



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

In the application of

Case No: 6602/13

SERVAAS DANIEL THERON

APPLICANT

(for his re-admission as attorney and conveyancer)

And

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

**INTERVENING
RESPONDENT**

Coram: NDITA & ROGERS JJ

Heard: 13 FEBRUARY 2015

Delivered: 6 MARCH 2015

JUDGMENT

ROGERS J (NDITA J concurring):

[1] The applicant ('Theron') applies for his re-admission and re-enrolment as an attorney and conveyancer. The application is opposed by the intervening respondent ('the Law Society').

[2] Thereon was admitted as an attorney and conveyancer on 9 July 1980. Thereafter he practised as a professional assistant and later as a partner of the firm Guthrie & Thereon. This firm was founded by his grandfather and continued by his father. At the times relevant to the present case Theron was in charge of the firm's Caledon branch.

[3] The firm's auditors, Badenhorst Auditors, reported certain apparent irregularities concerning Theron in the latter part of June 2009. The firm wrote to the Law Society on 24 June 2009, summarising these irregularities and Theron's explanations and sought guidance on the way forward.

[4] Thereon resigned from the firm on 30 June 2009 and has not since practised as an attorney. On 22 July 2009 he and his former partners concluded a settlement agreement in terms whereof Theron was to forfeit the value of his share in the partnership and pay a substantial amount to the firm. The settlement agreement was varied on 28 August 2009.

[5] During October 2009 Badenhorst Auditors furnished an audit report to the Law Society. Theron provided his comments on the report and Badenhorst Auditors responded to those comments.

[6] On 20 April 2010 the Law Society issued an application to interdict Theron from practising pending a striking-off application. Theron filed a notice of opposition but subsequently abandoned the opposition. He says he did so on counsel's advice and because he was in any event not practising. The interdict was granted on 4 February 2011.

[7] On 3 August 2011 the Law Society issued an application for Theron's striking-off. Theron delivered a notice of opposition. When he failed to file his answering papers in accordance with an extension granted by the Law Society, the latter applied for an order to compel which was granted on 25 November 2011. On 21 December 2011 Theron filed his answering papers. The application was heard on 4 May 2012. Theron was represented by counsel who submitted that Theron should be temporarily suspended rather than struck off. On 17 May 2012 this court (Traverso DJP, with Saldanha J concurring) delivered judgment. The court ordered that Theron's name be struck from the roll of attorneys and conveyancers. There was no appeal against the judgment.

[8] The present application for re-admission was issued on 29 April 2013, that is about 11 months after the striking-off order. Theron's founding affidavit was accompanied by affidavits from various character witnesses. By way of a letter dated 20 May 2013 the Law Society identified certain matters it usually expected an applicant for re-admission to address. This led to a supplementary founding affidavit by Theron together with a further character affidavit. In February 2014 the Law Society, not being satisfied with the case for re-admission, delivered an application to intervene to oppose. During July 2014 Theron filed his replying papers which included supplementary affidavits by the character witnesses aimed at remedying criticisms of those affidavits made by the Law Society.

[9] At the hearing before us Theron was represented by Mr M Verster (the heads having been drawn by Messrs JJ Botha SC and Verster). Mr Koen of the Law Society's attorneys of record appeared for the Law Society.

[10] The re-admission application is governed by s 15(3) of the Attorneys Act 53 of 1979, which reads in relevant part as follows:

'(3) A court may, on application made in accordance with this Act, re-admit and re-enrol any person who was previously admitted and enrolled as an attorney and has been removed from or struck off the roll, as an attorney, if –

(a) such person, in the discretion of the court, is a fit and proper person to be so re-admitted and re-enrolled;...'.

[11] The principles which apply in such applications were recently set out, with reference to relevant authority, in the majority judgment of Ponnar JA in *Swartzberg v Law Society, Northern Provinces* 2008 (5) SA 322 (SCA). The onus is on the applicant to convince the court on a balance of probabilities that there has been a genuine, complete and permanent reformation on his part; that the defect of character or attitude which led to his being adjudged not fit and proper no longer exists; and that, if he is re-admitted, he will in future conduct himself as an honourable member of the profession and will be someone who can be trusted to carry out the duties of an attorney in a satisfactory way as far as members of the public are concerned (para 14). In considering whether the onus has been discharged the court must have regard to the nature and degree of the conduct which occasioned the applicant's removal; the explanation if any afforded by him for such conduct which might mitigate or aggravate the heinousness of the offence; his reaction to the enquiry into his conduct and the proceedings to secure his removal; the lapse of time between his removal and application for re-admission; his activities subsequent to removal; his expressed contrition and its genuineness; and his efforts at repairing the harm which his conduct may have occasioned to others (para 15).

[12] The attitude of the Law Society to the applicant's re-admission is a factor of importance. Although it is not a condition precedent for re-admission that the Law Society should be so satisfied, considerable weight must be given to its attitude (para 18).

[13] One of the factors mentioned above is the lapse of time between the applicant's removal and his application for re-admission. In *Pugh v Incorporated Law Society* 1909 TS 154 Innes CJ observed that the sanction of striking-off reflects the very grave nature of the attorney's wrongdoing. Though one not could fix a definite period for rehabilitation, 'it is under ordinary circumstances hopeless for him to approach the Court until a very considerable number of years has elapsed' (at 56; see also *Simpson v Incorporated Law Society* 1909 TS 103; *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 775H-776D). In *Pugh* a re-admission application, brought just under three years after the striking-off, was dismissed. In *Ex parte Aarons (Law Society, Transvaal, Intervening)* 1985 (3) SA 286 (T), where an application was refused, the applicant's counsel referred the court to various

cases in which re-admission was granted after what the court regarded as relatively short periods (at 300C-F). These periods ranged from three to nine years.

[14] I turn now to a consideration of the conduct for which Theron was struck from the roll. After an apparently unblemished career of many years, he came under financial pressure during the course of mid-2007 after he and his wife separated and he became embroiled in an acrimonious divorce. He had to pay her maintenance while attempting to sustain a new household and meeting his son's university expenses.

[15] Over the period September 2008 to March 2009 Theron paid various personal expenses from his firm's trust account, debiting the amounts to various deceased estates and other clients in respect of whom the firm held trust monies. These personal expenses included his obligations to SARS, university fees, MTN, Volkswagen and the Western Province Rugby Union. The total amount improperly drawn in this way, as admitted by Theron, was R415 686. In respect of certain other amounts he had explanations which Mr Koen was willing to accept for purposes of the present proceedings.

[16] Of the said amount of R415 686, all but R17 000 was debited to deceased estates. In the striking-off application Theron said that what he had done was draw trust cheques in favour of the firm to the debit of the estates, deposit the cheques back into the firm's trust account and then credit the monies to trust ledger accounts in his own name against which he thereafter drew cheques for his personal expenses. He claimed that the amounts represented interim executor's fees which the firm could lawfully have charged but in respect of which he had not actually raised debits in accordance with proper accounting practice. His conduct, so he alleged, was to the prejudice of his partners rather than the trust clients, because he was effectively appropriating the full benefit of the fees to himself.

[17] The balance of R17 000 was debited to monies held on trust in respect of a conveyancing transaction. Theron said that the amount represented 'wasted costs' which his firm could lawfully have levied in connection with amendments to contractual documents and for which the purchaser had accepted liability. He

admitted, however, that the wasted costs had not been debited as fees. He claimed, once again, that this prejudiced his partners rather than a trust client.

[18] In the Law Society's replying affidavit in the striking-off, delivered on 20 March 2012, its deponent said that Theron was being dishonest in asserting a belief that his firm was entitled to interim executor's fees. Given that he was an experienced attorney, he must have known, according to the Law Society, that in terms of s 51(4) of the Administration of Estates Act 66 of 1965 an executor was not entitled to receive any remuneration before the estate had been distributed as provided for in s 34(11) or s 35(12) as the case might be unless such payment was approved in writing by the Master. It was pointed out that Theron had not alleged the existence of such approval by the Master.

[19] Theron did not attempt to deal with the latter aspect by way of a supplementary answering affidavit. He did make a supplementary affidavit on the day of the hearing, 4 May 2012, in which he sought to introduce evidence of the settlement agreement reached between himself and the firm. That supplementary affidavit, which the court refused to receive, did not touch on what the Law Society had said regarding the interim executor's fees.

[20] In her judgment in the striking-off application, Traverso DJP said that Theron was being 'insincere' when he stated that the monies were debited to the deceased estates in the belief that he was entitled to interim executor's fees. She accepted the Law Society's criticism of the explanation. She said that Theron's explanation showed that he was 'prepared to attempt to justify his actions in a dishonest manner in order to try and minimise his culpability'.

[21] In the present proceedings Theron in his founding papers repeated his explanation concerning the debiting of the monies to the deceased estates and the conveyancing client without addressing what the Law Society had said regarding s 51(4) of the Administration of Estates Act and what this court said in that regard in the striking-off judgment.

[22] Another complaint which the Law Society relied on in the striking-off application concerned a cheque which Theron caused to be drawn on the firm's trust account in favour of himself and which he debited to the trust ledger account of Mr PJ Rust ('Rust'). This happened on 22 October 2008. Rust was a former colleague of Theron who had resigned from the firm in June 2007 and opened a furniture business in Caledon. The firm owed Rust money in respect of his withdrawal from the partnership. The trust ledger account in question related to the firm's said obligation to Rust.

[23] Theron's explanation was that in October 2008, at a time when he was involved in bitter divorce proceedings, his sister, who worked at a bank, facilitated a bank loan to him of R50 000. Of this sum she retained R20 000. Theron caused the balance of R30 000 to be paid into the firm's trust account and credited to Rust's ledger account. The money, he said, was never Rust's money. He (Theron) had only dealt with the funds in this way because he wanted to prevent his wife and her lawyers from learning of the loan. Because he was obliged to make all his bank statements available to them, they would have discovered the loan had he deposited the money into his own account. He said the money was paid into the trust account in this way for Rust's credit with the latter's knowledge and approval. Rust made a confirmatory affidavit to this effect.

[24] The Law Society in reply said that the explanation demonstrated that Theron had no inclination to differentiate between trust and business monies. In her judgment Traverso DJP agreed but added that the explanation demonstrated that Theron had used the trust account in an attempt to mislead his wife, her lawyers and ultimately the court and that this pointed to a character defect and lack of integrity.

[25] In his supplementary founding affidavit in the present proceedings Theron added some detail regarding the Rust matter which he had not mentioned in the striking-off application. He alleged that he had initially intended to use the sum of R30 000 to acquire an interest in Rust's close corporation (which conducted the furniture business), which was why he had credited the money to Rust's trust ledger account. He later decided against the investment and then wrote a trust cheque in his own favour for R27 000 so that he could pay his son's university fees. This

explanation, so it seems to me, is at odds with what Theron said in his answering affidavit in the striking-off application. In the earlier proceedings Theron did not claim that the money had been paid into the firm's trust account and credited to Rust's name in connection with any proposed investment transaction; he specifically said it was done to conceal the proceeds of the loan from his wife.

[26] Certain other matters were dealt with in the striking-off application. Cheques for Theron's personal expenses had been debited to trust ledger accounts in the name of the JB Beukes Testamentary Trust and Mrs E Bothma. In the Beukes matter, Theron alleged that one of the cheques was in payment of tax owed by the widow, Mrs Hester Beukes, and that the other two cheques, totalling R15 000, were part of loans of R60 000 and R100 000 which Mrs Beukes had agreed to make to him. In the striking-off application the Law Society criticised this explanation because no written loan agreements in support of his version were attached. In the present proceedings Theron attached documents signed by Mrs Beukes on 4 March 2009 and 6 May 2009 confirming that she had lent him R60 000 during 2008/2009 and a further R100 000 during April 2009. He said that the late Mr Beukes had worked for some years as the firm's bookkeeper and that he had been handling Mrs Beukes' financial affairs for more than ten years.

[27] Mr Koen for the Law Society argued the case on the footing that his client was not able to dispute Theron's version regarding the Beukes matter. I must nevertheless observe that I entertain what I regard as a legitimate sense of unease at the notion of an attorney obtaining personal loans from an elderly widow and then obtaining written consents from her after the event. Indeed, in *Law Society of the Northern Provinces v Dube* [2012] 4 All SA 251 (SCA) the court went further, stating that it was 'irregular and unethical' for an attorney to borrow money from a client (paras 21 and 25). Another feature which disturbs me about the Beukes matter is the following. Theron disclosed for the first time, as an attachment to his replying papers in the present proceedings, an affidavit made by his erstwhile partner Mr van Rooyen ('Van Rooyen') on 19 February 2013, ie about two months before the re-admission application was issued. In that affidavit Van Rooyen listed payments which the firm had made to trust clients from monies refunded to the firm by Theron after his resignation and stated that to the best of his knowledge there were no other

monies due to clients. Theron appears to have procured this affidavit as confirmation of the latter fact, and he produced it as part of his replying papers in support of his assertion that full reparation had been made. However, Van Rooyen's affidavit indicates that the amount owed to the JP Beukes Testamentary Trust was R407 125,75 and that this indebtedness was reflected in acknowledgments of debt dated 4 March 2009, 6 May 2009 and 15 June 2009. Theron in his explanations referred only to the first two acknowledgments of debt totalling R160 000. It is also not clear why, if these were loans concluded between the client and Theron personally, the firm found it necessary to make the reimbursement to the client. I am not convinced that the court has heard the full story regarding these loans.

[28] In regard to the Bothma matter, Theron explained the three trust cheques drawn in payment of his personal expenses as being repayments to himself of loans he had made to Mrs Bothma at a time when she was strapped for cash pending the sale of her late husband's property. The Law Society again criticised the explanation because no evidence of a written loan agreement was presented. In the present proceedings Theron attached two documents signed by Mrs Bothma which appear to confirm his explanation.

[29] In paying his personal expenses out of trust funds totalling R415 686, Theron, apart from breaching rules 13.13.7 and 13.13.9 of the Law Society's rules, committed theft. Until such time as invoices were passed for services duly rendered to the relevant deceased estates and other clients, the funds held for them on trust had to be retained intact (*Law Society of the Cape of Good Hope v Tobias* 1991 (1) SA 430 (C) at 442F-I). The fact that Theron might have believed that his firm would be entitled to raise fees for the amounts in question does not detract from this simple proposition (cf *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) paras 9-10). Both in the striking-off application and in the present proceedings Theron seems to have failed to appreciate this. In his answering affidavit in the striking-off application he denied having misappropriated trust funds, claiming that his accounting practice had not always been correct and that this was to the prejudice of his partners rather than the clients. I am by no means satisfied from his affidavits in the present case that he appreciates the true character of his misconduct or sees it in its true light.

[30] Furthermore, the exculpatory version he offered, if it were regarded as ameliorating the misconduct, depends for its cogency on the premise that his firm was entitled to debit the amounts in question as fees to the relevant estates. I have already observed that Theron has failed in the present proceedings to address what the Law Society and this court said in the previous proceedings regarding s 51(4) of the Administration of Estates Act. In the absence of evidence of the Master's written consent, his firm was not entitled to debit the fees at the time he used the trust funds in question. He has not frankly conceded that he knew this to be the case. There is also no evidence that his firm ever became entitled to charge the fees in question or did in fact charge them. Theron has not claimed that the firm has done so nor indicated that he has attempted to obtain evidence from his former partners in that regard.

[31] Van Rooyen's affidavit, which existed at the time Theron launched the re-admission application but which he only produced as part of his replying papers, may perhaps suggest that some of those fees were raised, since otherwise one might have expected a greater amount to have been refunded to trust clients. However, Van Rooyen's affidavit was not produced as evidence that any particular fees had been charged but rather in support of a contention that he had made full reparation to the firm and clients. The affidavit was only produced in reply. It raises certain unanswered questions. For example there is the discrepancy in the amount borrowed by Theron from the JP Beukes Testamentary Trust. The affidavit mentions refunds which the firm had to make to certain deceased estates not mentioned in the complaints canvassed in the striking-off. In other instances there are discrepancies in the amounts involved. For example, in the striking-off application the amount in respect of the estate of the late JJ du Toit was R10 000 whereas Van Rooyen's affidavit says that R50 000 had to be refunded. In respect of the estate of the late JP le Roux the amount mentioned in the striking-off application was R20 000 whereas Van Rooyen's affidavit refers to a refund of R45 713.

[32] Although Theron's misconduct in the above respects infected only a small part of an otherwise unblemished career, it was nevertheless not an isolated lapse. He perpetrated it over a period of at least six months by way of a number of payments for his personal benefit.

[33] In regard to the Rust matter, I have already commented on what seems to be a shifting of Theron's ground from the striking-off application to the re-admission application. His explanation in the striking-off application justified the criticism made in Traverso DJP's judgment. There is no reason to doubt the truth of his admission in the previous proceedings that he intended to conceal the loan proceeds from his wife in the divorce proceedings. The justness of the criticism arising from that conduct has not been fully and frankly conceded in the current proceedings.

[34] I accept that a strong motivation for Theron in seeking re-admission is to restore the reputation of his family, which has a long legal tradition. However, he has also stated in his replying affidavit that he has relatively few years left to practise professionally, that he has many financial commitments and cannot survive purely on the salary he earns with his current employer, Lifestyle Financial Services. While there is no shame in earning reasonable fees as a lawyer, it is not irrelevant that part of Theron's motivation to resume practice is the monetary burden imposed by current commitments. Financial stress was the reason for his previous lapses and will, it seems, continue to be a pressure which he will need to be able to resist, regardless how hard it presses.

[35] In the light of the above considerations and the very short period which passed from the time of the striking-off to the institution of the re-admission application, it is difficult to see how even the most convincing character evidence from third parties would enable a court to be satisfied of a genuine, complete and permanent reformation on Theron's part. But in any event the character evidence does not have this very convincing character. The force of the affidavits from certain lay acquaintances of Theron is inevitably reduced by the fact that the deponents are not lawyers with an appreciation of the very high standards which the court expects from practitioners and by the fact that they are his friends or associates with a natural sympathy for his plight. A further difficulty with those affidavits is that the deponents all had a very high regard for Theron until they learnt of his misconduct, ie were not able to perceive his character flaws at the time he was perpetrating the misconduct. And then, fairly shortly after he shared with them his fall from grace, they became convinced of his contrition and that he would not err again. It seems to me that all of them held this view, ie that he was fit to continue practising as an

attorney, before Theron was struck off the roll in May 2012. For example, Mr Louw, a financial broker, says that after an initial period of mistrust he began to entrust deceased estates to Theron as from October 2009. Mr du Toit, a credit manager, says that although his initial reaction was one of mistrust he subsequently recovered full confidence in Theron. He refers to their frank discussions over the last three years. However, this court was not satisfied that Theron was a fit and proper person to remain on the roll at the time he was struck off in May 2012. The primary focus of character evidence thus needed to be reformation in character subsequent to the striking-off.

[36] There was a character affidavit from one attorney, being Rust. He too, though, is Theron's friend, which may affect his impartiality. Furthermore, in the striking-off proceedings he filed a confirmatory affidavit regarding Theron's explanation for the debit of R30 000. It would be unfair to Rust, who is not a party to these proceedings, to express criticism of him but the cogency of his affidavit in support of Theron's character in the present proceedings is I fear diminished by his apparent confirmation in the earlier proceedings of the fact that he allowed Theron to use his (Rust's) trust account to conceal the loan proceeds from Theron's wife.

[37] An additional character witness was introduced as part of Theron's supplementary founding papers. The affidavit in question was by Dr JW Burger ('Burger'), a minister in the NG Church. Theron was a member of Burger's congregation in Caledon but there was little contact for five years until Theron contacted him in June 2013 to request an interview. Theron evidently wished if possible to have Burger's support in the re-admission application. Burger summarised the interview in his affidavit. His concluding recommendation in paragraph 10 was that Theron be given a chance to practise again, that he had learnt a harsh lesson and that he would tackle the remaining few years of his professional life with honesty and commitment. Burger expressed the view that Theron was not inherently an unreliable person.

[38] However, paragraphs 8 and 9 presented some difficulty for Theron, as the Law Society pointed out in its opposing papers. In those paragraphs Burger said that Theron in the interview expressed the view that he had not set out to behave

unethically but had committed accounting errors (*'... dat hy nie doelbewus oneties wou optree nie, maar wel boekhoukundige foute begaan het'*). He did not want to prejudice anyone but his decisions under pressure had been wrong decisions. He felt guilty for the damage he had caused to the firm's reputation, for the community's disillusionment and for the harm the affair had caused in his relationship with his children. Theron regarded the striking-off as very harsh (*'dat die tugmaatreëls baie streng was'*) and not in keeping with the nature of his misconduct. He had been able to explain most of the charges against him but was not given the opportunity to put his case to his partners. He needed to process these emotions and had made progress in doing so.

[39] For obvious reasons, the above statements by Theron to Burger do not inspire confidence that he has yet appreciated the true import of his misconduct. In response to the Law Society's criticisms in this regard, the applicant filed a further affidavit from Burger as part of his replying papers. The latter stated that Theron had indeed admitted during the interview that he had mismanaged and misapplied trust and business funds and that what he had done under financial pressure of the divorce was unethical. Regarding paragraph 9 of his earlier affidavit, Burger said that Theron had hoped that he would be suspended rather than struck-off but now accepted the sanction and wished to carry on with his life if afforded the opportunity.

[40] I am left somewhat uncertain as to what exactly Theron intended to convey to Burger. While I have no reason to doubt the sincerity of what Burger says in his supplementary affidavit, I also see no reason to doubt that he accurately conveyed, in paragraphs 8 and 9 of his earlier affidavit, the impression made on him by Theron during the interview. Burger does not say that he interviewed Theron again in order to clarify matters. I do not think, in the circumstances, that this single interview, with its equivocal import on matters crucial to the re-admission, can be given significant weight.

[41] Theron also delivered, as part of his replying papers, an affidavit by a Dr S Badenhorst, a counselling psychologist who interviewed him on three occasions for a total period of five hours during May and June 2014. She subjected him to certain psychometric tests. Her interpretation of the evaluation was that he 'has relative low

ego strength, is uncertain about himself, and finds it difficult to cope with life demands', that as a result of his limitations 'he attempts to present himself in a more positive light than what he is', that he attempts to please others to win their approval, which explains his behaviour in the past. His 'rigidness is overruled by his attempt to accommodate others', which results in him 'experiencing feelings of guilt'. After his fall from grace he lost hope for the future and experienced high levels of anxiety, using alcohol as a coping mechanism. He admitted that he had 'made a mistake' and showed remorse. He had suffered a great deal from humiliation in the community. He had also suffered financially, physically and emotionally. He was 'adamant not to overstep any unethical boundaries ever again'. She says: 'The opinion exists that the possibility for similar offences are unlikely'. Her recommendation was that the possibility of restoring Theron to his professional role receive 'positive consideration'.

[42] In my view, Badenhorst's recommendation, which seems to me to be tentatively expressed, does not appear to flow from the tests she applied and her assessment of Theron's personality. I do not doubt that she genuinely thinks he should be given another chance but I do not find in her report an expert assessment which gives the degree of assurance of reformation of character required for re-admission.

[43] I have taken into account that Theron has paid a substantial amount to the firm, both as reparation to clients and for damage caused to the firm's reputation, and that there are no outstanding claims by trust creditors. This, however, is not in itself evidence of reformation (though a failure to have made reparation would have called into doubt the genuineness of the remorse expressed by Theron).

[44] In matters like this one may feel a measure of sympathy for the applicant. It is not the purpose of this judgment to condemn Theron. It is possible that he would serve the community with diligence and integrity if re-admitted. However, the court must remind itself that the primary focus of its disciplinary jurisdiction is the protection of the public, not the punishment of the errant attorney (*Malan & Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 7; *Budricks* supra para 7). It is not the court's function, when considering re-admission, to give the

applicant 'another chance'. The court does not, in order to refuse relief, need to be satisfied that the applicant is not a fit and proper person to practise as an attorney. It is for the applicant to discharge the onus of convincing the court on a balance of probabilities that there has been a genuine, complete and permanent reformation on his part and that the defect of character or attitude which led to his being struck-off no longer exists and that he will if re-admitted conduct himself as an honourable and trustworthy member of the profession. I am not satisfied on these matters, from which it follows that the application must be dismissed with costs.

NDITA J

ROGERS J

APPEARANCES

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