

IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
19-06-2012	R. Webster
DATE	SIGNATURE

CASE NO.: 40666/2006  
DATE:

19/6/2012

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

APPLICANT

V

ROELOF JOHANNES VAN DER MERWE

RESPONDENT

JUDGMENT

WEBSTER J

1. The applicant seeks an order that the respondent, an admitted attorney be suspended from practice and further that he surrender his certificate admitting him to practise and further ancillary relief i.a. that a *curator bonis* be appointed to administer and control the respondent's trust account including accounts of insolvent and deceased estates or any independent accounts opened and held by the applicant in any bank in the Republic of South Africa in accordance with the provisions of section 78(1) of Act 53 of 1979 and/or any separate savings trust or accounts contemplated in accordance with the provisions of sections 78(2) and 78(2A) of Act 53 of 1979; an further ancillary relief ordinarily granted by this court in order for the *curator bonis* to take possession and charge

of all trust fund records and the like to safeguard the interests of the respondent's clients, correspondent attorneys, etc. pending the institution of proceedings to have the respondent's name struck off from the role of attorneys as he is not a fit and proper person.

2. The applicant was admitted as an attorney of this court on 25 April 2005. Except for the initial Fidelity Fund certificate that is issued upon an attorney's admission as such all subsequent Rule 70 certificates are issued only upon the filing by a practitioner of an auditor's report for the period ending 28 February of each and every succeeding year after admission: such certificate has to be submitted on or before 31 August of every year.
3. The purpose of the Rule 70 auditor's report is to satisfy the Law Society that the practitioner has kept proper books of account and that all trust funds of clients have been properly and correctly accounted for. Failure to file the necessary auditor's report constitutes an offence in terms of Rule 89.11.
4. The respondent's, according to the founding affidavit, failed to submit his auditor's report for the year ending (28 February) following his admission and in respect of subsequent years. Various complaints were made against the respondent. As a result thereof the respondent was summoned to appear before a disciplinary committee. The disciplinary committee did not proceed with the inquiry – it referred the matter to the Council of the Law Society for reconsideration.
5. The respondent's conduct giving rise to this application consists of his failure to provide the Rule 70 auditor's reports and various complaints. Briefly summarised they are:

- (i) C.E. Pienaar: the respondent was instructed to represent Ms Pienaar in a family matter. The respondent failed to file the necessary answering affidavit; failed to advise his client of the date of hearing; failed to attend a round table conference and failed to furnish Ms Pienaar with a statement of account;
- (ii) Rule 70 auditor's reports: the first report was submitted 3 years late; the second was submitted 2 years late; the third was submitted 1 year late. When the matter was heard the court was informed that the respondent had filed all auditor's reports that he was obliged to file and further that it appeared that there was no shortfall in his books of account;
- (iii) Failure to attend court, misleading the court on whether his client had properly instructed him or not resulting in the delay in the prosecution of a trial in the Regional Court. The complaint was submitted by the President of the Regional Court: Gauteng. He was candid enough to explain that *"...in the event that my client instructed me to delay the matter by postponing the case as long as many times necessary as she was waiting for her funds to arrive from the UK, such delays should be layed at her door, not mine, as I obviously had to execute her instructions..."*;
- (iv) Misappropriation of trust funds: the respondent admits that he misappropriated R70 000 being damages recovered from the Road Accident Fund on behalf of Ms A.M.E. Hoffman.

6. The respondent admits his transgressions and that he acted unprofessionally. He blames his book-keeper for his failure to file the auditor's reports. He admits (i) conducting himself unprofessionally; (ii) failing to keep proper books of account; (iii) practising without a fidelity fund certificate; (iv) misappropriating the R70 000 due to Ms Hoffman. There are various other complaints against the respondent. These are of unprofessional conduct in matters in which he was instructed or where he failed to respond to communications from clients, the applicant, correspondents and colleagues.
  
7. The respondent filed a lengthy answering affidavit deposed to on 16 March, 2007. An excerpt from paragraph 2 thereof [page 176] reads as follows: *"Ek het enkele jare gelede as gevolg van onbesonnenheid en die stres van my beroep op 'n sosiale basis begin om afhanklikheidsvormende middels te gebruik en daarmee te eksperimenteer. In die afgelope 2 jaar het ek totaal afhanklik van hierdie middels geraak en is ek tans vir alle praktiese doeleindes verslaaf aan heroïen. Die misstappe wat ek begaan het waarna hierbo en in die verklaring hierin verder verwys word, het telkens geskied by geleentheid waar my oordeel aangetas was as gevolg van die gebruik van die afhanklikheidsvormende middel. Ek opper dit nie as 'n verskoning nie, maar wens aan te dui dat ek volledig insig het in my probleem en het ek om daardie rede reeds alle stappe geneem om binne die volgende week of twee in die Elim Kliniek te Kempton Park opgeneem te word en is dit my vaste voorneme of totaal te rehabiliteer. Sedert ek hierdie besluit geneem het, poog ek om so min as moontlik van die middel te gebruik, maar die afhanklikheid van so 'n ernstige verdowingsmiddel is van so 'n aard dat ek dit nie sonder hulp en bystand sal kan doen nie."*

8. He undertook further in that affidavit that: *"Verdermeer onderneem ek om die foute wat ek wel begaan het en soos wat ek later hierin in detail sal aandui, nie weer in die toekoms sal gebeur nie en dat ek reeds alle maatreels getref het om stiptelik te voldoen aan die reëls en kontrolemaatreels wat binne die struktuur van die professie bestaan. Ek smee k in hierdie aangeleentheid nog 'n kans gegun sal word om my bona fide te bewys in die nakoming van die reëls van die orde met betrekking tot spesifiek die aangeleenthede waar ek fouteer het en andersins en dat selfs in die geval waar hierdie Agbare Hof dit sou oorweeg om my te skors vanwee die erns van oortredings, sodanige skorsing opgeskort sal word om my die geleentheid te gee om my positiewe voorneme om van my probleem van verslawing te genees en daarna die reëls stiptelik na te kom in die praktyk te kan bewys."*
9. The applicant, in its reply points out that, having been offered the opportunity to rehabilitate himself the respondent *"...continued with the similar conduct towards his clients and there were further complaints..."* and that *"...the only suitable remedy in those circumstances is that the respondent be struck from the roll"*.
10. Mr Botes sought an indulgence to hand in an additional affidavit. Ms Asmal, for the respondent, had no objection. Leave to do so was duly granted. The new evidence tendered in the said affidavit is that the respondent again submitted himself for treatment in March of this year. He was admitted to the rehabilitation centre from 3 August 2011 to 8 March 2012. He received treatment and medication and was subjected to various tests. He also underwent a psychological test and clinical evaluation. On the day preceding the date of hearing he had again subjected himself to a test which confirmed that there were no traces of any drugs in his body.

11. The court was further informed that the respondent had (i) written up his trust account books and his auditor had submitted all outstanding Rule 70 certificates; (ii) had been issued with fidelity fund certificates for the year ending December 2008, December 2009, December 2010, December 2011, and December 2012: these were issued on 27 February 2012. We were re-assured that there was according to Mr Faris, the respondent's official charged with investigations of practitioner's trust account books, currently no risk with regard to trust funds in the respondent's trust account.
12. Ms Asmal submitted that the respondent had a long history stretching over eight (8) years during which he had failed to conduct himself as an officer of this court. He had not been amenable to basic disciplinary measures. He had failed to honour undertakings and attend meetings with officials of the respondent. He had become aware of his drug addiction problem as way back as 2007. He had re-assured the respondent then that he was in a rehabilitation centre and had undertaken to submit reports at three months intervals. The respondent had only submitted reports in October, 2007, July, 2008 and December, 2008. She submitted that the respondent's track record indicated a proclivity towards recalcitrance rather than reformation and rehabilitation as had been the case in the past. She submitted that the respondent had proved to be unreliable. She emphasized that the applicant had accorded the respondent more than an adequate opportunity to rehabilitate himself. She moved for an order in terms of the order prayed.
13. Mr Botes made an impassioned appeal for the court to find that the respondent had, over the last year, made progress which had eluded him over years: the respondent had shown commitment to total change in both his private life and in his practice. The

respondent was, he submitted, prepared to subject himself to discipline, had undertaken to continue with his rehabilitation programme, psychiatric treatment and regularly submit monthly results of clinical tests that he will be subjected to.

14. This matter has a long history. On the papers as they stood without the recent developments there could have been no doubt whatsoever that the applicant's evidence established conclusively that the respondent's conduct fell far short of the standards expected by this court of its officers. I would have had no hesitation in granting the relief sought by the applicant. The recent developments, however, indicate that the respondent has undergone a total metamorphosis. The writing up of his books could only have been achieved through total co-operation by the respondent with his bookkeeper and auditor, if that had been necessary.
15. It is clearly early days for the court to form any view as to whether the respondent will sustain the standards that have eluded him thus far or whether he will slide back into his old ways. The preponderance of probabilities suggests that he is unlikely to maintain the discipline required of him. It is against this background that the court has to consider the rescue intervention suggested by Mr Botes. He had suggested that this court grant an order suspending the respondent from practice but suspending the order on certain terms and conditions.
16. In reply, Mrs Asmal emphasized the history of the matter and the fact that the applicant had been immensely patient with the respondent. She high-lighted the fact that the respondent had extended the very "life-line" now sought and emphasized that it had not worked in the past.

17. It is one of the fundamental time-honoured traditions of our courts that justice should be dispensed fairly, without fear or favour. Those who have erred or transgressed should be dealt with appropriately. That, however encompasses various issues one of which is the element of mercy, not maudlin pity, however.
18. The use of prohibited drugs such as those used by the respondent is a universal phenomenon and problem. Its victims are not limited but are from all walks of life even in countries where the sentences imposed are the death penalty. This country has demonstrated through the abolishment of the death penalty just how valued the right to life is. The order sought by the applicant whilst only a suspension is, as already indicated earlier on, a precursor to an application to a striking off. This court is obliged to examine whether the facts in this case justify an order that will set in motion striking off proceedings.
19. The recent developments as set out in the affidavit handed up and accepted during argument portray a last-ditch effort by the respondent to save his profession. Unlike in the past, he has made a significant success with the serious problem of trust books not having been written up. That no irregularity was reported on by his auditor is a clear indication of the respondent's integrity. In the known instance of misappropriation of Mrs Hoffman's money the respondent made a clean breast of the facts and undertook to pay her within 30 days. Payment thereof is one of the conditions of the suggested order.
20. When the above facts are considered in context, it is my view that the respondent deserves a measure of mercy in the form of an opportunity to complete the process of rehabilitation he has



embarked upon. The process contains the input of experts. A reprieve against being struck off will, on the probabilities, be not only sobering but will serve as encouragement for the respondent.

21. In the circumstances I would grant the order proposed on behalf of the respondent.
22. **The following order is made:**
  1. **The Respondent is suspended from his practice as attorney for a period of 6 (six) months.**
  2. **The Respondent is ordered:**
    - 2.1 **to subject himself to any internal disciplinary proceedings of the Applicant arising out of the complaints against him which resulted in the launching of this application;**
    - 2.2 **to subject himself to intensive medical and psychological treatment in respect of his addiction to cocaine and/or heroin;**
    - 2.3 **to furnish Ampath Pathologists with urine samples once a month (every 30 days) with the specific purpose to determine if there are any elements and/or traces of opiates and/or heroin and/or cocaine in his body;**
    - 2.4 **to subject himself to physiological therapy by Dr EJM Matthews with the specific purpose to monitor and/or facilitate the treatment of his drug dependence;**
    - 2.5 **to proceed with the therapy which is prescribed by Dr C Naidoo with the specific purpose of rehabilitating him from the use of any drugs and/or other substances;**

- 2.6 to instruct Ampath Pathologists to furnish all results of urine tests to the Applicant with the specific purpose to determine whether any opiates and/or cocaine and/or heroin is present in his body or physical system; and
- 2.7 to instruct Dr EJM Matthews to furnish the Applicant with a progress report every 3 months in respect of the Respondent's prognosis in respect of the psychological treatment that he receives.
- 3. The Respondent is ordered to pay to Mrs AME Hoffman the amount of R70,000.00, pursuant to the settlement agreements under case numbers 16159/2008 and 15453/2008, within 30 (thirty) days from date of this order;
- 4. The suspension as referred to in paragraph 1 above is suspended for a period of 5 (five) years subject to the Respondent not being found guilty of any contravention of the Applicant's Rules and/or Regulations for a period of 5 years from date hereof. In the case of the Respondent being found guilty of any contravention of the Applicant's Rules and/or Regulations within a period of 5 (five) years of the date hereof, the Respondent will immediately be suspended from his practice as an attorney of this Court for a period of 6 (six) months subject to the Applicant being entitled to take any further steps (which includes an application for the striking of the Respondent's name from the Roll of Practicing Attorneys) against the Respondent; and

5. The Respondent is ordered to pay the costs of this application on the scale between attorney and client.



**G. WEBSTER**  
**JUDGE IN THE HIGH COURT**

**I agree.**



**N. KOLLAPEN**  
**JUDGE IN THE HIGH COURT**