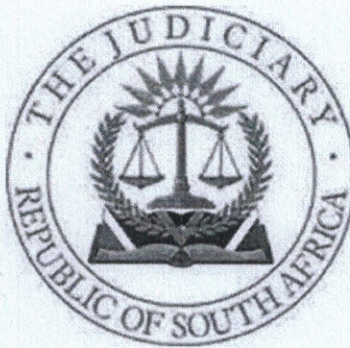




IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

In the matter between:

CASE NUMBER: 2433/2023

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

APPLICANT

and

LEBOHANG MICHEAL MOKHELE

RESPONDENT

CORAM:

VAN ZYL, J et VELE, AJ

HEARD ON:

07 SEPTEMBER 2023

JUDGMENT BY:

VELE, AJ

DELIVERED ON:

8 JANUARY 2024

[1] The South African Legal Practice Council ("the LPC", alternatively "the applicant") approached this court for the granting of the following orders against the Respondent:

- (i) That the Respondent be struck off the roll of legal practitioners of the High Court of South Africa;
- (ii) That the Respondent be directed to immediately surrender his certificate of admission and enrolment as a legal practitioner to the Registrar of the court within 10 court days of the order of this court;
- (iii) That should the Respondent fail to comply with prayer 2 above, the Sheriff of this court be authorised to take possession of the said certificate wherever and/or from whomever he or she may find it and hand it over the Registrar of this Court;
- (iv) That Margarette Van Wyk and her successor(s) in-title be and is appointed as Curator *Bonis* to the practice of the Respondent as contemplated in section 90(1)(c) of the Legal Practice Council Act 28 of 2014, and shall retain the powers and functions accorded to her in the orders of this Court granted on 22 November 2022 (the rule *nis*) and 20 April 2023 (confirmation of the rule *nis*) under case number: 5511/2022, which are attached hereto as annexure "Y" and "X" respectively.
- (v) The Respondent be ordered to pay the costs of this application at the scale of attorney and client;
- (vi) That such further and/or alternative relief, as this Court may deem appropriate, be granted to the Applicant.

[2] The Applicant is a body corporate established in terms of section 4 of the Legal Practice Act 28 of 2014 ("the LPA"), having jurisdiction over all the legal practitioners and candidate legal practitioners as contemplated in the LPA. The Respondent herein is Mr Lebohang Michael Mokhele, an attorney practising under the name and style of LM Mokhele INC, in line with the provisions of sec 34(5) (a) of the LPA, as the sole director thereof.

- [3] The background of the matter is that a rule *nisi* was granted against the Respondent under case number 5511/2022 on 23 November 2022 in terms whereof, *inter alia*, he was suspended from the practice of legal practitioners pending an application to have him struck from the roll of legal practitioners. The rule *nisi* was confirmed on 20 April 2023. This followed the complaints by two of his erstwhile clients Mr Xolile MacDonald Yawa ("Mr Yawa") and Mrs Mathabo Emily Tau ("Mrs Tau"). Their complaints were lodged independently regarding the manner the Respondent was executing their mandates. For convenience sake Mr Yawa's matter will be referred to as "the Yawa complaint", whilst Mrs Tau's matter as "the Tau complaint".
- [4] The Yawa complaint was initially a complaint against the manner in which the Respondent was dealing with the instructions to file a petition in the Supreme Court of Appeal against a decision of this Court not to grant leave to appeal in a deceased estate and customary marriage dispute. Events took a different turn when the LPC's Investigation Committee was involved and uncovered that the Respondent has made some withdrawals from the money deposited into his Trust account, without having done any work in line with the mandate.
- [5] The Tau complaint was in relation to the misappropriation of funds deposited in an interest bearing trust account of estate Late Lehlohonolo Winston Tau, lodged by Mrs Tau, the deceased's widow and heir to the estate, following the Respondent's failure to account for the monies he received on behalf of the estate. Once the LPC's Investigating Committee was involved, it uncovered unauthorised withdrawals of funds, in various transactions totalling of over R1 million, but not paid to any of the estate's creditors. The funds in the trust account were transferred without the consent of the Master of the High Court of the Free State or Mrs Tau.
- [6] The crux of the matter in both the aforesaid complaints is that the Respondent misappropriated trust monies entrusted to him.

- [7] I deem it apposite to record the following applicable principles as set out in the judgment of *South African Legal Practice Council v Melato* (1863/2020) [2021] ZAFSHC 305 (2 December 2021) at paragraphs 10 – 15:

"[10] When the court considers an application of this kind, it follows a three-stage inquiry: see, *inter alia*, *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); *Malan & Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA).

[11] Firstly, the court has to decide whether the alleged offending conduct has been established on a preponderance of probabilities. It is a factual enquiry.

[12] Secondly, the enquiry is whether the person concerned is, in the discretion of the court, not a fit and proper person to continue to practice or should be suspended from practice. This requires the court to exercise a discretion that involves a weighing up of the conduct complained of against the conduct expected of a legal practitioner, and in this regard it is partly value judgment and partly objective fact.

[13] Thirdly, the court enquires whether in all the circumstances of the matter the person in question ought to be removed from the roll of practitioners or whether an order of suspension from practice for a specified period might suffice. Again, this involves the exercise of a discretion as to whether the ultimate penalty is warranted in the circumstances.

[14] At this stage of the inquiry, the function of the court is primarily to protect the public, rather than punish the attorney. (See *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA) para 7.) That said, the Supreme Court of Appeal endorses a conservative approach to standing and erosion of professional ethics rather than "a kid gloves approach." [See *Malan*, *supra*, para 11, and *Hewetson v Law Society of the Free State* [2020] 3 All SA 15 (SCA) para 51.]

[15] Each case depends on its own circumstances. The entire inquiry is of a disciplinary nature, and how the court conducts the inquiry depends on the circumstances of the case. (See *Solomon v Law Society of the Cape of Good Hope*, 1934 A.D. 401 at 412.)

- [8] In the Yawa complaint lodged with the LPC on 30 August 2021, the complainant instructed the Respondent in December 2020 to file a petition to the Supreme Court of Appeal. The Respondent invoiced him R165 000.00 for services allegedly rendered, meanwhile nothing was done at that stage. Let it be said that

this was not a pro forma invoice, as there was no itemised billing attached. Following Mr Yawa's enquiry, the amount was reduced to R45 000.00, which he paid on 26 February 2021. This deposit increased the Respondent's trust account balance to R86 038.11. On 27 February 2021, a transfer of R69 500.00 was made from the trust account with reference "Fees February 15H00" to a beneficiary in a matter unrelated to Mr Yawa's matter, bringing the balance to R2 189.91, resulting in a trust deficit. The Applicant addressed several correspondences to the Respondent, which he failed to respond to.

- [9] The LPC was forced to bring an application under case number 3312/2022, in relation to Mr Yawa and two other matters, for an order to suspend the Respondent from practice as a precautionary measure pending the disciplinary hearing. The Respondent opposed same, merely denying making any transfers and failing to carry out the mandate of Mr Yawa. This application served before Mathebula, J and Mthimunya, AJ who dismissed the application, as they found that there was no factual basis to conclude that there was offending conduct, as the disciplinary hearings on this and two other matters were still pending. That was "the first application".
- [10] The Court as per Mthimunya, AJ, in *The Legal Practice Council v Lebohang Michael Mokhele* (3312/2022) delivered on 14/09/2022 referred to the Supreme Court of Appeal decision in *the Law Society of the Northern Provinces v Morobadi* (1151/2017) [2019] ZASCA 185, paragraph 25 thereof, but held at paragraph 26 of its judgment as follows:

"This court finds no factual basis to conclude that the offending conduct has been established, given that the disciplinary proceedings of the applicant have not been finalised have not been finalised on the one complaint and not been initiated on the other two. The basis upon which the applicant seeks a suspension order against the respondent has not been established. Undoubtedly, the applicant is agitated by the flippant approach adopted by the respondent in their dealings with each other. It raises eyebrows and respondent must be reined in to act in accordance with the prescripts of this noble profession. These matters must be brought to finality."

- [11] Though the application was unsuccessful, the court displayed its displeasure at the manner the Respondent was conducting himself. The Applicant is relying on the Court's remarks in the judgment delivered in the first application at paragraph 19 thereof:

"... The applicant has intimated misappropriation of funds on the basis that the Respondent would make transfers from the trust to the business account without issuing a statement of account. The Respondent when called upon to proffer an explanation shies away from the issues. He is less than candid with the applicant and this court. The irresistible conclusion is that there was such a trust."

- [12] Subsequent to the dismissal of the first application, the LPC then instituted disciplinary proceedings in respect of the Yawa complaint consisting of eight charges. The disciplinary hearing commenced on 25 October 2022 and concluded on 21 February 2023. The charges were the following:

Charge 1. Breach of provision 3.11 of the Code of Conduct for all practitioners, in that he failed to file a petition for leave to appeal in the Supreme Court of Appeal, after being instructed to do so and paid the amount of R45 000.00.

Charge 2. Breach of the provisions of Rule 54.12.3 and 54.12.4, as he failed to provide Mr Yawa with a statement of account within a reasonable time after his mandate was terminated.

Charge 3. Breach of provision 18 of the Code of Conduct for all legal practitioners, as he failed to issue Mr Yawa with a receipt after R45 000.00 was paid into his trust account on 26 February 2021; alternatively; breach of Rule 54.14.09 of the Legal Practice Act Rules, on 26 to 27 February 2021, as the Respondent made various payments to persons other than trust creditor Mr Yawa, causing a trust credit shortfall.

Charge 4. Breach of the provisions of Rule of 54.14.10, as he failed to immediately report trust account shortfall to the Applicant; alternatively, contravention of Rule 54.14.11 in that the firm should immediately report in

writing to the Applicant once any account of a trust creditor be in debit. The Respondent received R45 000.00 into his trust account on 26 February 2021, made a transfer of R69 500.00 termed "Fees February 15H00" to a beneficiary that was no trust creditor of Mr Yawa, which left the trust account in balance of R2 189.91, which resulted in a trust deficit.

Charge 5. Breach of provision 16.4 of the Code of Conduct for all practitioners, as he hampered the Applicant from doing its work, by failing to provide statements of account and copies of his file, requested in a letter dated 31 May 2022, sent to him on 01 June 2022.

Charge 6. Breach of provision 3.1 of the Code of Conduct for all practitioners, in that he failed to maintain the highest standard of honesty and integrity, when he refunded Mr Yawa with another trust creditor's funds in March 2022 and misled Mr Yawa that the LPC informed him that Mr Yawa should enter into a settlement agreement in which he was to withdraw his complaint against the Respondent, as set out in Mr Yawa's affidavit dated 28 July 2022.

[13] The Respondent's explanation for transferring the R45 000.00, was that he paid same to one Yossi Vissoker, a handwriting expert he commissioned to authenticate the signatures on a relevant document, but Mr Vissoker failed to provide the report, as requested. He recovered the amount paid to Mr Vissoker and refunded it to Mr Yawa in February or March 2022. However, the Respondent was unable to provide any invoice issued by Mr Vissoker, which was the basis for transferring the funds, nor was he in a position to show proof of payment to Mr Vissoker.

[14] Once all the evidence, including the Respondent's was heard, the Disciplinary Committee found the Respondent guilty of all the main charges against him and referred the matter to the LPC with the recommendation to bring the application to strike the Respondent off the roll of legal practitioners.

[15] The Tau complaint was next. Mrs Tau lodged a complaint against the Respondent, as he failed to account to her as to how funds deposited into her late husband's

estate trust account were dealt with. The Respondent prepared and lodged two liquidation and distribution accounts with the Master of the High Court, Free State, but failed to reflect an amount of R1 million received from FNB Life Insurance. The LPC in reaction to Mrs Tau's complaint, addressed a letter, dated 27 July 2022, for his attention, with the reply due by 26 August 2022. This Respondent did not reply. The position was the same with a follow up letter sent on 31 August 2022, for his reply on 14 September 2022.

[16] The LPC's Investigation Committee uncovered the following:

16.1 The Respondent was appointed as Executor in Estate Late Tau in April 2021 and opened an estate late bank account at Standard Bank. During the period 28 May 2021 to 18 June 2021, the total sum of R1 131 710.29 was deposited as follows: 28 May 2021, R89 160.00 deposited from FNB Life Insurance; on 29 May 2021 an amount of R42 550. 29 and on 18 June 2021 a lump sum of R1 000 000.00 from FNB Life Insurance.

16.2 Subsequent to the deposits, various transfers took place from the estate late account: The first transfer being on 13 September 2021 with reference 2021256001/1 for the sum of R50 000.00; on even date a further transfer of R100 000.00 with reference 2021256001/1 was made; on 07 October 2021 a transfer of R35 000.00 was made with reference E/L Tau Loan; on 15 October 2021 a transfer of R54 000.00 was made with reference Tau Loan; on 29 October 2021 a transfer in the sum of R473 643.00 was made with reference Loan; on 05 November 2021 a transfer of R30 000.00 was made with reference Loan; on 30 November 2021 a transfer of R170 000.00 was made with reference Loan; on 10 December 2021 a transfer of R100 000.00 was made with reference 20211344001/1; on 29 December 2021 a transfer of R70 000.00 was made with reference E/L Tau; on 10 January 2022 a transfer of R7 000.00; on 22 January 2022 a transfer of R10 000.00 was made with reference E/L Tau Loan and finally on 31 January a transfer of R40 000.00 was made with reference E/L Tau. The important factor is that not one of the said transfers were authorised by either the Master or Mrs Tau, who was still to receive a payment, and the

payments preceded the lodging of the first and second Liquidation and Distribution accounts with the Master.

- [17] Mrs Tau flagged the Liquidation and Distribution account after she noticed that the amount R1 000 000.00 was not reflected therein and sought the intervention of Ms Erna du Pisanie of the Master's Office. Ms Du Pisanie arranged a meeting, during which the Respondent confirmed that the amount of R1 000 000.00 was omitted from the Liquidation and Distribution account and amended same prior to again filing it with the Master's Office on 12 September 2022, long after the last transfer had been made.
- [18] The Investigation Committee concluded that the Respondent contravened provisions of the LPA, as well the Administration of Estates Act, as he failed to account for funds received on behalf of the deceased estate, he failed to respond to communication, he failed to deal with Mrs Tau's instruction and he misappropriated trust monies. Once again, the Investigation Committee recommended that the LPC initiate urgent court proceedings in terms of section 43 of the LPA to obtain interim relief and referred the matter to the Disciplinary Committee to conduct a hearing against the Respondent.
- [19] The Applicant approached the court under case 5511/2022 on 04 November 2022 and filed the affidavits of Mrs Tau, confirming that she received no pay - out, and Ms Du Pisanie, confirming that when the transfers were made, they were not authorised by the Master. The LPC sought a rule *nisi* to suspend the Respondent from practice pending an application to strike the Respondent from the roll of legal practitioners. That was the "second application". The Respondent opposed the application and denied that funds had been transferred from the estate late account to his business account. He questioned the veracity of the bank statements and made a derogatory statement that the LPC fabricated the statements. The Respondent's affidavit contained certain glaring flaws, like the deponent's signature, which differed from the one appearing in his answering affidavit in the first application, but the Respondent was adamant that it was his signature.

- [20] On 23 November 2022, the second application was heard by Reinders, J and Boonzaaier, AJ, who granted the rule *nisi* with concomitant interim orders, suspending the Respondent from practice of legal practitioners with immediate effect, pending an application to have his name struck from the roll of legal practitioners.
- [21] On 05 December 2022, the Respondent lodged an application for leave to appeal the interim order. In the meantime, he addressed a letter to the Applicant's attorneys of record informing them of his intention to continue practicing as a legal practitioner, as, according to the Respondent, the application for leave to appeal suspended the order dated 23 November 2022. He demanded the return of all files uplifted by the LPC on 24 November 2022 by no later than close of business on the same day. He further demanded that the bar placed against him applying for a 2023 Fidelity Fund Certificate be removed. On 06 December 2022, the LPC responded and raised concern about his unrepentant and brazen non-compliance with the court order.
- [22] In defiance of the court order, he continued to practice, as he appeared in this court on 06 December 2022 in the matter of S v Bakili, case number 38/2019, instead of appearing at his disciplinary hearing scheduled for the same time. He again appeared in this court on 20 January 2023 in the matter of S v Mokhesi and 17 others under case number 45/2021. This called for the LPC's urgent intervention in protection of the rule of law, court integrity and unassuming members of the public.
- [23] The LPC consequently launched an urgent application seeking that the Respondent be declared to be in contempt of court. The Respondent filed an opposing affidavit in which he maintained his stance that the interim order has been suspended by the filing of his application for leave to appeal. That was the "third application".
- [24] The contempt application was heard by Daffue, J on 06 March 2023, with the judgment handed down on 17 March 2023. He found the Respondent guilty of contempt of the order and imposed the sanction of committal to imprisonment for

a period of one month, wholly suspended on condition that the Respondent complies with the order.

[25] The application for leave to appeal the interim order in the second application was set down for hearing on 24 March 2023. On 23 March 2023, the Respondent filed a supplementary notice to the notice to appeal, citing new circumstances in favour of granting such an application. He started singing in a different tune, as he indicated for the first time since the commencement of the matter that indeed, all the transfers as stated in the affidavits filed in support of the applicant's case, had in fact been made from the Estate Late Tau's account. He, however, stated that he has now repaid all the funds into Mrs. Tau's newly instructed attorneys' trust account and therefor there is no more prejudice to or impoverishment on Mrs. Tau's part.

[26] His previous statement in the answering affidavit that bank statements were fabricated by those in charge of the LPC changed, like day to night. This is dishonesty of the highest order. During the hearing of the application for leave to appeal the interim order, in which application the Respondent represented himself, he spontaneously conceded during argument that the interim order had correctly been granted and that Reinders, J and Boonzaaier, AJ did not misdirect themselves in granting same. In the founding affidavit filed in the current application at para 127, the Applicant quoted the Respondent's address at the aforesaid leave to appeal proceedings, which reads as follows:

"And, my Lady, again, the fact that there are changed circumstances, it is true that when the Honourable Court considered the initial application, this changed circumstances were not, definitely not before Court and I cannot ever falter the Honourable Court for granting such an order and I am not even saying that the Honourable Court made a mistake by such order, but I am duty bound to bring any changed circumstances to the fore of the Honourable Court to say that when the initial application was considered, and if these factors were not placed before the Court and I am requesting the Honourable Court to consider them when they hear an application for leave to appeal."

[27] This is an indication that at no stage did the Respondent act in good faith when he stated that the court had erred or misdirected itself when granting the rule *nisi*.

If anything, he was merely buying time for himself to continue practicing. Even after the Respondent's aforesaid concession, he persisted with his application for leave to appeal based on the alleged "changed circumstances". Reinders, J and Boonzaaier, AJ consequently refused the application for leave to appeal in their judgment dated 27 March 2023 and the rule *nisi* remained in place, returnable on 20 April 2023.

- [28] For purposes of the return date of the rule *nisi* issued in the second application, the Respondent filed a further supplementary affidavit stating that Mrs Tau was repaid in full on 10 January 2023, after they entered into a settlement agreement for her to withdraw the complaint. He gave an interesting explanation of how the funds were "erroneously" transferred by one of his staff members, one Malik Van der Ross into his business account. He submitted it exonerated him from misappropriating the late estate funds. The court rejected this explanation, on the basis that it was devoid of the truth, since he also failed to give reasons as to why payments were made, prior to the finalisation of the administration of the estate and the Master's authorisation. He stated at paragraph 18 of his supplementary affidavit as follows:

"The transfer of such funds from estate account of the client was mistakenly done by the firm's estate administrator in that, he rendered under the mistaken impression that, the monies belonging to the estate will be paid from business account, where the money will be ultimately deposited."

- [29] On the return date, the matter was before Mhlambi, J and Berry, AJ, who rejected this version. Mhlambi, J in his *ex tempore* judgment, saw through the alleged change of circumstances and dismissed it as a ploy to circumvent the effect of the interim order. He further found both the answering and supplementary answering affidavits to be lacking in as far as truth was concerned. The Respondent's half-hearted challenge of the application was baseless, but an attempt to avoid the unavoidable. Mhlambi, J further found that the alleged "changed circumstances" confirm that the Respondent did not keep proper books of his practice and misappropriated funds. The rule *nisi* was then confirmed.

- [30] Let us take this for a moment to be correct, is it not against the very reason why a clients' funds are kept in a trust account, separate from an attorney's business account, the latter being funds he can deal with as he pleases? The only logical conclusion is that the funds were placed into the business account for his sole benefit, as not a single creditor of Estate Late Tau benefited from the payments. Up to now, the Respondent has not divulged as to how these funds were distributed and for what reason as we know for a fact that they were not and could not have been "loans". In any event, if these payments had been made by the firm's estate administrator, Mr Van der Ross, it is a further indication that the Respondent had abdicated his responsibilities and outsourced them to someone who lacked the basic understanding of how a trust account operates, without any form of supervision whatsoever.
- [31] Clearly, his conduct constituted gross negligence, which amounted to recklessness. It is against the very spirit of operating a trust account, which is a safe environment for a third party's funds. Mr Van der Ross' confirmatory affidavit does also not address this maze either, namely how trust funds can be mistakenly confused for business account funds. Interestingly enough is the fact that some of those transactions were recorded as "loans", an indication that funds were transferred with the intention to be refunded, which is what took place here, as he repaid. However, the fact that it had been repaid, does not negate the fact that the payments constituted unlawful and illegal payments. We should also not forget that this happened against the backdrop of his answering affidavit in the second application, the rule *nisi* application, in which he denied that any such transfers took place, insinuating that the bank statements that were used in support of the application were fabricated by the LPC and did not constitute a true and correct reflection of any of his accounts, without any further explanation. He therefore either hastily replied without any attempt whatsoever to verify the true state of affairs or he was concealing the truth.
- [32] With regard to the Yawa complaint, the Respondent informed the Disciplinary Committee that he responded to the LPC's letters as requested by them, but failed to provide any proof thereof, citing the removal of files from his office by the Applicant as his reason for lack of proof. The Respondent was just misleading

the proceedings as even during the first application when all his files were still in his possession, he did not produce same. His lack of honesty persisted.

- [33] He was not sure as to when the refund to Mr Yawa was done, simply saying it was in February or March 2023. This is interesting as the Respondent was expected to keep record of all funds coming in and going out of his trust account and should be able to state a specific date of the said transaction. The bank statements reflect a transfer of R69 500.00 into his business account as fees. The Respondent is well aware of the accounting practice requiring him to show where funds are from and where they ended. Strangely enough, this was not raised in his answering affidavit filed in the first application, which preceded the disciplinary hearing, as all he did was to deny the transfer of funds from his trust account. Perhaps an afterthought?
- [34] In similar fashion to the Tau complaint, he changed his stance from complete no knowledge of the transfer of the money from the trust account, to having an explanation as to what happened to the funds after having being deposited into his trust account. He confirmed that the R45 000.00 was transferred into the account of one Vissoker, a hand – writing expert, as fees. The amount was later transferred back into his trust account and refunded to the complainant after they reached a settlement agreement, that Mr Tau will withdraw the complaint. Unfortunately, for him, there is no paper trail for this so-called transaction. He has no invoice nor proof of transfer of the said amount. There is no correspondence addressed to Mr Vissoker inquiring about the progress of the instructions, as all the blame was placed on his shoulders. The worst thing for the Respondent is that he could not produce any bank statement reflecting Mr Vissoker having deposited the funds back into the Respondent's trust account and/or the date of such deposit.
- [35] The Respondent was handling the trust account the same way a street – hawker deals with his customers, no paper trail. All we know is the funds were transferred into his business account, as early as the day after it was deposited into his trust account, with no work was done, hence the full refunds. Another interesting point is how Mr Yawa was actually pressurised to pay the said amount. He was

informed that the funds were urgently needed for the filing of his application at the Supreme Court of Appeal. It started as an invoice of R160 000.00 as a global figure, with no itemized billing, which ended in a discounted amount of R45 000.00, which is just over a quarter thereof, still without providing the itemized account.

[36] This gave rise to charges 1 to 6 at his disciplinary hearing, referred to earlier. He was rightly found guilty on the said charges.

[37] I will move to Mrs Tau's complaint. The Respondent's conduct was more than brazen, as he first attempted to conceal a deposit of R1 000 000.00 by not reflecting it in the Liquidation and Distribution account. Surely, he intended embezzling the said funds to the detriment of the orphaned children and their mother, who had no means to take care of them. He started by transferring small amounts, as time progressed the withdrawal increased to several hundred thousands of rand. All this was happening before the Liquidation and Distribution account was placed before the Master for authorisation and without the consent of Mrs Tau, whose pleas for funds to be released to maintain her children, were falling on deaf ears.

[38] The Respondent is opposing this application to strike him from the roll of legal practitioners on procedural grounds as well. According to the Respondent, the non-compliance by the Applicant with alleged procedural requirements denied him his constitutional right as set out in section 34 of Constitution of South Africa Act 108 of 1996, which reads as follows:

"Everyone has a right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal and a disciplinary committee."

[39] The first issue raised by the Respondent is the Applicant's failure to have constituted a disciplinary hearing in respect of the Tau-complaint before having approached Court for him to be struck from the roll of legal practitioners. The second issue is the Applicant's alleged denial of the Respondent's right to appeal

the outcome of the Tau-disciplinary hearing before having approached Court with the present application. The Respondent states that after the Disciplinary Hearing Committee found him guilty on all the main charges in the Yawa-matter, he intended appealing the outcome, but the Applicant informed him by means of a letter dated 31 May 2023 as follows:

"You are further advised of your rights to appeal to the appeal tribunal within 30 days as per Section 41 read with Rule 44.1 (*sic*) of the Legal Practice Act 28 of 2014. Please be advised that at the present moment appeal tribunals have not been constituted as yet, therefore you may direct your appeal to the High Court, if not satisfied with the decision of the Disciplinary Committee."

[40] The enabling S 41(1)(a) and (4) of the LPA came into effect on 26 May 2023. The relevant parts of the said section read as follows:

"41(1)(a) ...a legal practitioner may..., as determined in the rules and within 30 days of being informed of the decision by a disciplinary committee, lodge an appeal with an appeal tribunal established in terms of subsection (2) against a finding of misconduct by the disciplinary committee or against the sanction imposed, or both;

...

(4) If a legal practitioner ... who has been found guilty of misconduct lodges an appeal in terms of subsection (1), the decision of the disciplinary committee may not be enforced before the appeal tribunal has decided the appeal."

[41] At the time of the finalization of the disciplinary hearing in the Yawa-matter, the enabling section 41 had therefore not yet come into operation. At the time when the letter was addressed to the Respondent, the enabling section had been proclaimed, but such appeal tribunals had not yet been established. However, in so far as the letter intended to advise the Respondent that he could appeal the finding of the disciplinary hearing to this Court on the basis of S 44 of the LPA, such advice was incorrect, since this Court could only review such a finding. It cannot entertain an appeal against such a decision.

[42] Section 44 of the LPA reads as follows:

"44 Powers of High Court

- (1) The provisions of this Act do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity.
- (2) Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or juristic entity or in connection with any decision of a disciplinary body, the Ombud or the Council in connection with such complaint or charge."

[43] Mr Mpahlwa, who appeared on behalf of the Respondent, relied on the judgment of *Samuels v South African Legal Practice Council* (formerly Law Society of the Northern Provinces) (1112/2021) [2022] ZASCA 175 (7 December 2022), in which an appeal was upheld, wherein procedural unfairness was the main issue for determination within the context of an application to strike an attorney from the roll of legal practitioners. However, from a reading of the said judgment it is evident that the facts of that matter are vastly distinguishable from the facts of the present matter to the extent that it cannot be relied on by the Respondent for purposes of the present matter. See *Melato v South African Legal Practice Council* (3380/2020) [2021] ZANWHC 5 (18 February 2021) (*which is actually a judgment of this Division of the High Court*). See also *South African Legal Practice Council v Mphanama* (9875/2022) [2022] ZALMPPHC 70 (13 December 2022). See further *Law Society of the Northern Provinces v Soller* (992/2001) [2002] ZAGPPHC 2 (26 November 2002).

[44] On the other hand, Mr Mazibuko, who appeared on behalf of the Applicant, referred to several decisions by the various Divisions of the High Court, including this Division, where it was held that a disciplinary hearing was not a pre-requisite for the bringing of an application to strike a legal practitioner from the roll. If the LPC is on the evidence available to it, of the opinion that a practitioner is no longer fit and proper to continue practising, it is entitled to approach court for an application to strike the practitioner from the roll of legal practitioners without being compelled to first proceed with a disciplinary hearing.

[45] The Supreme Court of Appeal reinforced the viewpoint of the various divisions of the High Court regarding an application to strike a legal practitioner from the roll without first conducting or finalizing a disciplinary hearing and confirmed that the provision of section 44 of the LPA was in line with the section 34 of the Constitution. The test is whether the practitioner is no longer considered a fit and proper person in the opinion of the Council acting objectively in line with the facts before it. See *Law Society of the Northern Provinces v Morobadi* [2018] ZASCA 185; [2019] JOL 40677 (SCA) at paragraph 25:

"... In general it is correct that the Council may proceed with the application for the striking off of the practitioner or for his or her suspension from practice without pursuing a formal charge before a disciplinary committee if in its opinion, having regard to the nature of the charges, a practitioner is no longer considered to be a fit and proper person."

[46] In *South African Legal Practice Council v Mphanama* (9875/2022) [2022] ZALMPPHC 70 (13 December 2022) Makgoba, JP held the following at paragraphs 5 to 6:

"[5] The right of the Legal Practice Council ("the LPC") to approach the Court for relief as sought in the present application before us does not depend on its prior holding of a disciplinary enquiry against the legal practitioner concerned.

The Court has inherent powers to hear the application for suspension or striking off a legal practitioner's name from the roll of legal practitioners irrespective of whether or not disciplinary steps have been taken against a legal practitioner by the LPC.

[6] The respondent legal practitioner has no right to insist upon a disciplinary enquiry being held prior to steps being taken for his removal from the Roll of legal practitioners. In fact, the Court can *mero motu* initiate steps to strike a legal practitioner's name off the Roll of legal practitioners."

- [47] The Respondent's opposition of the application on the basis of alleged procedural issues can consequently not succeed. In this instance, the Applicant did not commit any procedural irregularities. Furthermore, the Respondent had more than ample opportunity to record his version of the relevant events and to state his case during and throughout the respective court applications referred to earlier, including the present application. The Respondent did not suffer any procedural unfairness. See *Law Society of the Free State v Le Roux and Others* (3039/2014) [2015] ZAFSHC 233 (30 November 2015) at paragraph 79.
- [48] In view of the totality of the facts and circumstances already with in this judgment, and my conclusions in relation thereto, I am furthermore satisfied that the alleged offending conduct has been established on a preponderance of probabilities.
- [49] It is an objective fact from the affidavits dealt with above that the Respondent has already made a number of damning admissions regarding the manner in which he dealt with the applicable trust funds. His behaviour was similar to that of the First Respondent in *Law Society of the Free State v Le Roux and Others*, *supra*, wherein Molemela JP (as she was then) at paragraph 80 held the following:
- "[80] The first respondent makes false statements without flinching and takes no responsibility for his actions. This court takes a dim view of an officer of the court who has no qualms in being untruthful to a court, for it demonstrates a lack of two important qualities that are the very essence of an attorney's profession: honesty and integrity. The attorney's profession is indeed an honourable profession, which demands complete honesty and integrity from its members. In consequence, dishonesty is generally regarded as excluding the lesser stricture of suspension from practice, while the same can usually not be said of contraventions of a different kind."
- [50] The Respondent initially opposed the applications to suspend him and pretended to be ignorant of the misappropriation of trust funds in respect of the two complainants. He even insinuated that the Applicant's Investigation Committee fabricated the bank statements that were used in support of the charges against him. The Respondent's lack of honesty and integrity can be seen throughout this whole matter. His false statements did not end at the disciplinary hearing, but continued in the affidavits filed in the respective applications. The Respondent

was just entangling himself deeper into the spider's web with his lies. Even though he had opportunities to redeem himself, he failed to do so.

[51] The Respondent did not want to take responsibility, even though it is clear that he cannot plead ignorance of the transfers which were made from his trust account, not into any other account but his own business account. Though he wanted us to believe that this one Vissoker was the one to whom the money was paid in the Yawa-complaint, he did not obtain a confirmatory affidavit from him, nor did he at least attach his invoice or proof of the deposit. The horse had already bolted by the time he wanted to close the stable, as it was only during the return date of the second application that he half-heartedly started to acknowledge that the relevant irregular and illegal transfers had been made from his trust account funds and attempted to provide explanations with regard thereto.

[52] It is in my view evident that the offending conduct of the Respondent clearly did not accord with the conduct expected of a legal practitioner.

[53] In resisting the Applicant's request for striking off as the only appropriate sanction, the Respondent is clinging to the fact that he has refunded the complainants. This aspect was dealt with and scorned by Legodi, JP in *Law Society of the Northern Provinces v Mabunda* [2019] ZAMPMBHC 8; 2734/2018 (18 October 2019), where he held the following at paragraphs 23 to 24:

"[23] It is common occurrence for errant attorneys that when investigated, they would rush to their clients almost seeking to silence them by paying them out of whatever source and then request them to withdraw the complaint. Unfortunately, by that time the horse would have already bolted. Trust money would have been misappropriated. A conduct that cannot be swept off the carpet by rushing to client, asking for apology and paying what was supposed to have been paid long ago.

[24] Insofar as Mr Mabunda might have seen his conduct of seeking to dispose of the complaints with clients in the process of investigation by its professional body, as mitigating, he is wrong. It is actually aggravating in itself. It amounts to defeating the end of justice. This is not only unprofessional but it also amounts to criminal unlawful

conduct the same way as misappropriation of trust funds does. It therefore cannot be minimised by paying what was long due to trust creditors."

- [54] It is the Respondent's attitude that since the money has been reimbursed, his conduct should be excused, which is the wrong way of approaching the matter. He is not remorseful at all, which is, *inter alia*, evident from the fact that he wanted to blame Mr Yawa for the situation he is presently finding himself in, since Mr Yawa reneged from their earlier agreement that should the Respondent reimburse him, Mr Yawa would in exchange withdraw the complaints against the Respondent. This is the very conduct Legodi, JP lamented about as being a trend when legal practitioners find themselves in situations similar to that of the Respondent. He has not apologised to those he wrongly and without any basis accused of having falsified the bank statements. He initially was non-responsive to the Applicant's several correspondences regarding the complaints against him. The Respondent also resorted to intimidating the complainants in the matters under investigation. He only reacted when the first application to suspend him from practice was brought before court.
- [55] Misappropriation of trust funds is a very serious offence, which must be dealt with harshly. The Respondent was the sole director of the practice and wanted the court to believe that he had outsourced the financial aspect to an unqualified person. Even if it is for a moment accepted to be true, it constituted reckless conduct on his part, for which he fails to accept responsibility.
- [56] It is part of an attorney's training how to deal with trust funds and to keep proper records of each amount received and paid out. Funds may only be transferred into the business account once work has been done and recorded as fees in an itemized manner so as to justify such a transfer. The bank statements in the present matter reflect something different, since trust money was transferred as soon as it was deposited without any record of work having been done. In the case of Mr Yawa, his instructions were not carried out, but the full amount was transferred the following day. In Mrs Tau's matter the Respondent misappropriated funds in excess of R1 100 000.00 The Respondent embezzled the R1 000 000.00 as it was not disclosed in the Liquidation and Distribution

accounts submitted to the Master. All transactions were conducted through his business account mostly disguised as so-called loans.

[57] The Applicant has proven that the Respondent was not only reckless in managing his practice, but his conduct also fell short of the two crucial elements of being a fit and proper person to practice as an attorney, which are honesty and integrity.

[58] The next question is what the appropriate sanction in the circumstances would be? Should the Respondent be struck from the roll and therefore barred from practicing as an attorney or should a lesser sanction be imposed in the circumstances?

[59] The nature of the Respondent's misconduct is very serious. Not only did he act recklessly, but his general conduct in dealing with these complaints from the start, are indicative of his failure to admit accountability. Furthermore, and importantly, it is evident that the Respondent lacks honesty. I have already dealt with the dishonest conduct of the Respondent in relation to the two complaints in his handling of the relevant trust funds and also in relation to the contents of his affidavits filed in the respective court applications, including the present one. It is therefore evident that the Respondent also lacks the required integrity. Members of the public are to be protected from attorneys of his ilk. The fact that the complainants have been reimbursed, cannot in the circumstances of this matter serve as a mitigating factor.

[60] When considering all the relevant facts and circumstances of this matter, I consequently have no doubt that the only appropriate sanction for the Respondent is that he be struck from the roll of legal practitioners.

[61] In the Notice of Motion the Applicant is seeking an order that the Respondent be ordered to pay the costs of the application on an attorney and client scale. Considering the outcome of the application, there is no reason why the Respondent should not be ordered to pay the costs of the application. Since the usual order in applications such as the present is that costs are to be paid on an attorney and client scale, there is also no reason to deviate from the usual order.

[62] The following orders are consequently made:

1. The name of the Respondent is struck from the roll of legal practitioners of the High Court of South Africa.
2. The Respondent or any other employee of the Respondent is prohibited, with immediate effect, from operating and dealing with any of the trust banking accounts of the Respondent's practice, the banking accounts of any deceased estates in respect of which the Respondent has been appointed as executor or Master's representative and any banking accounts of any insolvent estates in respect of which the Respondent has been appointed as a liquidator.
3. The Respondent is directed to immediately surrender his certificate of admission and enrolment as a legal practitioner to the Registrar of this Court within 10 court days from date of this order.
4. Should the Respondent fail to comply with prayer 3 above, the Sheriff of this court is authorised and directed to take possession of the said certificate wherever and or from whomever he or she may find it and hand it over the Registrar of this Court.
5. Margarette Van Wyk and her successor(s) in-title is appointed as Curator *Bonis* to the practice of the Respondent as contemplated in section 90(1)(c) of the Legal Practice Act 28 of 2014 ("the Act"), to administer and control the trust accounts of the Respondent and any accounts relating to insolvent and deceased estates and any deceased estate and any estate under Curatorship connected with the Respondent's practice as an attorney and including the separate banking accounts opened and kept by the Respondent at a bank in the Republic of South Africa in terms of section 86(1) of the Act and/or any separate savings or interest-bearing accounts as contemplated by section 86(3) and/or section 86(4) of the Act, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said

sub-sections or in which monies in any manner have been deposited or credited as set out in paragraph 6 hereunder.

6. The Applicant is exempted from furnishing security for the performance of its obligations as Curator *Bonis*.

7. The Respondent is ordered to deliver all of the records relating to his legal practice, which for all the purposes of this order, but without limitations, will include all accompanying records, files, correspondence and documents which are directly or indirectly relevant to or which contain particulars of information relating to:
 - (a) Any monies received, held or paid by the Respondent for or on account of any person;

 - (b) Any monies invested by the Respondent in terms of any provisions of section 86 of the Act;

 - (c) Any interest on monies so invested in terms of section 86(3) or section 86(4) of the Act;

 - (d) Any estate of a deceased person administered by the Respondent whether as executor or on behalf of the executor, in terms of the provisions of the Administration of Estates Act, Act 66 of 1965;

 - (e) Any estate in which the Respondent acted as or on behalf of the Curator to administer the property of a minor child or any other person in terms of section 72 of the Administration of Estates Act, Act 66 of 1965;

 - (f) Any insolvent estate administered by the Respondent as trustee or on behalf of the trustee in a trust in terms of the Insolvency Act, Act 24 of 1936;

- (g) Any trust administered by the Respondent as trustee, or on behalf of the trustee in terms of the Trust Property Act, Act 57 of 1988;
 - (h) Any company liquidated in terms of the Companies Act, Act 61 of 1973, administered by the Respondent as Liquidator or on behalf of the liquidator;
 - (i) Any Close Corporation liquidated in terms of the Close Corporation Act, Act 69 of 1984, administered by the Respondent as liquidator or on behalf of the liquidator;
 - (j) The Respondent's practice as an attorney/legal practitioner of this Court, and any related files of any Client.
8. Should the Respondent fail to comply with the provisions of the preceding paragraph 7 of this order after service thereof upon him or after a return by the person entrusted with the service thereof that he/she has been unable to effect service thereof on the Respondent (as the case may be), the sheriff for the district in which such accounting records, records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such Curator.
9. The said Curator shall have the following powers:
- (a) To hand over any said records to any person entitled thereto, as soon as she has satisfied herself that the fees and disbursements in connection thereof have been paid or satisfactorily secured, or that same are no longer required;
 - (b) To accept a written undertaking by a trust creditor to pay such amount as may be due to the Respondent, either on taxation, assessment or by agreement, as satisfactory security for the purpose of paragraph

9(a) above, provided that such written undertaking incorporates a *domicilium citandi et executandi* of such creditor;

- (c) To require that any records so handed over, be delivered back to her if in her sole and absolute opinion, she considers them to be relevant to and (including any possible anticipated or threatened claim against her as Curator *Bonis* and/or the Respondent's clients and/or the Legal Practitioners Fidelity Fund ("the Fund");
- (d) To administer and control all of the Respondent's trust account(s) which for the purpose of this Order shall include:
 - (i) The accounts relating to any estate, curatorship, trust or company, referred to in paragraph 5 hereof;
 - (ii) Any and all banking accounts opened and kept by the Respondent (or on the Respondent's behalf) in terms of any provision contained in the Act or any of the Acts referred to in paragraph 7 above.
- (e) Subject to the approval of the Board of Control of the Fund ("the Board"), to sign and endorse cheques, and/or withdrawal forms and generally to operate upon the said trust accounts, but only to such extent and for such purposes as may be necessary to bring completion to current instructions in which the Respondent was acting as at the date of his suspension;
- (f) Subject to the approval of the Board, to recover and receive and, if necessary in the interest of persons having lawful claims upon the said trust accounts and/or investments by the Respondent in respect of monies held, received and/or invested by the Respondent in terms of section 86(2) and 86(3) of the Act ("trust monies"), to take any 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 said trust accounts and to receive such monies and to pay same to the credit of the said trust accounts;

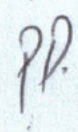
- (g) To ascertain from the Respondent's records the names of all persons on whose account the Respondent appears to hold or to have received trust monies ("trust creditors");
- (h) To call upon such trust creditors to furnish proof, information and/or affidavits as she may require to enable her, acting in consultation with and subject to the requirements of the board, to determine whether any such trust creditors have a claim in respect of money in the said accounts, and if so, the amount of such claim;
- (i) Subject to the approval of the Board, to admit or reject in whole or in part, the claims of any such trust creditors without prejudice to such trust creditor's right to access to the civil courts;
- (j) Subject to the approval of the Board, to pay such claims as she may consider lawfully due;
- (k) In the event of there being any surplus in the said trust accounts after payment of such claims, to utilise such surplus to settle or reduce as the case may be, firstly any claim of the fund in terms of section 86(5) of the Act in respect of any interest therein referred to and, secondly without prejudice to the rights of the Respondent's creditors, the costs, fees and expenses, 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 all such claims, costs, fees and expenses, to pay such balance to the fund;

- (l) In the event of there being insufficient trust monies in the said accounts to pay in full the claims of the trust creditors as reflected in the records of the Respondent:
 - (i) Subject to the approval of the Board, to close the said accounts and to pay the credit balances therein to the fund and to require such credit balances therein to be placed to the credit of a special suspense account in the name of the Respondent in the Fund's books;
 - (ii) To refer the claims of all trust creditors to the Board to be dealt with in terms of the provisions of the Act;
 - (iii) To authorise the Board to credit the credit balances referred to above to its "*paid claims account*" when the funds have been paid, in terms of Section 55 of the Act, admitted claims of the trust creditors of the Respondent in excess of such credit balances, provided that, notwithstanding the foregoing, the Board in its discretion shall be entitled to transfer to its "*paid claims account*" the amounts of any claims as and when admitted and paid by it.
 - (m) Subject to the approval of the chairperson of the Fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any such other person where considered necessary to assist her in carrying out of her duties as Curator *Bonis*;
 - (n) To render from time to time returns to the Board showing how the said accounts have been dealt with until such time as the Board notifies her that she may regard her duties as Curator *bonis* as discharged.
10. The Respondent shall within 6 (six) months after having been requested to do so by the Curator, or within such longer period as the Curator may agree to in writing, satisfy the Curator, by means of the submission of taxed bills of

costs or otherwise, of the amount of the fees and disbursements due to the Respondent in respect of his 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, subject to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof.

11. A bill of costs drawn on the High Court scale of attorney and client costs taxed by the Registrar of this Court (who is authorised to do so) *mutatis mutandis* as if the Curator and the responsible officials of the Applicant in discharging their duties as contemplated in this order had acted as attorneys, shall constitute proof of their reasonable fees and disbursements ("the Curatorship fees and disbursements") and that the Registrar is authorised to issue a writ of execution for payment thereof by the Respondent.
12. The Curatorship will terminate when the Curator receives a final written discharge from such duties from the Applicant consequent upon the Curator filing with the Applicant a final report and account, together with supporting vouchers, in respect of the execution of the Curator's duties in terms of this Order.
13. The Respondent is hereby directed:
 - (a) to pay, in terms of section 87(2) of the LPA, the reasonable costs of the inspection of the accounting records of the Respondent;
 - (b) to pay the Curatorship fees and disbursements;
 - (c) to pay the expenses relating to the publication of this order or an abbreviated version thereof.
14. The Respondent is hereby removed from office as:

- (a) Executor of any estate of which the Respondent has been appointed in terms of section 14(1), read with section 54(1)(a)(v) of the Administration of Estates Act, No 66 of 1965, or the estate of any other person referred to in section 72(1) thereof;
 - (b) Curator or guardian of any minor or other person's property in terms of Section 72(1) read with section 54(1)(a)(v) and section 85 of the Administration of Estates Act, No 66 of 1965;
 - (c) Trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;
 - (d) Liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 71 of 2008;
 - (e) Trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;
 - (f) Liquidator of any close corporation appointed in terms of section 74 of the Close Corporations Act, No 69 of 1984;
 - (g) Administrator appointed in terms of section 74 of the Magistrates' Court Act, No 32 of 1944.
15. The Respondent is ordered to pay the costs of this application on an attorney and client scale, including the costs occasioned by the employment of Counsel.

 
S. O. VELE, AJ

I concur:



C. VAN ZYL, J

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