# THE SUPREME COURT OF APPEAL
# OF SOUTH AFRICA

Reportable

CASE NO: 270/06

In the matter between :

**JOHAN VAN DER BERG** Appellant

and

**THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA** Respondent

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| **Before:** | **HARMS ADP, STREICHER, NUGENT, LEWIS JJA & MUSI AJA** |
| **Heard:** | **26 FEBRUARY 2007** |
| **Delivered:** | **22 MARCH 2007** |
| **Summary:** | **Application to strike advocate from the roll – restatement of the duties of advocates.** |
| **Neutral citation:** | **This judgment may be referred to as *Van der Berg v General Council of the Bar* [2007] SCA 16 (RSA)** |

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## J U D G M E N T

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**NUGENT JA**

NUGENT JA:

[1] A person who is admitted to practise as an advocate, and who chooses to exercise that right to practise, must adhere to the recognised standards of the profession.[1] An advocate who fails to adhere to those standards to a degree that satisfies a court that he is unfit to continue to practise is liable to be suspended from practise or to have his name struck from the roll of advocates.[2] On the application of the General Council of the Bar of South Africa (GCB) the name of the appellant – who has practised as an advocate at the Cape Bar for over 30 years, the last sixteen years as Senior Counsel – was struck from the roll of advocates by the Cape High Court (H.J. Erasmus and Dlodlo JJ). This appeal is with the leave of that court.

[2] Proceedings to discipline a practitioner are generally commenced on notice of motion but the ordinary approach as outlined in *Plascon-Evans*[3] is not appropriate to applications of that kind. The applicant's role in bringing such proceedings is not that of an ordinary adversarial litigant but is rather to bring evidence of a practitioner's misconduct to the attention of the court, in the interests of the court, the profession and the public at large, to enable a court to exercise its disciplinary powers.[4] It will not always be possible for a court to properly fulfil its disciplinary function if it confines its enquiry to admitted facts as it would ordinarily do in motion proceedings and it will often find it necessary to properly establish the facts. Bearing in mind that it is always undesirable to attempt to resolve factual disputes on the affidavits

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[1] Those standards are largely reflected in the Uniform Rules of Professional Conduct of the GCB though a court 'is not bound by those rules and remains the ultimate arbiter of the ethical rules of conduct of the profession'. See *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T).
[2] Section 7(1)(d) of the Admission of Advocates Act 74 of 1964.
[3] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (A) at 634E-635D.
[4] *Society of Advocates of South Africa (Witwatersrand Division) v Edeling* 1998 (2) SA 852 (W) at 860B-D; *General Council of the Bar of South Africa v Matthys* 2002 (5) SA 1 (E) at 5A-C.

alone[5] (unless the relevant assertions are so far-fetched or untenable as to be capable of being disposed of summarily) that might make it necessary for the court itself to call for oral evidence or for the cross-examination of deponents (including the practitioner) in appropriate cases. In the present case that might well have been prudent and desirable so as to resolve the many questions that are raised by the evidence, but that notwithstanding, the appeal can in any event be properly disposed of on the undisputed facts. (For that reason it is also not necessary to revisit what degree of persuasion evidence must carry before facts can be taken to have been established in cases of this kind.[6])

[3] The issues and material facts in this matter appear from the careful and meticulous judgment of the court below but some repetition is nonetheless unavoidable. Various procedural matters that were raised in the papers and dealt with by the court below were not pursued in this court and I need say no more about them. I will deal with the various complaints against the appellant in the chronological order in which the relevant events occurred.

[4] The complaints against the appellant all arise from his relationship with Mr Jürgen Harksen who arrived in this country from Germany in 1993 to seek relief from what Harksen quaintly described as 'mounting pressure' from his European creditors. The creditors concerned had paid substantial sums of money to Harksen in the belief that the moneys would be invested with large returns. Harksen led them to believe that they were assured of being repaid because he was the beneficiary of a large fortune – Harksen placed it at about DM1.85 billion – that was invested in a fund known as SCAN 1000 that was

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[5] *Middelberg v Prokureursorde Transvaal* 2001 (2) SA 865 (SCA) at 870G-H; *Summerley v Law Society of Northern Provinces* 2006 (5) SA 613 (SCA) para 3.

[6] *Olivier v Die Kaapse Balieraad* 1972 (3) SA 485 (A) at 496F-G; Cf *Campbell v Hamlet* [2005] 3 All ER 1116 (PC) at 1120 para 15 and 1123 para 26.

held in trust. But when investors sought to recover their money there was none to be had and Harksen fobbed them off with various explanations for why the trustees were unable to release the necessary funds. I think it can now safely be accepted that in truth there was no fund, there was no trust, and there were no trustees (although that is not admitted by the appellant).

MISLEADING THE COURT

[5] One creditor, Mr Siegfried Greve, pursued his claim against Harksen in this country by applying for Harksen's sequestration in March 1995. Other creditors later intervened to support the application. In his founding affidavit Greve alleged that there was no SCAN 1000 fund, no trust, and no trustees. Harksen disputed those allegations, and in support of his assertion that the fund and the trust existed he produced what purported to be affidavits of three of the alleged trustees (Mr Hans-Josef Siegwart, Mr Ove Unri Johannson, and Mr Lars-Peter Arnemann) that purported to have been attested before a Swiss official.

[6] Enquiries that were made by the attorney for an intervening creditor revealed, amongst other things, that the Swiss official had never encountered Johannson and Arnemann, and that the attestations to their affidavits had been forged. When these facts were brought to the attention of Harksen's legal representatives – who included the appellant – there was naturally some consternation.

[7] The upshot was that the appellant, accompanied by an attorney, travelled to Switzerland, intent upon meeting with the alleged trustees, obtaining an explanation for the forged attestations, and securing authentic

affidavits. In Switzerland they met Siegwart. It is not necessary to deal in any detail with the explanations they received from Siegwart. It is sufficient to say that he told them that the affidavits had indeed been signed by Johannson and Arnemann respectively but admitted that he had forged the attestation and obfuscated why he had done so.

[8] The appellant prepared fresh affidavits for the signature of the three deponents, having been assured by Siegwart that Johannson and Arnemann would soon arrive to sign them (they were said to be in the vicinity of the Mediterranean and in New York respectively). Days went by, the two men did not arrive, various explanations were offered by Swiegart, and when it became apparent that, in the words of the appellant, 'the whole issue had become ridiculous', the appellant and his attorney packed up and left.

[9] While returning to South Africa the appellant prepared a memorandum recording his impressions of what had occurred. He recorded that Swiegart had been obstructive, dishonest and fraudulent, and had never intended that Johannson and Arnemann would appear. He went on to record the following:

'It is our duty to satisfy ourselves whether Jürgen Harksen has any knowledge of the attitude adopted by Siegwart and/or Siegwart, Johannson and Arnemann, and whether Johannson and Arnemann in fact exist. If Harksen is in any way whatsoever part of this scheme to mislead the Court including the representation that there is a trust of which they are trustees, and this is a scam, we have no option but to withdraw. …. If we are not satisfied that Jürgen Harksen is a part of this unacceptable conduct and behaviour of Siegwart and/or Siegwart, Johannson and Arnemann, we have no right to withdraw from our mandate.' (I will return to that view of his ethical duty later in this judgment.)

[10] What happened thereafter in relation to the sequestration application is not material to the complaint made against the appellant. For completeness it is sufficient to say that Harksen's legal representatives asked for the offending affidavits to be struck out and Harksen was finally sequestrated on 16 October 1995. Whether the appellant ever discussed his experience in Switzerland with Harksen, and if so what Harksen said, does not appear from the affidavits.

[11] In April 1996 Harksen's provisional trustees brought an application aimed at recovering certain property that was believed to belong to Harksen. In the founding affidavit it was again alleged that SCAN 1000 and the trust were fictitious. Harksen deposed to an answering affidavit in which he once more asserted that there was indeed such a fund, and that there were indeed trustees who were administering the fund.

[12] Harksen's affidavit was settled by the appellant and the fact that he did so forms the subject of the first complaint. The GCB alleged in the founding affidavit that it should be inferred from the surrounding facts that at the time the appellant settled the affidavit he 'either knew that SCAN 1000 and the alleged trustees thereof did not exist, alternatively, he suspected that they were a fiction but allowed the assertion as to their existence to be made recklessly and without regard for the truth.' In effect the complaint is that the appellant was a party to misleading the court by knowingly or recklessly allowing perjured evidence to be placed before it.

[13] The appellant denied that he knew or suspected that the fund and the trustees did not exist at the time he settled Harksen's affidavit but

acknowledged that he had had some reservations[7] in that regard. The court below found that the appellant settled the affidavit while suspecting that the evidence it contained was untrue and thereby 'acted in a manner that was incompatible with the high standards of integrity and honesty that are expected of an advocate.'[8]

[14] Advocacy fulfils a necessary role in the proper administration of justice. (What is said in this judgment applies equally to attorneys to the extent that they play an equivalent role but for convenience I have referred to advocates). It is through the availability of the knowledge and skills of an advocate that a litigant is able to realise the right of every person to have a dispute resolved by a court of law. Its function in the administration of justice at the same time defines the duties of those who practise it. The right of every person to have a dispute resolved by a court of law would be seriously compromised if an advocate were to be required to believe the evidence of his client before being permitted to present it. That would mean that the rights of the litigant would be determined by the advocate rather than by the court. As David Pannick QC observes (in his book entitled 'Advocates') an advocate is required

'to keep his personal opinions of the merits of the case (legal or otherwise) to himself and not make them the subject of his submissions. The advocate's duty to his client authorizes and obliges the advocate to say all that the client would say for himself (were he able to do so) … He has no right to "set himself up as a judge of his client's case" and should not "forsake [his] client on any mere suspicion of [his] own or any view [he] might take as to the client's chances of ultimate success". As Baron Bramwell explained in 1871, a "man's rights are to be determined by the Court, not by his [solicitor] or counsel … A client is

[7] 'Sekere voorbehoude'.
[8] '…het nie voldoen aan die hoë graad van eerlikheid en integriteit wat van 'n advokaat vereis word nie.'

entitled to say to his counsel, I want your advocacy, not your judgment; I prefer that of the Court."'[9]

The Master of the Rolls made the same point when describing the duty of an advocate towards his client in *Rondel v Worsley*:[10]

'[A barrister] has a monopoly of audience in the higher courts. No one save he can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility. A barrister cannot pick or choose his clients. He is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end.'

[15] The finding by the court below that it was improper for the appellant to settle the affidavit because he suspected that the evidence was false is not correct. Merely to suspect, or even to firmly believe, that evidence is false does not preclude an advocate from permitting his client to place the evidence before a court. On the contrary, it would be improper for an advocate to refuse to do so on those grounds alone. For the same reason the submission on behalf of the GCB that an advocate may settle an affidavit only if 'the advocate has a reasonable basis for believing that the evidence might be true' is also incorrect. An advocate is not called upon to believe, to any degree, the evidence that he is instructed to place before a court. Even if he believes positively that his client's evidence is false, he is entitled, and indeed obliged, to place it before a court if those are his client's instructions, and there can be no qualification in that regard. (No doubt it would be prudent for an advocate to advise his client that a court is likely to share his belief but that is something else.)

[9] Pages 92-93.
[10] 1967 (1) QB 443 (CA) at 502.

[16] But it is a different matter altogether if an advocate knows (as a fact and not merely as a matter of belief) that evidence is false or misleading. For the role of advocacy in furthering the proper administration of justice also gives rise to duties that are owed to the court, primarily a duty upon an advocate not to deceive or mislead a court himself. After observing in *Rondel v Worsley* that the advocate must do 'all he honourably can on behalf of his client' the Master of the Rolls went on as follows:[11]

'I say "all he *honourably* can" because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court.'

In *Incorporated Law Society v Bevan*[12] the Chief Justice expressed it as follows:

'Now practitioners, in the conduct of court cases, play a very important part in the administration of justice. Without importing any knowledge or opinion of their own – which it is entirely wrong that they should ever do – they present the case of their client by urging everything, both in fact and in law, which can honourably and properly be said on his behalf. And this method of examining and discussing disputed causes seems to me a very effective way of arriving at the truth – as effective a way, probably, as any fallible human tribunal is ever likely to devise. But it implies this, that the practitioner shall say or do nothing, shall conceal nothing or state nothing, with the object of deceiving the Court; shall quote no statute which he knows has been repealed, and shall put forward no fact which he knows to be untrue, shall refer to no case which he knows has been overruled. If

[11] At 502.
[12] 1908 TS 724 at 731-732.

he were allowed to do any of these things the whole system would be discredited. Therefore any practitioner who deliberately places before the Court, or relies upon, a contention or a statement which he knows to be false, is in my opinion not fit to remain a member of the profession.

[17] An advocate breaches his duty to the court not only by permitting evidence to be given knowing it to be false but also by failing to speak when he knows that the court is being misled. An example is *Meek v Fleming,*[13] in which counsel knew that the jury was under the impression that a police witness was a Chief Inspector and failed to disclose that the officer had been demoted to the rank of sergeant on account of misconduct.

[18] Advocates who confine themselves to acting upon instructions will usually avoid ethical conflicts of that kind. But advocates who depart from that salutary practice, and set about discovering the truth for themselves (which they have no duty to do) invite such conflicts. For by doing so they run the risk of becoming material witnesses themselves and thereby compromising their ability to perform their proper function. That is what occurred in the present case.

[19] That an attempt to make contact with the three alleged trustees had produced only a dishonest, fraudulent and obstructive man claiming to be a trustee, but had failed to discover the others, was clearly material to the truth of Harksen's assertion that a trust existed. So material that in my view a court with knowledge of those facts might justifiably have rejected Harksen's assertion summarily on the grounds that it was 'far-fetched [and] untenable'.[14] Having discovered those facts the appellant was not obliged to refuse to

[13] 1961 (2) QB 366 (CA).
[14] *Plascon-Evans*, above.

permit Harksen's evidence to be placed before the court – it was for the court and not for the appellant to assess the impact of those facts on Harksen's evidence – but if Harksen's evidence was to be placed before the court the appellant was obliged to ensure that those facts were also disclosed. Without them the evidence misrepresented the true state of affairs, which was not only that Harksen alleged that the trust existed, but also that a search for them had produced only the results that I have described.

[20] The appellant's view of his ethical duties once he had discovered those facts, as reflected in the extract from his memorandum that I referred to earlier, was misguided. The fact that Harksen might not have known of or been a party to Siegwart's machinations was quite immaterial. It was the appellant's own knowledge of the facts that gave rise to the dilemma and not whether Harksen was aware of or a party to them. Once the appellant became aware of the facts his duty was to tell Harksen that if he persisted in asserting that the trustees existed, the appellant's own evidence of what he had discovered would also need to be disclosed. If Harksen had instructed the appellant not to make the disclosure the appellant's proper course would have been to withdraw. Any explanations that might have been forthcoming from Harksen were properly to be directed to the court and not merely to his counsel: explanations by Harksen could not somehow have made the appellant's knowledge of the facts disappear.

[21] The appellant cannot be faulted for permitting Harksen to assert to the court (in the affidavit that the appellant settled) that the fund and the trustees existed, which was the charge brought against him by the GCB. (The GCB expressly refrained from contending in this court that the appellant knew those

assertions to be false.) Where he is to be faulted is for permitting those assertions to be made without simultaneously disclosing the additional facts he had discovered that were material to the truth of the assertions, and in that respect he acted improperly. I have pointed out that that is not strictly the offence with which the appellant was charged but we would fail in our duty if we were to overlook it merely on that ground. The facts that establish the offence are all undisputed, no further evidence could alter the position in that regard, and there can be no explanation that would justify the appellant's conduct.

CHARGES CONCERNING FEES.

[22] Complaints of various kinds were made by the GCB concerning fees that were received by the appellant and it is convenient to deal with them together.

[23] It has been affirmed by this court in recent cases that, at least in regard to the conduct of litigation, advocacy is a referral profession, and that an advocate misconducts himself if he acts in such matters without the intervention of an attorney.[15] It follows, as a consequence of that rule, that 'fees for professional services may only be paid by or through an attorney'[16] (subject to certain exceptions that are not now relevant). Needless to say, fees charged by an advocate must be reasonable.[17]

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[15] *De Freitas v Society of Advocates of Natal* 2001 (3) SA 750 (SCA); *Commissioner, Competition Commission v General Council of the Bar of South Africa* 2002 (6) SA 606 (SCA) para 19; *Rösemann v General Council of the Bar of South Africa* 2004 (1) SA 568 (SCA).

[16] Rule 7.9.1 of the Uniform Rules of Professional Conduct of the GCB.

[17] Rule 7.1.1 of the Uniform Rules of Professional Conduct of the GCB.

[24] In about February 1999 Harksen was taken into custody (apparently pending proceedings for his extradition to Germany). In April 1999 Harksen's wife telephoned the appellant and asked him to represent her husband in various proceedings, including proceedings for his release on bail. The appellant informed her that he needed to be instructed by an attorney if he was to assist. On 12 April 1999 he received a letter from a legal practitioner in Switzerland, Mr Studer, in the following terms:

'This morning I was instructed by Janette Harksen to ask you [to represent] Jürgen Harksen's interests in his extradition case immediately and, if necessary, her interests in different matters. I was also instructed that you will be paid by third parties, represented by attorney Uwe Griem, Hamburg/Germany.'

Later that day the appellant received the following letter from Studer:

'We are relieved – and I do not only speak for Jürgen and myself, but for all those who believe in Jürgen that you are going to take care of the pending matters. I have been instructed to confirm that you have been mandated as the leader for the following cases:

1. Bail application (coming Wednesday), if lost
2. Bail Review at Supreme Court;
3. Appeal against [Magistrate Wagner's] committal of Jürgen;
4. Filing of an application to secure the bail of R1 000 000,00;
5. Appeal against judgment of [Judge Brand] (of last Friday);
6. Control of the application § 3.2 pending at the Constitutional Court;
7. Jeannette's sequestration.

I am convinced that we shall have a perfect cooperation.'

[25] The appellant required payment of the sum of R250 000 – his estimate of his fees for the work that would be required, which he anticipated would engage him for about two months. The following day the sum of £25 000 was deposited to the appellant's account at a foreign bank at the instance of a third party.

[26] In 2001 the appellant received two further amounts of R150 000 and R100 000 respectively from an entity known as the Voyager Trust. According to the appellant these payments constituted his fees for further work that he performed on the instructions of Studer (the appellant recorded the work in an invoice as being 'consultation, advice, drafting papers and opinion').

[27] The GCB alleges in respect of all these payments that the appellant acted improperly by receiving payment other than from or through an attorney and that the fees concerned were excessive. (Certain further fees received by the appellant – amounts of DM58 000, DM56 000 and DM168 000 – were also said to be excessive but I do not intend dealing with them for reasons that follow.)

[28] The appellant explained, but only in general terms, the nature of the work that he performed in return for these fees. The court below found that in each case the fees were excessive. I do not think those findings were justified on the evidence, which is insufficient to determine what work was done. (That is not to say that the evidence established that the fees were not excessive.) In the absence of proper evidence of the work that was done – or not done, as the case may be – there is no foundation for determining whether the fees were reasonable. No doubt it is incumbent upon an advocate who is alleged to have charged excessive fees to provide sufficient detail of the work that was performed to enable the fee to be assessed, and in appropriate cases cross-examination might be called for to establish the true facts, but in the absence of such evidence I do not think the court below was justified in making its finding.

[29] With regard to the further charges ('receiving payment other than from or through an attorney') the court below found that, at least in relation to work that concerned litigation, Studer was no more than a nominal attorney. Since the payments were not received through an attorney as contemplated by the rule the appellant acted improperly in receiving them. I agree with those findings. But I think I should add that the difficulties relating to fees, at least so far as they related to litigation, all arose because the appellant acted without proper instructions in the first place. An advocate may not act in litigation other than on the instructions of an attorney and by that I do not mean a nominal attorney. Had the appellant been properly instructed, as required by that rule, he would no doubt have been held to account by his attorney for the fees that he charged. That would necessarily have required that he record his fees in the ordinary way, that he mark his briefs with the work he had done and the fee that was relevant to that work, that he submit accounts that could be scrutinized by his attorney, and no doubt he would have received payment in a more conventional way. Had he acted at the outset in accordance with his obligations these charges need never have arisen.

THE MANDATE RELATING TO THE 'CHASE-MANHATTAN FUND' AND THE FEE RELATING TO THAT MANDATE

[30] By March 2001 the appellant had terminated full-time practice and turned his hand to viticulture. The Cape Bar Council permitted him to keep associate membership.

[31] It seems that Harksen was aware that the appellant was on the lookout for investment capital to develop a wine cellar on his farm. In March 2001

Harksen telephoned the appellant and told him that he wished to introduce him to a potential investor. It seems that this was the start of a plan by Harksen to lure the appellant into a new fraudulent scheme.

[32] Harksen arrived at the appellant's farm accompanied by Studer who told the appellant that he was acting for a foreign investor who would be interested in investing in the appellant's project. In due course Studer, purporting to act on behalf of a trust, agreed that the trust would advance $1.7 million on loan to the appellant for a period of ten years. Needless to say, the money was never forthcoming.

[33] Meanwhile Harksen and Studer told the appellant that Studer was to undertake the payment of Harksen's creditors. Payment was to be made, so the appellant was told, from a fund of US$44 billion that was being held by Chase Manhattan Private Bank and Trust Ltd (Chase Manhattan) on behalf of an entity called Global Finance SA. (What relationship was said to exist between Harksen and Global Finance is not clear. It is also not clear what relationship, if any, there was said to be between the Chase Manhattan fund, and the SCAN 1000 fund.)

[34] Some time later the appellant was induced (precisely how this occurred does not appear from the papers but clearly Harksen was masterminding the scheme) to accept a mandate to participate with Studer in paying the creditors. The arrangement was essentially this: Global Finance purported to authorise the appellant and Studer to take charge of the fund that was purportedly being held by Chase Manhattan and to pay various creditors, including those of Harksen, from the fund. In return, the appellant and Studer were to be paid

$22 million, from which they were to meet disbursements incurred in performing the mandate.

[35] The authorisation by Global Finance was recorded in a document purporting to be a power of attorney given by 'Frederick Chanberie in my capacity as Director of Global Finance SA' authorising the appellant

'on behalf of Global Finance SA to sign the Notarial Recordal dated 14 May 2001, to act as set out in the said Notarial Recordal on behalf of Global Finance SA, and to do all that is necessary to give effect to the mandate in terms of the said Notarial Recordal dated 14 May 2001.'

[36] In the 'notarial recordal', which was a notarialised document signed by the appellant on the same day, the appellant recorded that he was

'acting for the directors of Global Finance SA Registration No. 19525792584 in terms of a Power of Attorney of Global Finance SA dated 14th of May 2001 and signed at Cape Town of which a copy is annexed as Annexure 1' (the document that I referred to earlier)

and that

'he, JOHAN VAN DER BERG and WALTER ADRIAN STUDER with power of substitution, have been authorised to make payments to all creditors of the companies Nord Analyse Hamburg or Fates Finance Inc or Global Finance SA or of Mr Jürgen Harksen upon documentary proof of the creditors' legal claims against the aforesaid companies or Mr Jürgen Harksen and against valid cession of such claims.'

[37] There are many loose ends in the evidence relating to the scheme but I need not deal with them because in truth it was all an elaborate fraud. If there was an entity known as 'Global Finance SA' it certainly had no fund of money at Chase Manhattan, least of all a fund of $44 billion, because Chase Manhattan was not involved at all. The appellant had regular telephone conversations with two people who purported to be representatives of Chase

Manhattan (‘Mr Goldstein’, who purported to be a Vice President, and ‘Mr Rothschild’, who purported to be its attorney) but at the time he signed the documents the appellant had not met them personally. Indeed, the only person purporting to be from Chase Manhattan whom he ever met (on only one occasion after the documents had been signed) was ‘Mr Goldstein’. The appellant also had regular telephone conversations with Mr Hamman, who purported to be the President of Global Finance, but it is not clear whether he had any contact at all with ‘Frederick Chanberie’. Who all these people actually were does not appear from the papers but it is clear that they were not who they purported to be.

[38] The documentation, under the hand of the appellant, was clearly designed by Harksen and his associates to create the impression that a large fund of money was immediately available for distribution by two respectable lawyers. Armed with that documentation Harksen would be in a position to once again persuade people to part with money on the assurance that they would be repaid. What clinched the deception was that the notarial document signed by the appellant recorded not only that had he been authorised to make the distribution but also that he was already in possession of cheques drawn by Chase Manhattan and a guarantee by Chase Manhattan (in the form of a letter of credit) that the moneys would be paid. It recorded that

‘the undersigned JOHAN VAN DER BERG

1. has been given the necessary authority and power to receive a Letter of Credit Drawn by The Chase Manhattan Private Bank and Trust Ltd, in favour of Global Finance SA … which he has duly received from The Chase Manhattan Private Bank and Trust Ltd and confirm that the Letter of Credit is now legally in his possession, he acting for Global Finance SA.

2. records that he has received bank cheques the drawer being The Chase Manhattan Private Bank & Trust Ltd from The Chase Manhattan Private Bank & Trust Ltd and confirm that the bank cheques are now legally in his possession, he acting for Global Finance SA.'

[39] Those statements by the appellant were false. The appellant had no cheques nor a letter of credit. (Documents that purported to be cheques and a letter of credit were later shown to him by Harksen.) With the written assurance from the appellant that he was in possession of documents that were almost the equivalent of ready money the potential for deception was complete. (Whether moneys were in fact solicited does not appear from the papers.)

[40] The appellant was later told by Harksen that because of his 'busy program' Studer was no longer available and the appellant agreed to execute the mandate alone (the amount available to pay disbursements and his fees remained $22 million). The appellant appointed an attorney to receive the funds into his trust account and to make the distribution under the appellant's supervision and he waited for the funds to arrive. Days, and then months, went by, and still the funds did not arrive, various explanations were given to the appellant for the delay, letters went back and forth, and eventually Harksen was arrested in April 2002, bringing the charade to an end.

[41] The saga resulted in three charges being brought against the appellant by the GCB. First, it alleged that by accepting the mandate the appellant 'engaged in another occupation which adversely affected the reputation of the Bar and prejudiced his ability to attend to the interests of his clients' in breach

of Rule 4.15.1.[18] Secondly, it alleged that 'in performing or purporting to perform the mandate the [appellant] made certain false statements' and that in doing so he 'acted unprofessionally and in a manner unbecoming to an advocate'. And thirdly, it alleged that the amount of $22 million that the appellant agreed to receive was excessive.

[42] A person who is admitted to practise as an advocate need not necessarily enter into practice and may embark upon any other occupation that is not incompatible with his standing as an advocate. The only additional restrictions that apply once an advocate chooses to practise are those in Rule 4.15.1. The second proviso to the rule is not now material – the appellant was not in full-time practice and his duty to other clients was not interfered with by accepting the mandate. Moreover, I do not think a mandate of this nature – which was essentially to arrange for the distribution of a fund to creditors – is one that an advocate may never accept. Distributing a fund of money to creditors, if done honestly and responsibly, is not inherently detrimental to the reputation of the Bar. But when seen against its background this was no ordinary mandate.

[43] The mandate that was offered to the appellant came against a considerable background. The appellant was well aware at the time that Harksen had once before claimed to have an interest in a large fund (SCAN 1000) and that large sums of money had been paid to Harksen on the strength of the existence of the fund. He also knew that Harksen's creditors claimed that there was no such fund and that they had been defrauded. His own

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[18] 'A member of the Bar is entitled to engage directly or indirectly in any occupation unless:
(i) his association with that occupation adversely affects the reputation of the Bar, or
(ii) such engagement prejudices the ability to attend properly to the interests of clients.'

enquiries had also revealed facts that had led the appellant to suspect that the scheme might be a scam (as he recorded in the memorandum that he dictated while returning from Switzerland). Since then Harksen had been sequestrated, attempts had been made to locate his assets amidst allegations that he had surreptitiously concealed them, and Harksen faced proceedings to extradite him to Germany to face criminal charges. If anything had occurred by March 2001 to dispel what the appellant coyly referred to as 'some reservations' that he had had some six years earlier the evidence does not disclose what it might have been. Indeed, the continued elusiveness of any objective evidence of the existence of the SCAN 1000 fund should only have exacerbated them. For the appellant to have associated himself with another alleged fund that was connected to Harksen, at least without first making careful and diligent enquiry, was most certainly detrimental to the reputation of professional advocates and hence to that of the Bar.[19]

[44] But it is in the purported execution of the mandate that the conduct of the appellant was even more extraordinary. The key to a confidence trick of that nature is to convince potential victims that a fund of money does indeed exist. The appellant provided Harksen with the means for doing just that when he signed a false statement that he was in possession of cheques and a letter of credit from Chase Manhattan. The appellant's explanation for making those false statements is that he was told by Studer, amongst others, that the document 'was required by the bank to get its funds and administrative documents in order for the purpose of making the funds available to Global Finance' and that the document was 'confidential and was

[19] The appellant contended that his acceptance of the mandate was conditional but even if that was so it is immaterial.

not to be used for any purpose other than that of the bank'. I have considerable difficulty understanding why the appellant would have thought that the bank required him to make false statements in order to get its affairs in order. But the submission before us on behalf of the appellant was that that evidence showed that the appellant did not intend to mislead. I think that submission misses the point. The question is not whether the appellant had fraudulent intent but rather whether an advocate should be making false statements at all, least of all false statements of the kind that the appellant made, in a document that is to leave his possession and control (and in fact left his possession and control). By doing so the appellant lent the reputation and standing of an advocate to a fraudulent scheme, whether or not he knew it at the time, and thereby brought the profession into disrepute, which would not have occurred if he had desisted from making false statements at all irrespective of his intent.

[45] With regard to the charge concerning the amount of the fee I am not sure that the rules regulating the profession apply to fees that are earned from other occupations. But in any event I have found that it was improper for the appellant to have accepted the mandate at all and the amount he was to be paid for doing so does not seem to me to take the matter further.

MISREPRESENTATIONS TO THE DIRECTOR OF PUBLIC PROSECUTIONS.

[46] In July 2002, after Harksen had been arrested, the appellant deposed to an affidavit outlining his relationship with Harksen, at the request of the Director of Public Prosecutions, in which he listed the fees that he had earned

from representing Harksen. The GCB alleges that the affidavit was misleading because it omitted various fees that had been earned.

[47] The list did not reflect the amounts of £25 000, (an amount of R30 000 was listed instead), R150 000 and R100 000 that I referred to earlier in this judgment, and in that respect, at least, it was inaccurate. The appellant alleged that the absence of proper record-keeping had resulted in the fees being omitted inadvertently. The court below rejected the appellant's explanation and found by inference that the fees had deliberately been mis-stated and concealed respectively.

[48] The state of a person's mind is as much a fact as any other and I have already referred to the undesirability of resolving factual issues on affidavit. In the absence of cross-examination of the appellant to test the truth of his explanation I do not think the finding against him was justified.

CONCLUSIONS

[49] In summary, the evidence discloses that the appellant acted in conflict with the duties of an advocate in various respects. He failed to disclose facts that were material to the truth of evidence that he permitted to be placed before the court and without which the evidence was misleading. He received fees other than through an attorney (which was merely a consequence of acting without proper instructions in the first place). He associated himself with a mandate that was detrimental to the reputation of the profession. And in executing the mandate he lent his name to false statements that had the potential to facilitate the perpetration of fraud.

[50] It remains to determine whether the conduct of the appellant justified an order striking his name from the roll. The enquiry before a court that is called upon to exercise its disciplinary powers is not what constitutes an appropriate punishment for a past transgression but rather what is required for the protection of the public in the future. Some cases will require nothing less than the removal of the advocate from the roll forthwith. In other cases, where a court is satisfied that a period of suspension will be sufficiently corrective to avoid a recurrence, an order of suspension might suffice.

[51] The various transgressions of the appellant should not be viewed in isolation. I accept that the appellant was not aware that the Chase Manhattan fund did not exist and was not a knowing party to the fraudulent scheme. I also accept that he had no fraudulent intent when he made the false statements. But the absence of such knowledge and fraudulent intent does not detract from the appellant's breach of his professional duties. A person who practises as an advocate is expected to know what those duties are and there are no grounds for excusing the appellant's various transgressions. This is not an inexperienced advocate whose judgment and appreciation of what his professional duties demand has yet to mature. The appellant has practised for more than thirty years and for sixteen years he has worn silk. The various transgressions, when viewed together, paint a picture of an advocate who is quite indifferent to the demands of his profession. His initial responses to the GCB, and his affidavit that is now before this court, betray not the slightest appreciation of where he has fallen short, but instead reflect indignation that his conduct should be called into question at all. I have no doubt that he is not fit to continue in practice and that the court was correct in ordering his name to be struck from the roll.

[52] With regard to costs we were informed from the bar that counsel for the GCB acted in this appeal without fee and that an order should be made only for the recovery of their disbursements. We intend making the ordinary order with regard to costs though we note for the information of the taxing master that the costs of counsel are restricted to the recovery of disbursements that have been made by them or on their behalf. I need only add that we have appreciated the assistance we have received from all counsel in this appeal.

[53] The appeal is dismissed with costs that include the costs of three counsel.

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R.W. NUGENT
JUDGE OF APPEAL

CONCUR:

HARMS ADP)

STREICHER JA)

LEWIS JA)

MUSI AJA)