Port Elizabeth.
Date heard:	26 July 2021.
Date of delivery of the judgment:	14 September 2021.