

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 078312/2023

DATE: 30-08-2023

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 6 NOVEMBER 2023

SIGNATURE

In the matter between

SOUTH AFRICAN LEGAL COUNCIL

Applicant

and

MMATLOU LESLEY MATSI & ANOTHER

Respondent

J U D G M E N T

DAVIS, J:

Due to the nature of the relief sought in this application and its position on the urgent roll I deem it appropriate that an *ex tempore* judgment be delivered so that the parties are immediately aware of their position and the matter can thereby be finalised, rather than be dragged out. The judgment is therefore as follows:

The applicant in this matter is the South African Legal Practice Council for the Gauteng Province. The respondent is an attorney of this court, and he practices as Matsi Law Chambers Incorporated in Pretoria. This is an application for the suspension of the first respondent, Mr Matsi, from practicing as a legal practitioner pending a final investigation to be concluded after the appointment of a curator to take control of his practice.

The nature of the proceedings are as follows: The Legal Practice Council, referred to as the LPC, is not an ordinary litigant, and its duties and obligations in terms of the Legal Practice Act, 28 of 2014 is well-known and need not be repeated again here in urgent court. Suffice to say that the applicant contends that it is as *custos moris* of legal practitioners in general, and specifically in terms of Sections 33 and 44 of the Legal Practice Act, obliged to launch an application of this nature, should it be of the view that a legal practitioner's conduct merits a suspension or that a legal practitioner is no longer fit and proper to practice.

The LPC has taken such a decision on 25 May 2013. That decision was preceded by a number of preceding steps. These are in summary the following: The LPC has received no less than eight complaints from clients of the legal

practitioner. The legal practitioner was in writing requested to respond to these complaints and he has done so. The responses have not satisfied the LPC, pursuant to which a Mr Nyali was appointed to conduct an investigation and to report to the LPC.

Mr Nyali has reported to the manager of the Gauteng Provincial office of the LPC on 17 April 2023, regarding his visit to the office of the practitioner and what has transpired there. His report runs into a number of pages. It details his interaction with the legal practitioner and his attempts to obtain books of account and supporting documents, including bank statements.

I shall deal with some of the contents of the report later, as well as the complaints dealt with therein. It is apposite at this stage, however, to deal with the conclusion reached by Mr Nyali, which he has confirmed by way of a confirmatory affidavit in this court, as part of these proceedings.

I quote his conclusion in full, to place the matter in context:

*Paragraph 16.1: The Legal Practice Council
initially instructed Ms Puseletso Nhlopo*

Hlogwana to attend to the inspection of the firm's accounting records. According to the email communication between Ms Hlogwana and the legal practitioner, she attempted to secure an appointment date for a meeting several times with no success. Ms Hlogwana resigned from her position at the Legal Practice Council prior to finalisation of the inspection. I have thus taken over Ms Hlogwana's file and was mandated to inspect the firm's accounting records.

16.2) I had a physical meeting with Mr Matsi on 9 September 2022. I informed him of my mandate to conduct an inspection in terms of Section 37(2)(a) of the Act. Mr Matsi was also informed of the scope of the inspection, as well as the information and records required for the inspection.

16.3) Subsequent to our meeting on 9 September 2022 I sent Mr Matsi a letter, specifying the accounting records required to complete the inspection.

16.4) After a number a number of follow-up

emails the practitioner failed to provide me with the firm's requested accounting records. Despite the fact that Mr Matsi was given ample time to provide the requested information he persisted in failing to do so. Due to the practitioner's failure to cooperate, the firm's bank statements were requested directly from the firm's bankers in terms of Section 91(4) of the Legal Practice Act.

16.5) The inspection was thus confined to the limited information available to me, which included information contained in the complaints, as well as the Trust bank statements obtained directly from FNB.

16.6) In my discussion with Mr Matsi, he advised that the maintenance of the firm's accounting records is outsourced to an external book keeper. According to Mr Matsi the accounting records are updated on a monthly basis. I was unable to validate the practitioner's statements without the maintenance(?) of accounting records, since I was not furnished with same."

From paragraph 16.7 to 16.13, a number of complaints are dealt with. I do not intend quoting from the report further regarding these complaints, as they were dealt with in the founding, answering and replying affidavits. I shall deal with them when dealing with the practitioner's response thereto.

The report of Mr Nyali concludes, however, as follows:

"16.14) During the inspection it was noted that the legal practitioner submitted manipulated audit reports and account, attorney's annual statements of a trust account for the financial years 2021 and 2022. It is clear that the audit reports were manipulated to conceal a huge deficit that existed at reported dates. Due to the practitioner's failure to provide the requested information I was unable to estimate the actual trust deficit. However, based on a high number of complaints lodged against the legal practitioner and my findings as detailed above, it is clear that a significant Trust [indistinct] exists. In the light of the above I am of the view that the [indistinct] poses a

threat to Trust creditors, the legal practitioner's Fidelity Fund, as well as the funds of future clients."

The report is ended by a recommendation that it be referred to the LPC to consider further appropriate action. I have already earlier referred to the LPC's consideration and resolution on what action to take, which was the launch of the current application for suspension of the practitioner. So far the nature of the proceedings and what brought the parties to court today.

Regarding the test for suspension, this has been set out sufficiently previously in *Jasat v Natal Law Society* 2000 (2) ALL SA 310 (SCA) at paragraph 10. The test is as follows: first, that the court must decide if the alleged offending conduct has been established on a preponderance of probabilities. After conclusion of this factual inquiry a court must consider if the practitioner concerned is, in the determination of the court, not a fit and proper person to continue to practice. This involves a weighing-up of the conduct complained of against the conduct expected of a legal practitioner, and involves a value judgment. Thirdly, the court must inquire whether, in all the circumstances, the practitioner in question should be removed from the roll or

whether a suspension from practice would suffice. The third enquiry is ordinarily applicable when an application for striking off is considered. The first two considerations, and the protection of the public, are those considerations relevant when a temporary or interim suspension is to be considered.

In the current case the position is as follows, and I shall not deal with all the eight complainants, but primarily only those referred to in the replying affidavit as well as that of a Ms Momolola.

The first complaint to be considered is that of Ms Msiza. From the affidavits the relevant facts regarding Ms Msiza's complaint can be summarised as follows: It is common cause that Ms Msiza was a client of the practitioner. Her claim against the Road Accident Fund was settled in court on 24 April 2019. The Road Accident Fund shortly thereafter, on 25 July 2019, made payment of exactly the amount contained in the court order, namely R1 915 920.00.

Shortly after that payment, on 30 September 2019, as subsequently determined by Mr Nyali from the respondent's bank statements, the respondent's trust account only had a balance of R271 673.18. The money received from the Road Accident Fund must therefore have been disbursed from the

trust account. From the bank statement it appears that it was used to pay other accounts, rather than Ms Msiza, including six personal loans of the practitioner and other expenses.

The month thereafter Ms Msiza complained to the LPC on 7 October 2019. The practitioner in his answering affidavit informed the court that Ms Msiza has since passed on. His answer in this regard is significant. When dealing with this complaint and the allegations regarding the trust deficit he states the following:

“Unfortunately Ms Msiza passed away just before payment could be made to her. An executor was appointed and she was assisted by her colleagues, Chip and Van Asway Attorneys. I can confirm here under oath that payment to client as regards the first capital, relating to the first order, was made to the abovementioned attorneys.”

No particulars are furnished as to what amount has been paid to these attorneys, no detail is furnished as to when payment of the amount allegedly paid out had been made. The date is, of course, of crucial importance, if one bears in mind that the trust account had already been

depleted by September of that year.

No particulars are furnished as to the payments allegedly made to the attorneys who, it is assumed, represent the executor in the estate. It appears that the practitioner knows some of the details of the estate, as he says that the deceased, that is Ms Msiza, is survived by traditional spouse, Mr Phiri, and four children, one adult and three minors, yet no further particulars or even an acknowledgment of receipt by the executor has been produced. It appears however, that the trust account had been depleted prior to the passing of Ms Msiza and prior to the appointment of the attorneys. Accordingly, the source of any payment to them, had not been disclosed.

The next complaint necessary to be dealt with is that of Ms Molefe. The details regarding this complaint is shortly as follows: Ms Molefe was also a claimant in a Road Accident Fund matter. She complained to the LPC that the legal practitioner has on 21 October 2022 received an amount of R837 722.70 from the Road Accident Fund in respect of her claim.

After Mr Nyali had inspected the Trust bank statements for that month he confirmed that the amount had

indeed been received in the trust account. Shortly thereafter, however, on 31 January 2023, the trust balance was only R333 441.00. This means that a substantial portion of the amount, if that had been the only funds in the trust account, had been disbursed without payment of it to the client. The complainant was eventually paid a lump sum in a rounded-off figure of R400 000.00 on 1 August 2022.

This is more than 20 months after the practitioner had received the capital from the RAF, and clearly, if one has regard to the depletion of the funds in the Trust account, this payment must have been made from funds other than that received in respect of this claim from the Road Accident Fund.

The case of Ms Mogolola was particularly highlighted by Counsel who appeared for the LPC. The reason for this is that it involves a minor child. The action in that matter was also against the Road Accident Fund on behalf of the minor child, in respect of a loss of support. Ms Mogolola had determined after a visit by her to the Road Accident Fund's offices, that the loss of support claim had already been paid to the practitioner on 7 July 2022.

However, she reported and complained to the LPC

that the practitioner had told her that funds would only be received in November or December of that year. He then also told her that initially he would deduct 25 percent of the capital account. There is no indication of whether this was in terms of a contingency fee agreement or not. Those particulars are still lacking.

Subsequently, however, the practitioner offered to give Ms Mogolola a R50 000.00 advance, whilst waiting for payment of the RAF Funds. The inspection conducted by Mr Nyali show that the matter had indeed been finalised on 26 November 2021, and an amount of R630 690.00 had been awarded to the minor child for the loss of support, and that amount had in fact been paid to the practitioner on 8 July 2022. This accords with the facts disclosed by the Road Accident Fund to Ms Mogolola.

Mr Nyali also discovered a letter addressed to Ms Mogolola by the practitioner, indicating that he had estimated an amount of R350 000.00 being due to her, but thereafter the inspection of the trust bank accounts noted payments to her of R5 000.00 on 13 September 2022, R5 000.00 on 30 November 2022 and R10 000.00 on 22 December 2022 only.

In the answering affidavit, in view of this set of facts the respondent's answer is telling. I quote it in full:

“Payment of the capital was made to client in the sum of R410 455.00 and this matter should be regarded as closed. Client received payment even though party and party costs have not yet been paid by the RAF. In fact, the RAF indicated its intention to review same. The law firm is somewhat prejudiced, as it runs the risk of not recovering its final costs and fees in full. The real justice for client is served. Therefore urgency does not arise, but is rather imaginative or putative, as it is based on old, incomplete factual narratives. Urgency has to be real.”

No particularity of the payment of this amount has been furnished and no particularity has been furnished regarding the previous payments. There was also no explanation of how this client's funds have been dealt with in the trust account.

Regarding a major source of non-compliance with obligations, one has to consider whether the obligation to

keep up the books of account had been satisfied, and whether there have been a cooperation in respect thereof with Mr Nyali on behalf of the LPC. Section 87(5)(a) of the Legal Practice Act obliges a practitioner to produce for inspection a book, document or article in his possession or under his custody or control if such is requested by the LPC.

Added to this is the obligation in terms of Section 37(2)(a) of the Act, requiring a practitioner to cooperate with the LPC when it investigates any matter. The failure to cooperate, as required by the Legal Practice Act, has been sufficiently set out by Mr Nyali in his report.

Apart from the obligation to co-operate and produce books of account, Section 87(1) of the Legal Practice Act provides that a Trust account practice, such as that of the legal practitioner in question, must keep proper accounting records containing particular information in respect of moneys received and paid by its own account, and moneys received, held or paid by the account of any person.

Rule 55(4) of the LPC Rules requires such books of account to be kept, which would be present fairly, and in accordance with an acceptable financial framework, the state of affairs of the business, of a firm such as the practitioner in

question, indicating assets and liabilities, day-to-day receipt of moneys and entries made in respect thereof, and information of all monies held and paid by it, or by the practitioner to the account of any person. This will include the three complainants already referred to.

Rules 34 and 48, further provide that practitioner must ensure that the total amount of money in its trust banking account, or trust investment account and trust cash, shall not be less than the total amount of the credit balances of the trust records shown in its accounting records. There are similar requirements in Rules 54.14.4 and 54.12 and 13.

Against the background of these facts one must then determine whether misconduct of the practitioner has been established. Non-Compliance with the obligations imposed in terms of the Legal Practice Act also constitutes misconduct.

Given the facts stated above, and given the lack of any explanation or proper responses from the practitioner, one cannot but conclude that misconduct has been established in numerous instances.

The next inquiry is whether the practitioner is then a fit and proper person to continue in practice. In *Vassen v The*

Law Society of the Cape 1998 (4) SA 532 (SCA), the Supreme Court of Appeal confirmed that an attorney such as the legal practitioner in question, should exhibit honesty, reliability and integrity. This also pertains to his trust affairs.

The judgment goes further to underline that the general public is entitled to expect that money will not be used for any purpose other than that for which it had been held. There are numerous other cases which also confirm the high standard of integrity expected from practitioners, no less so than *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) and *Incorporated Law Society Transvaal v Visser and others, Incorporated Law Society Transvaal v Viljoen* 1958 (4) SA 115 (T), a decision of this court.

What is furthermore expected of a practitioner, when his conduct is placed before a court under scrutiny is that he should display absolute candour and at least take the LPC and the Court into his confidence. The respondent has failed to do so, and the manner in which he dealt with the complaints referred to in the founding affidavit show a disregard, not only for the Court, but also for his obligations towards the public and those who complained of his conduct in particular.

The fact of the matter is further that the practitioner continued to practice and apparently still continues to practice without proper books of account, and proper management of his trust account. He also continues to do so without a Fidelity Fund Certificate, thereby placing the public and any future client at risk.

In my view, the practitioner's conduct merits his suspension and that control over his practice should be exercised by a curator as proposed by the LPC.

Order:

1. That the Honourable Court dispenses with the forms and service provided for in the Uniform Rules in terms of Rule 6(12)(a) and disposes of this matter at such time and place and in such manner and in accordance with such procedures as it seems fit.
2. That MMATLOU LESLEY MATSI (hereinafter referred to as "the First Respondent") be suspended from practising as a legal practitioner on an urgent basis pending the finalisation of the application, and on the following conditions.
3. That the First Respondent immediately hand delivers

his certificate of enrolment as an attorney to the Registrar of this Honourable Court.

4. That in the event of the First Respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from date of this order, that the Sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate and to hand it to the Registrar of this Honourable Court.
5. That the First Respondent be prohibited from handling or operating on his trust accounts as detailed in paragraph 6 hereunder.
6. That the Director/Acting Director and or Nominee, of the Gauteng Provincial Office of the Applicant, be appointed as *curator bonis* (herein after referred to as "*curator*") to administer and control the trust accounts of the Respondents, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with the First Respondent's practice as attorney and including also, the separate banking account opened and kept by the First Respondent at a bank in the Republic of South Africa in terms of section 86(1) of the Legal Practice Act ("LPA")

and/or any separate savings or interest-bearing accounts as contemplated by section 86(3) and section 86(4) of the LPA, in which monies from such trust bank accounts having 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:

6.1 immediately to take possession of the Respondents’ accounting records, records, filed and documents as referred to in paragraph 7 and subject to the approval of the Board of Control of the Legal Practitioner’s Fidelity Fund (herein after 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 deem necessary to bring to completion current transactions in which the First Respondent was acting at the date of this order;

6.2 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 the First Respondent in respect of monies held, received and/or invested by the First Respondent in terms of Section 86(3) and section 86(4) of the PA (herein after referred to as “the 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 the First 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);

- 6.3 To ascertain from the Respondents accounting records the names of all persons on whose account the First Respondent appears to hold or to have received trust monies (herein after referred to as “trust creditors”) and to call upon the First Respondent to furnish him, within 30 (thirty) days of the date of service of this order such further period as he may agree to in writing, with the names, addresses and

amounts due to all trust creditors;

- 6.4 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 the Respondents and, if so, the amount of such claim;
- 6.5 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' rights of access to the civil courts;
- 6.6 Having determined the amounts which he considered are lawfully due to trust creditors, to pay such claims in full subject always to the approval of the Board of Control of the Fund;
- 6.7 In the event of there being surplus in the trust account(s) of the Respondents 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 63(3) of the LPA in respect of any interest therein referred to and, secondly, without prejudice to the rights of the trust creditors of the First Respondent, the costs, fees and expenses referred to in paragraph 13 of this application, or such portion thereof as has not already been separately paid by the First Respondent to Applicant, and, if there is any balance left, subject to the approval of the Board of Control of the Fund, to the First Respondent, if he is solvent, or, if the First Respondent is insolvent, to the trustee(s) of the First Respondent's insolvent estate;

- 6.8 In the event of there being insufficient trust monies in the trust banking account(s) of the Respondents, 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 bank account(s) amongst the trust creditors

alternatively to pay the balance to the Legal Practitioner's Fidelity Fund;

6.9 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

6.10 To render from time to time, as curator, returns to the Board of Control of the Fund showing how the trust account(s) of the Respondents has/have been dealt with, until such time as the Board notifies him that he may regard his duties as curator as terminated.

7. That the First Respondent immediately delivers his accounting records, records, filed and documentation containing particulars and information relating to:

7.1 any monies received, held or paid by the First

Respondent for or on account of any person while practising as an attorney;

7.2 any monies invested by the First Respondent in terms of section 86(3) and section 86(4) of the LPA;

7.3 any interest on monies so invested which was paid over or credited to the First Respondent;

7.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by the First Respondent, whether as an executor or trustee or curator or on behalf of the executor, trustee or curator;

7.5 any insolvent estate administered by the First Respondent as trustee or on behalf of the trustees in terms of the Insolvency Act, No 24 of 1936;

7.6 any trust administered by the First Respondent as trustee or on behalf of the trustee in terms of the Trust Property Control Act, No 57 of 1988;

7.7 any company liquidated in terms of the

Companies Act, No 61 of 1973, administered by the First Respondent as or on behalf of the liquidator;

7.8 any close corporation liquidated in terms of the Close Corporation Act, 69 of 1984, administered by the First Respondent as or on behalf of the liquidator; and

7.9 the First Respondent's practice as an attorney of this Honourable Court, to the curator appointed in terms of paragraph 6 hereof, provided that, as far as such account records, files and documents are concerned, the First Respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.

8. That should the First 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 the First Respondent (as the case may be), the sheriff of the district in which such accounting records,

records, files and documents are, be empowered and directed to search for and take possession thereof wherever they may be and to deliver them to such curator;

9. That the First Respondent be and is hereby removed from office as –

9.1 executor of any estate of which the First 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 refer 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.
10. That the curator shall be entitled to:
- 10.1 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;
 - 10.2 Require from the persons referred to in paragraph 10.1 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 the First Respondent and/or First Respondent's clients and/or the Fund in respect of money and/or other property

entrusted to the First Respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;

10.3 Publish this order or an abridged version thereof in any newspaper he considered appropriate;

10.4 Wind-up the Respondent's practice.

11. That, if there are any trust funds available, the First 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 (First Respondent) in respect of this 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 the director of the Legal Practitioner's 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 the First Respondent be and is hereby directed:

- 13.1 To pay, in terms of section 87(2) of the LPA, the reasonable costs of the inspection of the accounting records of the Respondents;
- 13.2 To pay the reasonable fees and expenses of the curator;
- 13.3 To pay the reasonable fees and expenses of any person(s) consulted and or engaged by the curator as aforesaid;
- 13.4 To pay the expenses relating to the publication of this order or any abbreviated version thereof; and
- 13.5 To pay the costs of this application on an

attorney and client scale.

14. The application for the review of the report of Mr Nyali is refused, with costs.

.....

DAVIS, J

JUDGE OF THE HIGH COURT

DATE JUDGMENT DELIVERED: 30 AUGUST 2023