Reportable: Yes / No
Circulate to Judges: Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 314/04

Date heard: 2004-04-30
Date delivered: 2004-04-30

In the matter of:

The Law Society of the Cape of Good Hope **Applicant**

versus

Pieter Herman Du Toit **Respondent**

Coram: **MAJIEDT J** *et* **LACOCK J**

J U D G E M E N T

MAJIEDT J:

1. This is an unopposed application to have the name of the Respondent struck off the Roll of Attorneys of this Court and for certain ancillary relief.

2. The Respondent is Pieter Herman du Toit, an attorney who previously practised as a director of *PH du Toit & Vennote Ing.* at 98 Kerk Street, Victoria West. The Respondent is presently resident in Bloemfontein.

3. The Respondent:

   3.1 was admitted as attorney of the Transvaal Provincial Division of the High Court of South Africa on 11 June 1991;

3.2 was enrolled as an attorney of this Court on 8 July 1997;
3.3 is a member of the Applicant society;

3.4 was interdicted from practising by order of this Court issued on 2 Junie 2003 by my brother Lacock J.

4. The approach to be adopted in a matter such as this, i.e. for striking off an attorney from the roll of attorneys has been succinctly set out by Hefer AP in the matter of **Law Society of the Cape Good Hope** *v* **Budricks** 2003(2) SA 11 (SCA) at 13J – 14A as follows:

"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 practise 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 threefold. 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."

5. The Applicant has on an overwhelming balance of probabilities established on the papers before us that the Respondent has committed the following transgressions:

5.1 A thorough examination of the Respondent's trust account statements with Standard Bank at Victoria West, together with the admissions made by the Respondent to attorney HR Rich (who had done certain investigations at the request of and on behalf of the Applicant society), provides clear proof that the Respondent has misappropriated trust funds – the amount so misappropriated is at the very least the sum of R43 000.00.

5.2 The Respondent has contravened the provisions of sec 41(1) of the Attorneys Act, 53 of 1979, by practising in 2002 without the requisite fidelity fund certificate.

5.3 The Respondent has also failed to comply with the Applicant society's rule 14.3.1 which enjoins members to "maintain the highest standard of honesty and integrity".

5.4 The Respondent has failed to comply with the Applicant society's rule 14.3.2 which requires that its members treat the interests of their clients as paramount.

5.5 The Respondent has also failed to comply with the Applicant society's rule 14.3.7 which requires of its members to "account faithfully, accurately and honestly for any of their client's money which comes into their possession, keep such money separate from their own money and retain such money for so long only as is strictly necessary."

5.6 The Respondent has also failed to comply with the Applicant society's rule 14.3.14 which enjoins members to "refrain from doing anything which could or might bring the profession into disrepute".

5.7 The Respondent has also failed to comply with the Applicant society's rule 13.13.3 in that the total amount of money in his trust banking account and cash was for a considerable period of time less than the total amount of credit balances owing to trust creditors.

5.8 The Respondent has also failed to comply with the Applicant society's rule 13.13.7 which enjoins attorneys' firms to ensure that "withdrawals to or from its trust banking account are made only ….. to or for a trust creditor or …. as transfers to its business banking account, provided that such transfers shall be made only in respect of money claimed to be due to the firm."

5.9 Lastly the Respondent has also failed to comply with rule 14.3.10 of the Applicant society which enjoins its members to "…. use their best efforts to carry out work in a competent and timely manner…".

6. The proved fact of the Respondent's misappropriation of trust funds, together with the cumulative effect of the other transgressions listed hereinabove, leaves me in no doubt whatsoever that the Respondent is not a fit and proper person to continue to practise as an attorney of this Court.

The gravity of these offences, in particular the misappropriation of trust funds, warrants in my view the most severe penalty, to wit that the Respondent be struck from the roll of attorneys.

7. In the course of investigations carried out by attorney Rich, to which I have alluded hereinbefore, the premises from which the Respondent had been practising were mysteriously and suspiciously burnt down and the computer which had been said to contain the data relating to the Respondent's bookkeeping records, was mysteriously and suspiciously damaged. The result of all this was that no bookkeeping records could be retrieved from either the Respondent's offices or from his computer. It comes as no surprise that the South African Police is presently conducting a criminal investigation into these aforesaid occurrences.

8. A further matter which bears consideration herein is that the order issued by my brother Lacock J on 2 June 2003, interdicting the Respondent from practising, contained the following directive:

> "2. That the application for the striking off of the Respondent referred to in paragraph 1 above, shall be instituted within a period of one hundred and twenty (120) days from date of this order or within such extended period as this Court may on application allow".

This application was launched well after the expiry of the 120 days referred to in the order above. In this respect there is an application for condonation before us. I am satisfied that, due to the delays in the investigation of the matter, caused in particular by the fact that the Respondent's bookkeeping records and files were damaged and destroyed when his offices had burnt down, as well as the damage to the Respondent's bookkeeping computer, a proper case has been made out for condonation to be granted herein.

9. I accordingly grant the following order:

A. The Applicant's non-compliance with the provisions of par.2 of the Order made by this Court on 2 June 2003 in case number 376/03 is condoned.

B. That the Respondent's name be struck off the Roll of Attorneys of this Court.

C. That the Respondent surrender and deliver to the Registrar of this Court his Certificate of Enrolment as an Attorney.

D. That should the Respondent fail to comply with the provisions of the preceding paragraph of this Order within 2 (TWO) weeks from the date of service hereof, the Sheriff for the District in which such Certificate of Enrolment is, be empowered and directed to take possession of and deliver same to the Registrar of this Court.

E. THAT the Respondent deliver his books of account, records, files and documents containing particulars and information relevant to:-

E.1 any moneys received, held or paid by the Respondent for or on account of any person;

E.2 any moneys invested by the Respondent in terms of Section 78(2) and/or Section 78(2A) of Act No. 53 of 1979 of the Republic of South

Africa;

E.3 any interest on moneys so invested which was paid over or credited to the Respondent;

E.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

E.5 the Respondent's practice as an Attorney,

to the curator appointed in terms of paragraph 10 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.

F. THAT should the Respondent fail to comply with the provisions of the preceding paragraph of this Order within 1 (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, be empowered to take possession of and deliver them to such curator.

G. THAT 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.

H. THAT a written undertaking by a person to whom the records, files and documents referred to in paragraph 6 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.

I. THAT such curator be 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.

J. THAT the Respondent be interdicted and prohibited from operating on his trust account(s) as defined in paragraph 10 hereof.

K. THAT the 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 of the Applicant, be 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 "<u>trust account(s)</u>") with the following powers and duties:-

K.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;

K.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 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) and/or Section 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);

K.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 30 (THIRTY) days of the date of the Order or such further period as he may agree to in writing, with the names, addresses of and amounts due to all trust creditors;

K.4 to call upon the 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;

K.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;

K.6 having determined the amounts which he considers are lawfully due to trust creditors, pay such claims in full, but subject always to the approval of the Board of Control of the Fund;

K.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 paragraph 11 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 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 insolvent estate;

K.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:

K.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;

K.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

K.8.3 to authorise the Board of Control of the Fund to credit the credit balance(s) referred to in 10.8.1 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 aforegoing, 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;

K.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 the curator; and

K.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.

L. THAT Respondent be and is hereby directed:-

L.1 to pay the fees and expenses of the curator, such fees to be assessed at the rate of **R300,00** per hour, including traveling time;

L.2 to pay the reasonable fees and expenses charged by any person(s) consulted and/or engaged by the curator as aforesaid;

L.3 to pay the costs of and incidental to this application on a scale as between attorney and client;

L.4 within 1 (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 cost, or otherwise, of the amount of 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.

____

SA MAJIEDT
JUDGE

I concur.

____

HJ LACOCK

JUDGE

FOR THE APPLICANT	:	ADV JG VAN NIEKERK instructed by HAARHOFFS
FOR THE RESPONDENT	:	Unopposed application
DATE OF HEARING	:	2004-04-30
DATE OF JUDGEMENT	:	2004-04-30