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

CASE NO: 23101/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 02/05/2023

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL APPLICANT

and

SHIREEN ELAINE ARCHARY 1ST RESPONDENT

ARCHARY INCORPORATED ATTORNEYS 2ND RESPONDENT
(REG NO: 20[....]21

JUDGMENT

BEFORE: HOLLAND-MUTER AJ (COWEN J CONCURRING):

[1] The Applicant is the South African Legal Practice Council (the "LPC"). The First Respondent is an admitted attorney of the High Court and the Second Respondent is the entity used by the First Respondent to conduct her practice as a legal practitioner. The Applicant has applied to this Court requesting it to remove the First Respondent from the roll of legal practitioners. There are multiple alleged infractions. Most egregiously, the impugned conduct centres on the First Respondent's alleged conduct in connection with various property transactions which culminated in her clients, the purchasers, losing substantial deposits paid in respect of the properties. These moneys were lost when the First Respondent allegedly paid the monies out to the seller in the absence of any transfer of the properties or any written instruction from her clients.

[2] It is trite law that applications of this nature are sui generis and of a disciplinary nature. There is no lis between the Applicant and the Respondents. The Applicant, as custos morum of the legal profession, merely places facts before the court for consideration. *Solomon v Law Society of the cape of Good Hope* 1934 AD 401 at 408-9 cited in *Hassim v Incorporated Law Society of Natal* 1977 (2) SA 757 (A) at 767 C-G; *Law Society Transvaal v Matthews* 1989 (4) SA 389 Tat 393 E-F.

[3] The question whether a legal practitioner is a fit and proper person to practice as a legal practitioner is not only dependent upon factual findings, but lies within the discretion of the Court. The Court must exercise its direction after considering all the facts placed before it. *Law Society of the cape of Good Hope v C* 1986 (1) SA 616 (A) at 637 C-E and *Law Society Transvaal v Matthews supra* at 393I-J.

[4] There is a three-fold enquiry to be conducted by the Court in determining whether the legal practitioner is fit and proper to remain enrolled as a legal practitioner, to enable the Court to exercise its discretion. *Jasat v Natal Law Society* 2000 (3) SA 44, [2000] 2 All SA 310 (SCA) at par 10.

[5] The Court must first decide whether the alleged offending conduct of the practitioner has been established, which is a factual enquiry. If established, the Court, secondly, has to exercise a discretion to decide whether the person concerned is or is not fit and proper to practice as a legal practitioner. This involves a

weighing up of the conduct complained of and the conduct expected of an attorney and, to this extent, is a value judgment. The nature of the conduct may be such that it establishes that the person is not fit and proper to continue proper to practice. In other instances the conduct may not be that serious and the relevant practice council or law society may, rather exercise its disciplinary powers, by imposing a fine or reprimanding the person. The Court may discipline an attorney by suspending him or her from continuing practising with or without conditions, or may reprimand the attorney. *Malan v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009(1) SA 216 (SCA); [2009] 1 All SA 133 (SCA) at [5].

[6] In the third place, if the Court decides that the person is not a fit and proper person to practise as a legal practitioner, the Court must, in exercising its discretion, take into account all the circumstances of the matter when deciding whether the practitioner is to be removed from the roll or merely suspended from practice, subject to conditions set by the Court. Whether the Court will adopt one course or the other will depend upon such factors as the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession, the likelihood or otherwise of a repetition of such conduct and the need to protect the public. It is ultimately a question of degree. *Jasat supra* at [10]; *Malan supra* at [4-9] and *Summerley v Law Society of the Northern Provinces* 2008(5) SA 613 (SCA) at 615 B-F.

[7] The main consideration of a court when exercising its discretion after the three stage inquiry is the protection of the public and the standard of the legal profession. It is not to punish by imposing a penalty or other sanction. It is a question of fact in each matter whether striking off or suspension is the appropriate sanction. Should the Court, however, find dishonesty on the part of the respondent, exceptional circumstances will have to exist to persuade the Court to suspend and not strike the respondent. *Summerley supra* at par 14- 15; *Malan supra* at [10].

[8] The unconditional removing of an attorney from the roll for misconduct is serious and has far-reaching implications. The overriding consideration when striking an attorney from the roll is the belief by the Court that the attorney is not fit and proper to continue to practise, and in future, when re-applying will have to satisfy the

Court that his or her rehabilitation and reformation is of a permanent nature. *Ex Parte Knox* 1962 (1) SA 778 (N) at 784; *Malan supra* (8).

[9] The offending facts placed before the Court must be proven on a balance of probabilities. When exercising its discretion, the Court must consider all the facts together and not in isolation. *Law Society Transvaal v Matthews supra* at 393 1-J. Precedents have limited value as facts are never identical. *Malan supra* at (9).

[10] The first respondent was suspended from practice on 15 June 2021 by Davis J after the applicant brought an urgent application for the striking of the respondent's name from the roll of practitioners (referred to as the "Davis- Order). The suspension imposed was indefinite pending the finalization of the application by the LPC. The first respondent filed an answering affidavit only on 24 February 2022 and the replying affidavit only found its way onto Caselines (the electronic filing system in use in the Gauteng Division of the High Court) on 28 October 2022.

[11] The matter was enrolled before this Court for 2 February 2023 and after hearing arguments on behalf of both parties, judgment was reserved. The leisurely pace of the proceedings is a concern for the Court but it did not seem to bother the parties, whose conduct, rather, is indicative of an absence of urgency to finalise the matter. Both answering and replying affidavits were filed way beyond the time limits normally applicable to filing of affidavits as set out in the Uniform Rules. While the first respondent took from 15 June 2021 until 24 February 2022 to file her answering affidavit, the replying affidavit was filed as late as 28 October 2022. This is not a textbook example of litigation on the part of either party, not least in circumstances of a matter concerning professional conduct.

[12] There are certain disputes between the parties which require attention. Some of these differences such that they cannot be decided on affidavit alone and oral evidence will be required as explained below. *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3) SA 623 (A) at 6341-635D, 635E. Moreover, clarification and elaboration is required on certain matters even where there is no dispute. Without clarity and elaboration on certain aspects, the Court is not in a position to conduct

the three stage enquiry. In this regard, the parties agreed that the Court can call for further evidence.

[13] In the view of the Court, the following aspects need to be resolved and/ or elaborated upon and clarified by further oral evidence, subject to the directives of the Court:

13.1 The Applicant's main argument on the alleged trust shortfall is that the First Respondent, when transferring funds from her trust account to outsiders, could not have done it without a written mandate or authorization of the clients which she did not have. The First Respondent is adamant that she could do it on oral instructions and that she indeed transferred the monies from the trust account to the sellers on the oral instructions of her clients. The alleged oral instruction is not adequately or satisfactorily explained and there is a dispute between the parties as to the nature and extent of the duties of an attorney, who is not a conveyancer, when dealing with trust monies received as deposits for the purchase of immovable property. On the latter, nothing was placed before the Court to enable a sensible consideration of whether, and if so, the extent to which, the First Respondent ventured impermissibly into the realm of work of conveyancing. Nor was any explanation given as to the nature and source of the alleged duty when paying out monies held in trust, pending transfer of property. More specifically, can it only be done on written instructions or do oral instructions suffice? Is this to be determined solely with reference to the agreement of sale (which can be interpreted without any further evidence) or is it governed by established requirements of professional conduct? The First Respondent's defence is that there is no shortfall in the Trust Account as she made payments on legitimate oral instructions by the relevant person. Various issues arise including as regards the First Respondent's state of mind and whether there was negligence or dishonesty involved.

13.2 The First Respondent conceded that she was in contempt of the Davis-order with regard to the delivery of certain documentation to the Applicant as set out in prayer 7 thereof. She avers that she handed her certificate of practice to her attorney and apologises for not delivering other "necessary" documentation. The

concession was made baldly with no explanation provided nor any elaboration of her state of mind. To admit being in contempt of a court order is a serious admission by the First Respondent painting herself as a person who disrespects the Court and who was willing to act in a manner that entailed both wilful and mala fide breach of a court order. The circumstances of this conduct and the import of the admission need to be clarified and elaborated upon by "narrow" oral evidence to enable the Court to conduct the three stage enquiry.

13.3 The First Respondent thirdly avers that although certain complaints entailing non-compliance with professional duties raised by the Applicant were serious and she admits the conduct, she denies others and contends that the nature of the transgressions are not so serious as to warrant the striking off of her name from the roll of practitioners. However, the facts must be considered together and the seriousness of the transgressions can only be decided when all of the disputed facts are before the Court. At least for the most part, the issues can be decided on affidavit. However, one issue requires elaboration, being whether the First Respondent ceased practising and whether her practice was truly dormant during material periods of non-compliance, circa 2020 and 2021.

[14] None of the parties deemed it necessary to suggest any appropriate conditions to be imposed on the First Respondent if suspension is the sanction considered by the Court. An attorney, who is subject to a striking off application and who wants to persuade the Court to impose a lesser sanction such as suspension for practice, should present appropriate conditions to the Court to enable the Court to formulate appropriate conditions of suspension. *Malan supra* (8).

[15] If the Court should find dishonesty on the part of the First Respondent when considering the requested oral evidence, the First Respondent should prove exceptional circumstances to persuade the Court against the striking off from the roll and rather to suspend the First Respondent for an indefinite future period subject to specific conditions. Striking off is not inappropriate when a court finds that the attorney was unable to administer and conduct a trust account but where dishonesty is involved, the Court must guard against the erosion of the profession's ethical values. The Court is of the view that the question whether each or any of the actions

of the First Respondent involved dishonesty or not is paramount when presenting oral evidence on the issues raised above. Summerley supra at par 15.

[16] In the result the following order is made:

1. The matter is referred for oral evidence on the following issues:

1.1 Whether the First Respondent transferred the trust monies to the seller on the oral instructions of a person mandated by the purchasers.

1.2 Whether in holding and transferring the deposits in and from the trust account, the First Respondent performed any act reserved for conveyancers or whether her conduct falls within the scope of an attorney who is not also a conveyancer.

1.3 Whether, in transferring the various amounts from the trust account on oral instructions and not on written instructions as set out above, the First Respondent transgressed any professional duty, and if so, its nature and source.

1.4 Whether any transaction(s) in respect of the payments entailed dishonesty.

1.5 The circumstances and state of mind of the First Respondent relating to the admitted contempt of court in respect of the First Respondent's failure to hand over her Certificate of Practice and other relevant documentation ordered by Davis J on 15 June 2021 to the Registrar of the Court and the LPC and whether it entailed any dishonesty.

1.6 Whether the First Respondent's practice was dormant during 2020 and 2021 and any other period thereabout relevant to her non-compliance.

2. The Applicant is to deliver the names of the witnesses it intends calling, a summary of their evidence and make discovery within 30 days from date of this

order and the First Respondent must deliver same within 30 days thereafter. The parties will not be permitted to call more than two (2) fact witnesses each save with the leave of the Court which must be requested when delivering the above documents.

3. Should either party intend to rely on any expert witness to deal with the respective scope and professional duties of conveyancers and attorneys who are not conveyancers, relevant expert notices and summaries must be delivered simultaneously with the above documentation and a joint minute must be delivered within 20 days thereafter. The parties are directed to explore the possibility of utilising a joint expert witness rather separate witnesses.

4. The parties must approach the Office of the Deputy Judge President for a special allocation for the hearing of oral evidence after complying with the above directives which request should not exceed a maximum of three (3) days.

5. The First Respondent remains suspended from practice pending the outcome of prayer 1 above.

6. Costs of the application will be within the discretion of the Court hearing oral evidence in the final adjudication hereof.

Dated at Pretoria on this 2nd May 2023

J HOLLAND-MUTER AJ
ACTING JUDGE OF THE PRETORIA HIGH COURT

I agree

S J COWEN