

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

HIGH COURT OF SOUTH AFRICE (NORTHERN CAPE HIGH COURT, KIMBERLEY)

CASE NO: 272/2013
HEARD: 26/04/2013
DELIVERED: 31/05/2013

In the matter between:

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE

APPLICANT

and

PIETER STEFAN VAN DER WESTHUIZEN

RESPONDENT

CORAM: *Pakati J; Erasmus AJ*

JUDGMENT

1. On 26 April 2013 we granted an order in terms of prayers 1, 2 and 3 of the Notice of Motion dated 19 February 2013. In terms of this order the respondent was suspended for a period of one year from practicing as an attorney for his own account, as a director of a professional company contemplated in section 23 of the Attorneys Act, No 53 of 1979 ('the Act'), or as a professional assistant in charge of a branch office of any practice. This order of suspension was suspended for a period for 5 years from date of the order on certain conditions. The respondent was further ordered to pay the costs of the application on attorney and client scale.

2. We indicated that reasons for the order would follow. These are our reasons.

3. The applicant lodged the application on 19 February 2013. The application was personally served on the respondent on 20 February 2013. He did not oppose the application.
4. We are empowered to grant the order by virtue of section 22(1)(d) of the Act. The approach that a court should follow in matters of this nature is threefold:¹
 - 4.1 The court must find on a balance of probabilities that the respondent is guilty of the conduct which forms the basis of the application;
 - 4.2 If the court so finds, it must exercise a discretionary value judgment as to whether the respondent is a fit and proper person to be permitted to continue practicing as an attorney or not.
 - 4.3 The court must take into account the circumstances in the matter whether or not to grant an order striking or suspending the respondent from practice.
5. The profession of an attorney requires absolute honesty, integrity and reliability from a practitioner.² Where he acts for others, the law expects uberrima fides, which means the highest possible degree of good faith.³ He owes the highest standard of trust not only to the Court and the public at large, but also to the Law Society of which he is a member.⁴
6. The background to this application and the facts thereof appear from the papers. A certain couple (Mr and Mrs Jagiello) were married to each other in community of property. Mr Jagiello consulted attorney Van Zyl on 10 May 2010, the date following the marriage, in regard to entering into an ante-nuptial contract. Jagiello

¹ *Summerly v Law Society of the Northern Provinces* 2006 (5) SA 613 at 615 B – F; *Jasat v Natal Law Society* 2003 (3) SA 44 at 44 D – E; *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A); *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) at 13 I – J and 14 at A – B.

² *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538

³ *Incorporated Law Society, Transvaal v Visser & Others* 1958(4) SA 115 (T) at 131

⁴ *Law Society of the Cape of Good Hope v Holmes* 2006(2) SA 139 (PD) at 145 F – G and 149 I

was advised that such a contract could not be entered into after marriage and explained to him that a court order was needed to change their property regime.

7. Some time later Van Zyl's firm received instructions from a client to recover monies from Mr Jagiello. It was discovered, after interpleader proceedings were filed and it was alleged that the Jagiello's were married by ante-nuptial contract. It appeared from the marriage certificate that the Jagiello's were married on 9 May 2010. Van Zyl reported the matter to the applicant.
6. The applicant forwarded a complaint to the respondent on 14 March 2012. The respondent, in a letter dated 17 March 2012, provided a detailed explanation to the applicant. The respondent, when approached by Jagiello after conclusion of his marriage, requested a Notary Public, Mr De Waal Esterhuyse of De Waal Esterhuyse Attorneys in Melkbosstrand and enquired from him whether he was willing to execute an ante-nuptial contract in terms of a power of attorney which the respondent had backdated to 7 May 2010, a date before the marriage took place. The respondent proceeded to certify that the couple had signed a power of attorney in his presence on 7 May 2010, to enter into the ante-nuptial contract. The ante-nuptial contract was executed and back-dated to 7 May 2010. It was registered in the Deeds Office in Cape Town.
8. In his response to the complaint, the respondent stated that he acted in the way he did because of an inexplicable and insane moment. He advised the applicant that he pleaded guilty to such charge as the applicant may bring against him. He furthermore set out mitigating factors.
9. The applicant concluded that the respondent was guilty of unprofessional conduct and had contravened certain of the applicant's rules and resolved to lodge the application.
10. The Applicant's conduct falls far short of the standards the Court expects from an attorney. He has contravened the Act and the applicant's rules. He is guilty of unprofessional, dishonourable and unworthy conduct and has brought the

attorney's profession into disrepute. His conduct was potentially prejudicial to third parties and was prejudicial to his creditor.

11. The sanction to be imposed lies within in the sole discretion of the court. Courts have generally required Law Societies to take a view on a matter to assist the court in deciding on the necessary sanction, which it has done in this matter.⁵ Given the respondent's immediate acknowledgment of his guilt, his regret and contrition and the fact that he neither made an attempt to conceal the truth, nor to mislead the applicant and the court, the view taken by the applicant cannot be faulted.

**S L ERASMUS
ACTING JUDGE
NORTHERN CAPE DIVISION**

I agree.

**B PAKATI
JUDGE
NORTHERN CAPE DIVISION**

**For the Applicant: P Horn
Haarhoffs Inc Kimberley**

⁵ *Incorporated Law Society, Transvaal v G 1953 (4) SA 150 – referred to in Law Society of the Cape of Good Hope vs C supra, on 638 I*