

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 88175/2018

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 27 February 2023

E van der Schyff
E van der Schyff

In the matter between:

THE LEGAL PRACTICE COUNSEL OF SOUTH AFRICA APPLICANT

and

LODWICK MAKGAHLELA MASHABA
MASHABA MAKGAHLELA ATTORNEYS

FIRST RESPONDENT
SECOND RESPONDENT

JUDGMENT

Van der Schyff J (Lenyai AJ concurring)

Introduction

- [1] The first respondent was suspended from practising as an attorney on 8 January 2019. The applicant subsequently took control and possession of the respondents' files. The applicant seeks an order striking the first respondent off the roll of attorneys.
- [2] I do not intend to deal with each allegation contained in the founding and supplementary affidavits filed by the applicant, but only to highlight the most pertinent. In the founding affidavit, the applicant, *inter alia*, averred that:
- i. there is a substantial deficit in the respondent's bookkeeping, the respondent failed to retain proper accounting records in respect of his practice, and contravened several provisions of the [then] Attorney's Act, Rules of the [then] Attorneys Profession and Law Society's Rules relating to bookkeeping;
 - ii. *prima facie* there appeared to be a trust deficit of R4 673 580.66 as at 28 February 2018;
 - iii. the respondent misappropriated trust funds;
 - iv. the respondent failed to account to clients;
 - v. the respondent delayed payment of trust funds;
 - vi. the respondent overreached clients;
 - vii. serious complaints were received against the first respondent.
- [3] A serious issue that the applicant's auditor discovered is that the certificate of balance provided in relation to the first respondent's trust account reflected a balance of R31 504.19 at 29 February 2016, whilst the firm's trust bank statements for the period 29 February 2016 to 31 March 2016 reflected an opening balance of reflected a balance of R4 669 810.39. The certificate of balance dated 28 February 2017 reflected the firm's banking account balance as at 28 February 2017 as R552 530.74, whilst copies of the trust bank statements indicated that the balance of the firm's trust banking account as at 28 February 2017 was R 5 552 530.74. The firm's trust accounting records reflected the opening cash book balance as at 1 March 2017 as R 5 552 530.74.
- [4] The applicant also takes issue with the fact that a number of payments allegedly received from the Road Accident Fund (RAF), is not identified other than by the

reference 'RAF payment'. Several client complaints are referenced in the founding affidavit. It is, amongst others, evident that the bookkeeping system utilised by the respondents was totally inadequate and payments received from the RAF were generally allocated to a general account 'Road Accident Deposits'.

- [5] No accounting records were available for the years 2013 and 2014. The LPC in addition received complaints from the RAF that the second respondent lodged duplicate claims with the RAF. The first respondent denied any knowledge regarding the submission of duplicate claims and alleged his signature was falsified on the submission documents.

- [6] The applicant's auditor concluded that the accounting records prepared by the auditor of the second respondent for the period 1 March 2016 to 28 February 2018 are not reliable. Where he was able to determine the values of the trust bank balances at certain dates, these values disagreed with the values in the trust accounting records. The LPC's investigation indicated that their auditor could not identify any costs that the firm recovered from the RAF when it submitted claims against the RAF on behalf of clients. The firm failed to communicate with trust creditors after receipt of their claim funds from the RAF. The trust creditors were either paid late, in instalments, or were paid by business cheques. On numerous occasions the firm raised VAT twice on the disbursements debited against clients' accounts.

- [7] A supplementary affidavit was filed by the applicant in January 2019, wherein additional complaints received from former clients of the respondents were included.

- [8] The respondents filed an answering affidavit in February 2019. The respondents denied that a shortfall existed in relation to the firm's trust banking account, and avers that there were sufficient funds at all material times to meet his trust obligations. The first respondent admitted that he failed to render timeous accounts to certain clients. He submitted that he could not be held responsible for the erroneous information contained in the Certificates of Balance issued by the Bank that did not reflect the balance of this trust bank account. He also indicated that a number of the complaints raised by clients were subsequently amicably resolved.

The first respondent stated that he changed his bookkeeping system from 'Excel' to 'Pastel' as recommended by the applicant's auditor and that his system has been up to date since March 2018. He was issued the required audit certificate for the year 2019.

- [9] The first respondent placed the blame for unresolved client issues before the feet of the respective clients. Ms. Chambani allegedly refused to furnish him with her bank account details, L. Radebe inexplicably approached another attorney after allegedly indicating his satisfaction with the resolution of the dispute, SC Nyoka ignored the many messages left by the first respondent, Ms. Mathonsi insisted on a cheque payment after it was explained to her that the amount exceeded the amount for which the cheque was guaranteed and then wanted to lay a complaint with the police when the cheque was not honoured; MZ Masango, who subsequently passed away, requested to receive only an interim payment and despite a request to his family the executor has not yet made contact with the respondents; RM Shaku requested various portions of her money to be paid to her as and when she needed it; O Phiri did not attend to the respondents' offices for the claim to be finalised despite numerous invitations.
- [10] In reply, the applicant submits that the bank statements 'must have been falsified in an attempt to conceal the theft of trust funds.' The applicant again obtained certificates of balance from the respondents' bank to confirm that the certificates of balance were correct. The amounts reflected therein have not changed, and confirm the validity of the certificates originally annexed to the applicant's forensic auditor's report. The applicant again submitted that the plethora of complaints lodged against the respondent detail that he failed to account for clients and refused to communicate with them.
- [11] On 12 September 2019, Van Nieuwenhuyzen J and Senyatsi AJ, as he then was, granted an order to the effect that the applicant must file a supplementary affidavit dealing with the original bank statements of the Trust Bank Account of the respondents. The applicant explains that the court was concerned that if the applicant's conclusion that the bank statements were falsified in attempt to conceal the theft of trust funds, a crime was committed. The court thus advised the

applicant's curator's department to procure original bank statements which would either confirm the balances as per the certificates of balance, or exonerate the respondent from a criminal charge in this regard. After receipt of the original bank account statements, the applicant submits that the conclusion reached by its forensic auditor that the respondent falsified bank statements in an attempt to conceal the theft of trust funds is indeed the factual position and not mere conjecture or speculation. The applicant also stated that at the time of commissioning the supplementary affidavit, the Legal Practitioner's Fidelity Fund had received sixty-one claims against the trust account of the respondent in the amount of R 23 680 016.20. The curator department confirmed that these claims pertain to monies paid into the respondents' trust account prior to his suspension. A further ten claims in the amount of R 2 000 000,00 against the respondents' trust account were received after the date of his suspension.

- [12] For purposes of this judgment, it is sufficient to compare the bank statement for the period 29 February 2016 to 31 March 2016 (the March 2016 period) as provided by the respondents to the applicant's auditor, with the bank statement obtained by the applicant's auditor for the same period of time, during 2021, subsequent to the order granted in September 2019. Whilst the former reflects an opening balance of R4 669 801,00 for the March 2016 period, the latter reflects an opening balance of R31 504.19; the former reflects a closing balance of R4 638 297.18 whilst the latter reflects a closing balance of R0. It is, also, noticeable that the bank statements obtained from the respondents' auditor did not contain a bank stamp, while the statements obtained by the applicant's curator department have bank stamps. The applicant made out a *prima facie* case that the bank statements provided by the respondents' auditor were falsified. Since the initial bank statements were provided to the applicant's auditor by the respondents' auditor, and since the bank statements confirm the balances in the trust cash book, one would have expected the respondents to address this issue and to clarify how the 'erroneous' statements were obtained, and what the reasons for the discrepancy could be. In these circumstances, a mere denial that the bank statements were falsified is not sufficient to give rise to a dispute of fact which would necessitate the matter be referred to oral evidence.

- [13] I agree with the applicant's submission that the plethora of Rules breached by the first respondent, the complaints of unprofessional conduct, the suspect trust bank accounts provided to the applicant's forensic auditor by the respondents' auditor, the discrepancies in the trust cash book if compared with the bank statements obtained by the applicant and confirmed under oath to be correct by a paralegal working at the bank, constitute sufficient proof that the first respondent had the propensity to mismanage and abuse his trust account. His capricious behaviour has resulted in members of the public being left out of pocket. The first respondent was not able to provide an explanation for the *prima facie* deficit on his trust account. He did not even endeavour to address the origin of the suspect bank statements, provided by his auditor to the applicant's forensic auditor.

Discussion

- [14] In *Malan & Another v The Law Society of the Northern Provinces*,¹ it was held that the Court must first decide as a matter of fact whether the alleged offending conduct by the legal practitioner has been established. This is a factual enquiry. Secondly, if the Court is satisfied that the offending conduct has been established, a value judgment is required to decide whether the person concerned is not a fit and proper person to practise as a legal practitioner. Differently put, the court ought to weigh up the conduct complained about against the conduct expected of an attorney. Thirdly, the court must decide whether, in view of all the circumstances of the case, the name of the attorney should be removed from the roll or suspended from practice. Ultimately this is a question of degree.
- [15] In answer to the first aspect reverted to in *Malan, supra*, I am of the view that the facts alleged by the applicant, if considered in totality of all the affidavits filed, have been proved on a balance of probabilities.

¹ 2009 (1) SA 216 (SCA).

- [16] The conduct expected of an attorney is always revisited in applications of this nature. It is trite that society expects of attorneys to be trustworthy, and reliable. The profession has determined the standard of care it expects of admitted attorneys.²
- [17] The first respondent, and by implication and association the second respondent failed to meet the threshold set by society and the professional community. If regard is had to the plethora of complaints, the mismanagement of trust funds, the state of affairs of the respondents' financial books, and the unexplained bank statements received from the respondents' auditor where balances accord with the trust cash book balances but not with the balances reflected on the certificates of balances or the bank statements ultimately obtained by the applicant's forensic auditor confirmed under oath by an official of the bank, I am of the view that a proper case is made out that the first respondent is not a fit and proper person to practice as an attorney.
- [18] This begs the question as to whether the name of the first respondent should be removed from the roll, whether he should be suspended from practice or allowed to practice under supervision.
- [19] The first respondent acknowledged that his bookkeeping was in disarray, but said that he was introduced to Pastel by the applicant's auditor, and since using Pastel his bookkeeping has been exemplary.
- [20] If the only complaint against the first respondent was rooted in his inability to do proper bookkeeping, I would have considered providing for remedial measures and professional improvement. However, the element of dishonesty that clouds this application manifests not only in the unexplained incorrect bank statements, to put it mildly, but also in the complaints by clients lodged with the applicant against the first respondent, and the claims instituted by a number of the first respondent's erstwhile clients against the Fidelity Fund. In addition, the first respondent does not take responsibility for the client's complaints but raises excuses and blames the majority of them for not receiving the money paid out by the Road Accident Fund to their benefit. He did not make the effort to meet with his auditor and banker in order

² See, e.g., *South African Legal Practice Council v Joynt* (20873/20) [2021] ZAGPPHC 471 (28 July 2021) paras [13] – [17].

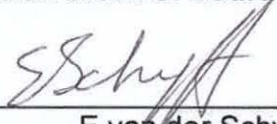
to proffer an explanation for what is described by the applicant as falsified bank statements, even after receiving copies of the bank statements obtained by the applicant's auditor that differs substantially from the statements provided by his auditors. He shows no remorse but says that the claims lodged with the Fidelity Fund resemble a drop in the ocean if considered against all the cases he dealt with. The facts of the current matter distinguish it from *The South African Legal Practice Council v Harper and another*.³

- [21] In these circumstances, it cannot be justified to allow the first respondent to practice as an attorney, even if under supervision. If the degree of misconduct is considered the only justifiable action is to remove the first respondent's name from the roll of attorneys. As a result, the relief sought by the applicant stands to be granted.

ORDER

In the result, the following order is granted:

1. The draft order marked X dated and signed by us is made an order of court.


E van der Schyff
Judge of the High Court

I agree


MMD Lenyai
Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

³ (51846/2021) [2021] ZAGPJHC 829 (21 December 2021).

For the applicant:

Instructed by:

For the respondents:

Instructed by:

Date of the hearing:

Date of judgment:

P. Moonsamie

IQBAL MAHOMED ATTORNEYS

Adv. N. Nortje

SEKGALA & NJAU ATTORNEYS

17 January 2023

27 February 2023

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

130-12
27/02/2023

At Pretoria on Monday 17 January 2023.

Before the Honourable Judge van der Schyff and, Honourable Judge Lenyai.

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

(Incorporated as the Law Society of the Transvaal)

and

MR LODWICK MAKGAHLELA MASHABA

1st Respondent

MASHABA MAKGAHLELA INC ATTORNEYS

2nd Respondent

Case number: 88175/18
Private Bag 267, Pretoria 0001
2023 -02- 27
GD-PRET-018
Applicant

DRAFT ORDER

IT IS ORDERED THAT IN TERMS OF THE PRAYERS IN THE NOTICE OF MOTION:

1. That the name of **MR LODWICK MAKGAHLELA MASHABA** (the respondent) be removed (struck) from the roll of attorneys of this Honourable Court, as an attorney, conveyancer and notary.

130-12

2. That respondent immediately surrenders and delivers to the registrar of this Honourable Court his certificate of enrolment as an attorney and conveyancer of this Honourable Court.
3. That in the event of the respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the sheriff of the district in which the certificates are, be authorised and directed to take possession of the certificates and to hand them to the Registrar of this Honourable Court.
4. That respondent be prohibited from handling or operating on his trust accounts as detailed in paragraph 5 hereof.
5. That Johan van Staden, the head : members affairs of applicant or any person nominated by him, be appointed as *curator bonis* (curator) to administer and control the trust accounts of respondent, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by respondent at a bank in the Republic of South Africa in terms of section 78(1) of Act No 53 of 1979 and/or any separate savings or interest-bearing accounts as contemplated by section 78(2) and/or section 78 (2A) of Act No. 53 of 1979, 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 (the said

accounts being hereafter referred to as the trust accounts), with the following powers and duties:

- 5.1 immediately to take possession of respondent's accounting records, records, files and documents as referred to in paragraph 6 and subject to the approval of the board of control of the attorneys fidelity fund (hereinafter referred to as the fund) to sign all forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which respondent was acting at the date of this order;
- 5.2 subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against respondent in respect of monies held, received and/or invested by respondent in terms of section 78(1) and/or section 78(2) and/or section 78 (2A) of Act No 53 of 1979 (hereinafter referred to as 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, if any, in which respondent was and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);

5.3 to ascertain from respondent's accounting records the names of all persons on whose account respondent appears to hold or to have received trust monies (hereinafter referred to as trust creditors); to call upon respondent to furnish him, within 30 (thirty) days of the date of service of this order or such further period as he may agree to in writing, with the names, addresses and amounts due to all trust creditors;

5.4 to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of, the board of control of the fund, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of respondent and, if so, the amount of such claim;

5.5 to admit or reject, in whole or in part, subject to the approval of the board of control of the fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;

5.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the board of control of the fund;

5.7 in the event of there being any surplus in the trust account(s) of respondent after payment of the admitted claims of all trust creditors in full, to utilise

such surplus to settle or reduce (as the case may be), firstly, any claim of the fund in terms of section 78(3) of Act No 53 of 1979 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of respondent, the costs, fees and expenses referred to in paragraph 10 of this order, or such portion thereof as has not already been separately paid by respondent to applicant, and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the board of control of the fund, to respondent, if he is solvent, or, if respondent is insolvent, to the trustee(s) of respondent's insolvent estate;

- 5.8 in the event of there being insufficient ~~trust monies~~ in the trust banking account(s) of respondent, in accordance with the available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which may be available in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the Attorneys Fidelity Fund;

- 5.9 subject to the approval of the chairman of the board of control of the fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and

- 5.10 to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of respondent has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.

6. That respondent immediately delivers his accounting records, records, files and documents containing particulars and information relating to:

- 6.1 any monies received, held or paid by respondent for or on account of any person while practising as an attorney;
- 6.2 any monies invested by respondent in terms of section 78(2) and/or section 78 (2A) of Act No 53 of 1979;
- 6.3 any interest on monies so invested which was paid over or credited to respondent;
- 6.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by respondent, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;
- 6.5 any insolvent estate administered by respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;

6.6 any trust administered by respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;

6.7 any company liquidated in terms of the Companies Act, No 61 of 1973, administered by respondent as or on behalf of the liquidator;

6.8 any close corporation liquidated in terms of the Close Corporations Act, 69 of 1984, administered by respondent as or on behalf of the liquidator; and

6.9 respondent's practice as an attorney of this Honourable Court, to the curator appointed in terms of paragraph 5 hereof, provided that, as far as such accounting records, records, files and documents are concerned, respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.

7. That should respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on 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.

8. That the curator shall be entitled to:

8.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;

8.2 require from the persons referred to in paragraph 8.1 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or respondent and/or respondent's clients and/or fund in respect of money and/or other property entrusted to respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;

8.3 publish this order or an abridged version thereof in any newspaper he considers appropriate; and

8.4 wind-up of the respondent's practice.

9. That respondent be and is hereby removed from office as –

9.1 executor of any estate of which respondent has been appointed in terms of 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);

9.2 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;

9.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;

9.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973;

9.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;

9.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984; and

9.7 administrator appointed in terms of Section 74 of the Magistrates Court Act, No 32 of 1944.

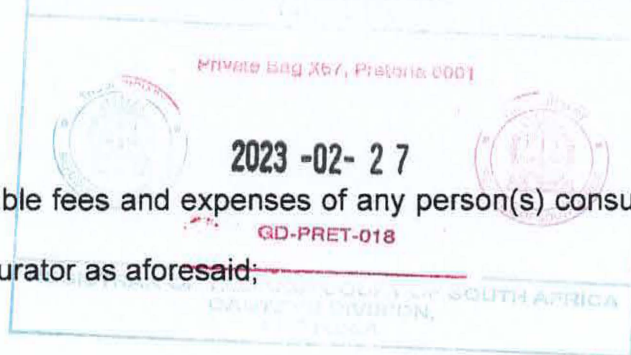
10. That respondent be and is hereby directed:

10.1 to pay, in terms of section 78(5) of Act No. 53 of 1979, the reasonable costs of the inspection of the accounting records of respondent;

10.2 to pay the reasonable fees of the auditor engaged by applicant;

10.3 to pay the reasonable fees and expenses of the curator, including travelling time;

10.4 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;



10.5 to pay the expenses relating to the publication of this order or an abbreviated version thereof; and

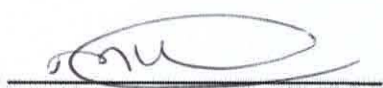
10.6 to pay the costs of this application on an attorney-and-client scale.

11. That if there are any trust funds available 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, shall 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 him (respondent) in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof;

12. That a certificate issued by a director of the Attorneys Fidelity Fund shall constitute *prima facie* proof of the curator's costs and that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.

13. That further and/or alternative relief be granted to applicant.

BY ORDER OF THE COURT



COURT REGISTRAR

Applicant's Attorney: Amelia Strecker, (Johannes Mahomed Attorneys) 072 211 6860

