



**THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT)**

Case No: 19773/12 &  
26509/10

In the matter between:

**THE LAW SOCIETY OF THE CAPE OF  
GOOD HOPE**

**APPLICANT**

And

**HADLEY ELSWORTH ADAMS**

**RESPONDENT**

**Coram:** TRAVERSO DJP & ROGERS J

**Heard:** 22 FEBRUARY & 7 June 2013

**Delivered:** 11 June 2013

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**JUDGMENT**

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**ROGERS J:**

## Introduction

[1] There are two applications before us by the Law Society of the Cape of Good Hope ('the Law Society') in which the respondent is an attorney Mr HE Adams ('Adams'). In the first application the Law Society seeks an order that Adams be imprisoned for 30 days for contempt of court; in the second application the Law Society asks that Adams be struck from the roll of attorneys.

[2] The matter initially served before us on 22 February 2013. There had been no notice of opposition nor had answering papers been filed. Despite this circumstance, our *prima facie* view was that certain aspects needed to be explained by the Law Society and admissible evidence of certain allegations needed to be adduced. We were thus minded to postpone the matter (despite the absence of opposition) to afford the Law Society an opportunity to supplement its papers. In the event Adams appeared in person at the hearing on 22 February 2013. He said that he wanted to oppose the application and requested time to do so. We thus postponed the hearing to 7 June 2013 with directions for the filing of supplementary papers by the Law Society on matters identified by the court and for the filing of answering and replying papers and heads of argument. The Law Society duly filed its supplementary papers on 22 March 2013. Adams failed to deliver answering papers timeously or at all.

[3] At 15h52 on 6 June 2013 (the day before the postponed hearing) Adams sent a faxed letter to the Law Society's attorneys which the latter in turn forwarded to the presiding judge at 16h24. In his letter Adams says that he had been 'diagnosed with chronic liver' and is thus unable to travel, that he has requested his doctor to refer him to Groote Schuur Hospital, that he expects to be in Cape Town by the end of June 2013 and would thus be 'available' on any date between 25 and 30 June 2013. (Those dates lie within court recess.) He goes on to say that he has compiled certain of his affidavits 'except the complaints relating to the Le Roux and Felixes' which he apparently intends dealing with while in Cape Town. (As will appear hereunder, the Le Roux and Felix complaints are central to the Law Society's case against him. Adams provides no information as to what is contained in the affidavits he has already prepared nor does he explain why they have not already been filed.)

He says that he is 'currently financially stricken' but that he is a 'strong believer of the audi alterem partem rule' and will 'oppose this application by any means'.

[4] Adams did not appear at the hearing on 7 June 2013. Mr Bean, who appeared for the Law Society at the postponed hearing, opposed a further postponement of the matter. The court refused the postponement and then heard Mr Bean on the merits of the applications. As will appear here under, the contempt application was issued as long ago as 08 December 2010. Adams filed a notice of opposition on 14 January 2011 but failed to file any answering papers. The striking-off application was issued on 16 October 2012. Adams did not even file a notice of opposition in response to that application. When he appeared in person before us on 22 February 2013 he had thus taken no steps of substance in regard to either of the applications, despite the serious allegations made therein against him and despite the fact that one of those applications had been issued more than two years previously. Our order of 20 to February 2013 required Adams to file his answering papers by 22 April 2013 and to file heads of argument by 30 May 2013. Having been granted this indulgence, he ignored our directions and instead sent the fax previously mentioned on the afternoon before the hearing. Viewed against the history of delay and inactivity on his part, the letter does not begin to make out a proper explanation for his conduct. At very least a substantive application for a postponement properly motivated by affidavit should have been delivered.

[5] I now turn to the merits of the two applications. Adams was admitted as an attorney of this court on 13 February 1998. He practised thereafter at times as a professional assistant and at times for his own account. Since July 2007 he practised for his own account with an office in Mitchell's Plain.

[6] On 16 April 2009 the Law Society launched an application against Adams to interdict him from practising as an attorney pending his obtaining a fidelity fund certificate for the year ending 31 December 2009 as required by s 41(1) of the Attorneys Act 53 of 1979 ('the Act'). According to the founding papers in the interdict application, Adams had failed despite reminder to file his audit report which was due by 31 August 2008; had failed to pay his law society membership fee for the financial year 1 July 2008 to 30 June 2009; had failed to apply for his 2009 fidelity

fund certificate; and had failed to pay the resultant R1 000 administrative fine imposed on him.

[7] On 6 May 2009 Adams filed a notice to oppose the interdict application. However, he did not file answering papers. On 29 June 2009 (the day before the hearing of the interdict application), Adams contacted the Law Society's attorney, Ms Omar, to request a postponement of the hearing. On the morning of the 30 June 2009 there was a telephonic discussion between Ms Omar and Adams during which she informed Adams that her instructions were to oppose a postponement and that the matter would proceed on that day. Adams accepted this and advised that he was not going to oppose the application. An order was duly granted in Adams' absence. Later that day Ms Omar spoke again with Adams and informed him that an interdict had been granted in terms of the notice of motion. Adams requested that she leave a copy of the order for him at her firm's reception desk, which she did (he made this request because he was constantly moving between Cape Town and Queenstown). Ms Adams only discovered in March 2010 that Adams had failed to collect the order. She then arranged for the order to be formally served by the sheriff, such service being effected on 11 March 2010. It is thus clear that Adams was aware of the order on the day it was granted and the contempt application and his conduct in general must be adjudicated on this basis, even though formal service occurred only in March 2010.

[8] On 21 December 2009 the Law Society received a complaint against Adams (dated 23 November 2009) from a Mr and Mrs Felix relating to Adams' handling of a matter in which they had instructed him to oppose an eviction order ('the Felix complaint'). On 22 January 2010 the Law Society sent a complaint to Adams for comment. He failed to respond. The complaint was sent to him again on 2 and 18 March 2010, and he again failed to respond. The Felix complaint would or should also have alerted the Law Society to the fact that Adams was acting contrary to the interdict order of 30 June 2009.

[9] On 25 June 2010 the firm Miller Bosman Le Roux ('MBLR') lodged a complaint with the Law Society against Adams, alleging that he had contravened the interdict by acting for a Mr Marais in a matter in the Strand Magistrate's Court where

MBLR acted for the other party. The Law Society in its papers refers to this as the Le Roux complaint. Further documentation in the Le Roux complaint was supplied to the Law Society by MBLR on 20 July 2010 and 16 August 2010. The Law Society did not put the Le Roux complaint to Adams for comment but resolved instead to launch the contempt application in the course of which Adams would have an opportunity to respond to the Le Roux complaint.

[10] The contempt application was issued on 8 December 2010 and served on Adams on 13 January 2011. Annexed to the founding affidavit in the contempt application were all the papers in the Le Roux complaint. Adams filed a notice of opposition but failed thereafter to serve answering papers. On 2 March 2011 an order was made through the chamber book requiring Adams to file his answering papers within 15 days, failing which [a] Adams would be barred from doing so without the leave of the court and [b] the Law Society would be entitled to roll the matter on the unopposed roll.

[11] The chamber book order was served on Adams on 31 March 2011 by affixing it to the door of his residence at 32 Glenwood Street Mitchell's Plain; and was served on him again, personally, on 5 November 2011. Adams still did not file answering papers. During the period January to May 2012 there was telephonic contact between officials of the Law Society and Adams during which the latter expressed a desire to 'sort everything out' and promised on several occasions promised to attend at the Law Society's offices to collect the notice of set down, promises he failed to keep. On 22 September 2012 a notice of set down was served on Adams personally at an address in Queenstown in the Eastern Cape, notifying him that the contempt application would be heard on 28 November 2012 (this was on the unopposed roll in third division).

[12] Prior to the arrival of the date for the hearing of the contempt application, the Law Society on 16 October 2012 launched its application to have Adams struck from the roll. The notice of motion specified 22 February 2013 as the date for the hearing of the application if it was unopposed. This application was served on Adams personally on 29 October 2012, again at the Queenstown address. As noted earlier, Adams did not file a notice of opposition and did not deliver answering papers.

[13] On 28 November 2012 the contempt application came before Cloete AJ in third division. In view of the pending striking-off application, she postponed the contempt application for hearing simultaneously with the striking-off application on 22 February 2013.

[14] The matter came before us initially on 22 February 2013 on which date the court made the order previously mentioned. At the hearing on 7 June 2013 the Law Society was represented at the hearing by Mr Bean, who filed full heads of argument. There was no appearance for Adams.

#### The striking-off application

[15] In terms of s 22(1)(d) of the Act an attorney may be struck off the roll if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney. This entails a three-stage enquiry:<sup>1</sup> [a] The court must first decide whether the alleged offending conduct has been established on a preponderance of probabilities. [b] The second enquiry is whether, with reference to this conduct, the attorney is a fit and proper person to continue to practise as an attorney. This is expressed as being a discretion but in reality involves a weighing up of the conduct complained of against the conduct expected of an attorney, this being a value judgement. [c] The third enquiry is whether in all the circumstances the person should be removed from the roll or whether an order suspending him from practice for a specified period will suffice. This is also a discretionary matter in which relevant factors include the nature of the offending conduct, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession, the likelihood or otherwise of a repetition of the offending conduct, and the need to protect the public. Ultimately it is a question of degree.

[16] In regard to the third of the above enquiries, there are three matters to be borne in mind:<sup>2</sup> [a] The main consideration is the protection of the public. The court should not be viewed, first and foremost, as imposing a penalty. [b] Second, and

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<sup>1</sup> See *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) para 10; *Malan & Another v Law Society, Northern Province* 2009 (1) SA 216 (SCA) para 4-6.

<sup>2</sup> See *Malan supra* para 7-10

although logic dictates that if a person is not a fit and proper person to practise as an attorney he should be removed from the roll, the Act contemplates not only permanent removal but suspension from practice. Permanent removal reflects that the court regards the misconduct as so serious that it manifests character defects and lack of integrity rendering the person unfit to be on the roll. Suspension, on the other hand, reflects a view that the person is likely to be rehabilitated after a period, but suspension on its own will seldom bring this about – there will usually be a need for ancillary conditions directed at aiding the process of rehabilitation, and it is for the delinquent attorney who seeks the lesser sanction of suspension to place the court in a position to formulate appropriate conditions. [c] Third, prior cases are of limited value in the exercise of the discretion, since each case is unique.

[i] The offending conduct

[17] As to the first enquiry (the offending conduct), it is appropriate to have regard to the allegations made in both the striking-off application as supplemented and the contempt application. Adams has been afforded an opportunity to respond to both applications. An attorney who was able to refute the allegations or place them in a more favourable light would be expected to respond, whether the allegations are imputed to him in the form of the striking-off application or a contempt application. The contempt papers were, furthermore, annexed to the founding affidavit in the striking-off application. An attorney is an officer of the court. The Law Society protects the interests of the public by placing facts before the court. The court, which is the final repository of disciplinary jurisdiction over its officers, must determine how to deal with the allegedly delinquent attorney.<sup>3</sup>

[18] Adams was guilty of several breaches of the Law Society's rules which led to the institution of the interdict proceedings in April 2009. Those breaches may perhaps be viewed as administrative in nature though it would be wrong to limit their characterization to this. In terms of s 41(1) of the Act an attorney is prohibited from practising on his own account unless he is in possession of a fidelity fund certificate.

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<sup>3</sup> See, for example, *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 409; *Kaplan v Law Society, Transvaal* 1981 (2) SA 762 (T) at 781 C; *Society of Advocates of South Africa (Wits Division v Edeling* 1998 (2) SA 852 (W) at 860 B-C.

A breach of this prohibition is, in terms of s 83(10), a criminal offence punishable by a fine of not more than R2 000 or imprisonment not exceeding six months or both. On 17 September 2008 the Law Society sent all attorneys under its jurisdiction, including Adams, the application forms for their 2009 fidelity fund certificates and requested that the completed applications be returned by 20 October 2008. Adams failed to apply for his 2009 fidelity fund certificate. Quite apart from the interdict order, he thus committed a criminal offence by practising as an attorney during 2009 and 2010 (as the Felix and Le Roux complaints show that he did).

[19] I have said that Adams committed a criminal offence, namely a contravention of s 83(10). In so holding I do not lose sight of the fact that in *S v Theledi* 1993 (2) SA 403 (T) it was held that it is not an offence for a practitioner to practise without a fidelity fund certificate – the court held that s 83(10) applies only to a non-practitioner. This conclusion appears to me, with the greatest of respect, to be untenable. Section 83(10) plainly envisages that the persons at whom the prohibition is directed are persons who could notionally obtain a fidelity fund certificate. Only an admitted practitioner can obtain such a certificate. The offence which the Acts creates in respect of non-practitioners who purport to practise as practitioners (ie without being an admitted attorney, notary or conveyancer) is contained in s 83(1). If s 83(10) applied only to non-practitioners, it would add nothing to s 83(1) and the reference therein to the absence of a fidelity fund certificate would in addition be nonsensical. Roux J, with whom Strydom J concurred, acknowledged in *Theledi* that his interpretation was ‘absurd’ (404D-E). I see no reason to adopt an interpretation which is both nugatory and absurd. Although it may have been more felicitous for s 83(10) to have referred to any practitioner who acts as such, I see no particular difficulty in interpreting the words ‘any person who... purports to act as a practitioner’ as referring to a practitioner practising without a fidelity fund certificate, ie a practitioner who practices despite the fact that in terms of s 41 he or she may not lawfully do so. In a number of subsequent cases, including cases decided by the Supreme Court of Appeal, it has been taken for granted that an attorney who practices without a valid fidelity fund certificate contravenes s 83(10): see *Law Society of the Northern Provinces v Mamatho* 2003 (6) SA 467 (SCA) para 1; *Summerley v The Law Society of the Northern Provinces* 2006 (5) SA 613 (SCA) para 4; *Law Society of the Northern*



*Provinces v Mogami* [2007] ZANWHC 64 para 13; *Law Society of Northern Provinces v Reinecke* [2008] ZAGPHC 218; *Law Society of Northern Provinces v Baloyi* [2010] ZAGPPHC 166 para 13.

[20] Adams made matters worse by adding to this statutory contravention a violation of the interdict order of 30 June 2009. He accepted instructions from the Felixes (in the eviction matter) in September 2009 and from Mr Marais (in the Le Roux matter) in May/June 2010.

[21] Although one can infer Adams' knowing breach of the order from the mere fact that he had knowledge of the order, one has it from his own mouth. The document which MBLR submitted to the Law Society on 16 August 2010 in connection with the Le Roux complaint was an affidavit made by Adams on 27 July 2010 in which he sought to explain his conduct in the Strand Magistrate's Court on 14 June 2010 with reference *inter alia* to his fear in the face of an alleged threat by an attorney from MBLR to have Adams arrested for practising as an attorney when he was prohibited from doing so. Adams also stated in this affidavit that he had appeared sometime previously in the magistrates court in Philippi at a time when (so he asserts) the presiding magistrate knew that Adams was not permitted to act as an attorney.

[22] The Le Roux complaint reveals another serious matter. In the affidavit just mentioned (which appears to have been made by Adams in support of an application by Mr Marais to set aside an order granted on 14 June 2010) Adams admitted that he tried to obtain a postponement of the case on 14 June 2010 by falsely claiming to the magistrate that his client was in the Eastern Cape. Adams admitted that this was a lie. This act of dishonesty appeared clearly from the contempt application and was also highlighted in the Law Society's supplementary papers in the striking off application. The Law Society's allegation that Adams thereby 'perjured' himself is not technically accurate, because Adams was not giving evidence under oath when he told the magistrate that his client was in the Eastern Cape. Nevertheless, for a legal practitioner to mislead the court with a deliberate falsehood is scarcely less serious than perjury. It has been repeatedly said that it is crucial for the administration of justice that courts should be entitled to rely on the

veracity of statements made to them by counsel<sup>4</sup> and the same is undoubtedly true of attorneys.

[23] There are additional acts of misconduct associated with the Felix complaint. It appears from their complaint that Adams in September 2009 agreed to take on their case. He required and was paid (in cash) a deposit of R3 450. Thereafter, so the Felixes assert, Adams did nothing in the case, failed to keep appointments and gave them false telephone numbers. He also claimed that he had instructed Adv G Papier in the matter but when the Felixes contacted the advocate the latter said that he had not had any dealings with Adams. The Felixes did not get their money back.

[24] The Law Society submitted that Adams misappropriated trust funds in the amount of R3 450. In the absence of an answer from Adams I think this additional complaint has been made out. The cash which Adams received from the Felixes was immediately impressed with a trust and should have been deposited into his trust account until he rendered the agreed services and became entitled to transfer the money from his trust account to his business account. According to the information contained in the Law Society's supplementary papers, Adams' trust account at Standard Bank was closed during May 2008. There is also evidence that Adams attended at the Law Society's offices in March 2010 as part of his endeavour to have the interdict lifted and that he informed the Law Society's Ms Marli Herman on this occasion that his trust bank account was dormant. It would appear, therefore, that he never deposited the Felixes' money into a trust account. One can thus rule out the possibility that there is a credit of R3 450 in his trust account and that he has merely failed to refund a sum which he still has in trust. On the evidence before the court, he never became entitled to appropriate the money to his own use. It follows that he stole the Felixes' money.

[25] In its supplementary papers the Law Society refers to a further instance of misappropriation of trust money by Adams. This concerns an instruction which Adams accepted from a Mr Jamiel Davids during March 2011 to assist him with an application for a liquor licence. For that purpose Davids entrusted a sum of R20 700

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<sup>4</sup> See, for example, *Ex parte Swain* 1973 (2) SA 427 (N) at 434 H. .

to Adams. According to the affidavit which Mr Davids filed with the Attorneys Fidelity Fund in November 2011 the said money was stolen by Adams. Adams has not responded to this or to any of the other allegations made by the Law Society in the striking-off and contempt applications.

(ii) 'Fit and proper' assessment

[26] I have no doubt in my mind that on the uncontested evidence Adams is not a fit and proper person to continue in practice as an attorney. He practised without a fidelity fund certificate in 2009 and 2010, in contravention of the Act and in knowing contravention of a court order. The inference of a wilful and *mala fide* contravention of the Act and of the order is justified, particularly in the absence of any response.

[27] I am inclined to think, particularly in the light of Adams' failure to offer any response to the contempt and striking-off applications, that this is enough to sustain a finding that he is not a fit and proper person. Nevertheless, his conduct in the Felix and Le Roux complaints and in the Davids matter places the issue beyond doubt. In the Felix matter he took their money, did no work, tried to fob them off with false information and made himself guilty of misappropriating trust funds. In the Le Roux matter he lied by his own admission to the presiding officer in the Strand Magistrate's Court on 14 June 2010. In the Davids matter he misappropriated R20 700.

(iii) The appropriate sanction

[28] A person who deliberately and persistently violates the Act and a court order, and who is capable of the dishonesty which Adams has exhibited, should *prima facie* be removed permanently from the roll. Adams has not filed answering papers and has done nothing to displace this *prima facie* view nor explained how, through appropriate conditions, he might be rehabilitated during a period of suspension. On the contrary, his failure to respond to serious allegations against him in three successive applications by the Law Society confirms the picture of a thoroughly unreliable and unprofessional person not worthy of the trust and confidence of members of the public.

[29] I thus consider that the Law Society is entitled to a striking-off order in accordance with the standard terms contained in the notice of motion.

The contempt application

[30] The findings made above justify that further conclusion that Adams' contempt has, in accordance with the criminal onus which applies in such matters, been proved beyond reasonable doubt.

[31] In considering the appropriate sanction, I take into account that the same conduct is in part the foundation for the striking-off order which is to be made. Although the striking-off order is primarily concerned with the protection of the public, it also constitutes from Adams' perspective a severe personal sanction. He will permanently be deprived of the opportunity to earn a living as an attorney. I thus consider that the penalty imposed pursuant to his contempt of court should not be directed at imposing further punishment but at providing him with a strong inducement not to violate the prohibition which will now exist against his practising as an attorney. Of course, this prohibition will now be sourced directly in the Act (particularly ss 83 (1) and (4)) rather than in a court order, but it remains important that Adams should not in future pass himself off as a person entitled to practise as an attorney. I would thus sentence him to a period of imprisonment of 30 days, such imprisonment to be suspended on appropriate conditions.

## Conclusion

[32] This court has already had occasion to remark on the need for the Law Society to act promptly when it has information of misconduct by a practitioner, and the court has deprecated delays which are not satisfactorily explained: see *Law Society of the Cape of Good Hope v Zietsman* [2010] ZAWCHC 219 paras 7-16). Regrettably the present case is another instance where the Law Society failed to act with due expedition – indeed, this is a more egregious example than *Zietsman*. On receipt of the Felix and Le Roux complaints it should have been obvious to the Law Society that Adams was *prima facie* guilty of serious misconduct in violating the interdict, in misappropriating trust funds and in having made dishonest statements in court. These matters should have been promptly investigated, and this should have led to the institution of striking-off proceedings by not later than the latter half of 2010, coupled (if this was thought appropriate) with a contempt application. The supplementary papers which the Law Society filed do not satisfactorily explain why it took until October 2012 for the Law Society to decide to seek Adams' striking-off. It is quite possible that the leisurely way in which the Law Society dealt with this matter has caused prejudice to members of the public who have dealt with Adams as an admitted attorney (for example, Mr Jamiel Davids, who lost R20 700 in his dealings with Adams in 2011). The Law Society's founding papers were also unsatisfactory in that certain of the complaints against Adams were not supported by admissible evidence. I trust that this is the last occasion on which this court will have to comment adversely on matters of this kind.

[33] Regarding costs, I do not think that Adams should be required to meet the costs associated with the appearance on 22 February 2013. Even if Adams had not belatedly appeared on that date to oppose the application, it would have been postponed because of the unsatisfactory nature of the Law Society's founding papers.

[34] I would make the following order:

*The striking-off application*

- (a) The respondent's name is struck from the roll of attorneys of this court.
- (b) Further orders are made in accordance with paras 2 – 11 of the notice of motion, including (in accordance with para 11.3 of the notice of motion) an order that the respondent pay the applicant's costs of and incidental to the application on a scale as between attorney and client, excluding however the costs of the appearance on 22 February 2013.

*The contempt application*

- (a) It is declared that the respondent committed contempt of this court's order of 30 June 2009 in case 7680/09 by practising as an attorney at least during August 2009 and May and June 2010.
- (b) The respondent is sentenced to a period of imprisonment of 30 days, the whole of which is suspended for five years on condition that the respondent is not convicted of contempt of the said order in case 7860/09 or of contempt of the order in case 19773/12 (by which the respondent has been struck off the roll of attorneys) or of a contravention of any offence contained in section 83 of the Attorneys Act 53 of 1979 where such contempt or contravention is committed during the period of suspension.
- (c) The respondent shall pay the applicant's costs on the scale as between attorney and client, excluding however the costs of the appearance on 22 February 2013.

**TRAVERSO DJP:**

[35] I agree and it is so ordered.

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TRAVERSO, DJP

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ROGERS J

## APPEARANCES

For Applicant:

Mr G. Bean

Bisset Boehmke McBlain

Cape Town

For Respondent:

No appearance