

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **13881/2021**

CASE NO: **13204/2022**

- (1) REPORTABLE: Yes
- (2) OF INTEREST TO OTHER JUDGES: Yes
- (3) REVISED: No.

SIGNATURE:



DATE: 8 September 2023

In the matter between:

LEGAL PRACTICE COUNCIL

Applicant

and

SENZO WISEMAN MKHIZE

Respondent

Summary – Application to be removed from the roll of practitioners – Section 34 of the Legal Practice Act - Respondent struck from roll of practitioners – Respondent accepted briefs directly from the public – Respondent's defence is that his administrators accepted the money without his approval - Counsel cannot avoid accountability by hiding behind the conduct of those that assist them in practice – The standards the Legal Practice Act create would be meaningless if counsel could avoid accountability by claiming their administrators acted improperly – The Respondent failed to exercise the necessary control and oversight over his practice.

JUDGMENT

DE VOS AJ:

INTRODUCTION

- [1] The case involves an application to remove Mr Mkhize from the roll of legal practitioners. The case engages, at the level of principle, the legitimacy of the legal system. The public's faith in the legal system is a condition for the rule of law. The conduct of lawyers can diminish the legitimacy of the legal system. It is for this reason, that the Court has oversight over the conduct of its officers. The public must be able to trust their lawyers will act ethically and with integrity; and if the public cannot trust their lawyers: they must trust that the Court will not hesitate to act. This is such a case, in which the Court is requested to act to redeem a breach of the public's trust in the legal system.
- [2] The Court has to consider two applications. The first is the application by the Legal LPC to suspend, alternatively strike Mr Mkhize from the roll of legal practitioners ("the LPC proceedings"). The LPC proceedings is underpinned by six complaints received from the public. At their core, the complaints are that Mr Mkhize, who practices as an advocate, has accepted instructions directly from the public. The second application is a review application launched by Mr Mkhize ("the review proceedings"). In the review proceedings, Mr Mkhize seeks to review and set aside the LPC's decision to launch the LPC proceedings.
- [3] The Court deals first with the LPC proceedings before considering the review application.

THE LPC PROCEEDINGS

- [4] The genesis of these proceedings is a complaint received from Ms Nkala. On 5 March 2020, Ms Nkala formally complained to the LPC. Her complaint, in essence is that she paid Mr Mkhize on three occasions and he failed to assist her. The outcome of the matter is that she had, despite employing Mr Mkhize to represent her and having paid him, lost her home which her grandmother had left to her.
- [5] Ms Nkala's words in the complaint are that –
- "I went to Adv Mkhize to help me. He wanted R 5 000 to open a file (04-06-19) after that he did nothing again. ... now they've kicked me out in December. I just want my money back since he has done nothing up to now".
- [6] Ms Nkala attaches three receipts to her complaint as proof that she paid Mr Mkhize. The first receipt is dated 9 June 2017 for R 10 000 for "service fees", the second is dated 4 June 2019 for R 5 000 for "consultation"; and the third is for R 3000 dated 8 September 2019, also marked "service fees". All three invoices bear the stamp of Advocate Senzo Mkhize with his address at the 3rd Floor Marble Chambers.
- [7] On 12 March 2020 the LPC sent the complaint with an invitation to respond to Mr Mkhize. Mr Mkhize did not respond. On 3 August 2020 the LPC sent Mr Mkhize a reminder. Again, Mr Mkhize did not respond. On 22 October 2020, the LPC extended a third invitation to Mr Mkhize. Mr Mkhize responded to this third invitation with a written response made under oath.

- [8] Mr Mkhize's written response accuses Ms Nkala of being vindictive. Mr Mkhize states that the money was "received by my secretary incorrectly". Mr Mkhize's statement provides that the "fees [were] received [by] my administrator Ms Zwane inappropriately" and "without Advocate Mkhize's involvement".
- [9] The LPC considered the complaint and Mr Mkhize's response. A Senior Legal Officer in the LPC, Mr Fourie, prepared a Memorandum. The Memorandum sets out the facts as conveyed in the complaint and Mr Mkhize's response. The Memorandum then notes that the -
- "explanation given by Mr Mkhize actually raises more red flags in the sense that if he is to be believed, he had no control over his employees and took no effort to repay the complainant. It was also not a once off 'error'. Some time passed between each payment and if he honestly wanted to reimburse the complainant he could have done so."
- [10] The Memorandum highlights that the statement contains a contradiction regarding whether Mr Mkhize consulted with Ms Nkala. First, Mr Mkhize denies having consulted with Ms Nkala. Mr Mkhize denies that "at that particular dates as stated had I known or consulted Ntsiki Lindiwe Nkala" (paragraph 6). However, later on in the statement, Mr Mkhize states, "I consulted Ntsiki Nkala once to which she brought incorrect and incomplete information... in chambers" (paragraph 13).
- [11] The Memorandum notes further that Mr Mkhize rendered no further legal services and blames his ex-employees. The Memorandum notes that the contact details contained in the stamp at the bottom of Mr Mkhize's statement to the LPC are identical to the stamp on the receipts. The Memorandum recommends that the LPC urgently apply to Court for the suspension of Mr Mkhize. The LPC

contends that the complaint shows that Mr Mkhize takes instructions and monies directly from the public, fails to execute his mandate and fails to respond to correspondence to him by the LPC.

[12] In April 2021, based on Ms Nkala's complaint, the LPC proceedings were instituted. The LPC filed a founding affidavit setting out Ms Nkala's complaint, the Memorandum from Mr Fourie and Mr Mkhize's response.

[13] Shortly after filing the founding affidavit, the LPC had to file a supplementary founding affidavit, as it had received five additional complaints regarding Mr Mkhize's conduct. These complaints are by Ms Tshabalala, Ms Maloba, Ms Madela, Mr Taunyane and Mr Suleiman. The complaints appear in detail in the supplementary affidavit and are presented in a summarised form here.

[14] The complaint by Ms Tshabalala, age 60, is that she paid Mr Mkhize R 10 000 and he failed to represent her in Court. Mr Mkhize also misrepresented to Ms Tshabalala what had occurred in Court. Ms Tshabalala's words in the complaint are: "he said everything is fine, the matter is done and right, but he lied to us". Ms Tshabalala complains that when she tried to call Mr Mkhize, he said he will meet her at his chambers; however, when she arrives the chambers are locked, and Mr Mkhize's phone is switched off.

[15] Ms Maloba, age 71, complained to the LPC that she instructed Mr Mkhize on 2 February 2018 to assist with a property transaction. Mr Mkhize charged Ms Maloba R10 000 for opening a "file/consulting/receiving" instruction. Ms Maloba further complained that Mr Mkhize did not complete his mandate. Although it is not clear, Ms Maloba's complaint suggests that Mr Mkhize did not comply with

either a court order or an instruction. Ms Maloba's attempts to meet with Mr Mkhize were unsuccessful as he "kept on postponing our appointment to meet."

[16] Ms Madela, aged 83, complained to the LPC that she instructed Mr Mkhize to assist with the registration of a title deed into her family name. Mr Mkhize provided Ms Madela with a written "letter of engagement". The letter of engagement shows that Mr Mkhize charged Ms Madela, amongst others, R 5 000 for "opening a file, consulting/receiving instructions from attorney". The letter of engagement shows Mr Mkhize charged Ms Madela R 5000 for "sheriff fees". Ms Madela provided the LPC with the written letter of engagement.¹ The letter of engagement bears Mr Mkhize's details and appears to be an invoice together with Mr Mkhize's banking details, specifically, the bank name, branch number and account number. The banking details are reflected as they would appear on an invoice. The letter of engagement is signed by Mr Mkhize.

[17] Mr Taunyane complained to the LPC that he instructed Mr Mkhize to file a case against the trustees of Mogale Alloy Trust. The complaint was that Mr Mkhize failed to execute his mandate. He further alleges that he paid Mr Mkhize a sum of around R178 000, and despite his attempts to terminate Mr Mkhize's mandate, Mr Mkhize refused to hand over the files.

[18] The last complaint set out in the supplementary affidavit is that of Mr Suleiman. Mr Suleiman complained to the LPC that he paid an amount of R 2000 to Mr Mkhize to assist with a condonation application. Mr Suleiman says Mr Mkhize

¹ Attached to annexure SA14.

failed to execute his mandate and, on three occasions during 2018, agreed to refund him, but he never did.

[19] The LPC's original case consisting of one complaint, as set out in the founding affidavit, increased to a total of six complaints, after filing the supplementary affidavit.

[20] Mr Mkhize did not file a notice of intention to oppose or an answering affidavit in response to these allegations and the LPC set the matter down on the unopposed roll. However, the Sheriff could not properly serve Mr Mkhize despite three attempts at Mr Mkhize's chambers. On 29 March, 30 March and 31 March 2021 the Sheriff found no one at Mr Mkhize's chambers and affixed the notice to his chamber doors. The LPC was not satisfied that this was sufficient service and therefore, the LPC served a notice of removal. In addition, the LPC launched a substituted service application. In response, Mr Mkhize launched eight applications against the LPC. I summarise these proceedings.

[21] First, in May 2022, Mr Mkhize launched an urgent application seeking to interdict the LPC. The matter was removed from the urgent roll. Second, in June 2022 Mr Mkhize launched a second urgent application to interdict the LPC from proceeding with an application to suspend/strike Mr Mkhize. On 8 June 2022, Thlapi J made an order, by agreement, ordering Mr Mkhize to file a notice of opposition by 2 June 2022 and to file an answering affidavit within 15 days. Third, on 12 June 2022, Mr Mkhize applied to the Constitutional Court for direct access (CCT196/2022), seeking a declarator that the LPC has sought to hold his career hostage. The affidavit in support of the application for direct access is similar to the affidavit in support of the second urgent application. Fourth, on 28 July 2022,

Mr Mkhize launched urgent proceedings to interdict the LPC from proceeding with its striking/suspension application. Bam J struck the matter from the roll with costs. Fifth, on 2 September 2022, Mr Mkhize launched review proceedings seeking to set aside the LPC's decision to refer his conduct to the Court for purposes of striking/suspension. Sixth, on 6 October 2022, Mr Mkhize launched an application to declare the LPC a vexatious litigant. Seventh, on 13 July 2023, Mr Mkhize launched urgent proceedings seeking to interdict the hearing of 18 July 2023 from continuing. The application was struck from the roll with costs. Eighth, Mr Mkhize launched an application to review the LPC's decision to launch the LPC proceedings. I will deal with this application in detail under a separate heading.

[22] In addition to these applications, Mr Mkhize also wrote two letters of warning to the LPC, to the effect that: were the LPC not to withdraw the application, Mr Mkhize would institute a damages claim of R 30 million.

[23] The LPC proceedings was set down to be heard on 25 October 2022. A couple of days before this hearing, Mr Mkhize filed his answering. The affidavit was filed late. It was filed more than a year after it was due in terms of the rules of court. It was filed five months out of time in terms of the order of Thlapi J of 2 June 2022. The affidavit was filed so late and so close to the set down of the matter that it resulted in a postponement of the hearing.

[24] On 8 March 2023, the parties were to attend a case management meeting. The minutes of the meeting indicated that representatives from the LPC were present with the case management Judge, the Honourable Justice van der Schyff and Mr Sidesha, the Judge's secretary. The minutes reflect that Mr Sidesha extended

an invitation to Mr Mkhize. The LPC's attorneys, as well as Mr Sidesha, made several attempts to contact Mr Mkhize on three cell phone numbers. Mr Mkhize did not attend the case management meeting.

[25] The LPC proceedings and the review application were set down to be heard by this Court on 18 July 2023. Shortly before the hearing of 18 July 2023, Mr Mkhize filed a notice removing the LPC application and the review application from the roll. This Court wrote to Mr Mkhize indicating that Mr Mkhize must attend at Court, where he will be provided with an opportunity to explain the basis for the unilateral notice of removal.

[26] During the week of 13 July 2023, Mr Mkhize launched urgent proceedings to interdict the Court from hearing the LPC application on 18 July 2023. The Court, per Mogotsi AJ, dismissed the urgent application with costs on an attorney-client scale.

[27] The hearing of 18 July 2023, commenced with Mr Mkhize wearing a senior counsel's robe. Counsel for the LPC pointed this out and contended that it is a fraud on the Court to represent oneself as a senior counsel when one is not. The following exchange then occurred:

“Mbongwe J: It is disturbing, Mr Mkhize, to hear that you are wearing silk in front of the Court where you are not a silk.

Mr Mkhize: M'Lord, that is also disturbing to my learning colleague because he knows that I am a silk. I have been practising in this division form the year 2010. Even today, I am not having an issue with that.

Mbongwe J: Surely there is a document that they[?] issue for silk.

De Vos AJ: Your letters patent, when were they issued?

Mr Mkhize: They issue documents, and there is a certificate. Yes, there is a patent. It was issued last year in November.

De Vos AJ: The President has not issued letters patent for three years.

Mr Mkhize: Yes

De Vos AJ: So, you cannot be silk without the letters patent, and the President has not issued these letters, even though there have been recommendations for silk.”

[28] Mr Mkhize then conceded that he did not have letters patent and offered to remove his robes. Subsequent to this exchange, Mr Mkhize was alerted to the fact that he had just made a misrepresentation to the Court. Mr Mkhize’s response, when being confronted with his misrepresentation, was to change his version and say to the Court that he was unaware of the requirement of letters patent.

[29] The hearing continued and Mr Mkhize sought a postponement of the matter. Mr Mkhize submitted that the matter was not ready to proceed and he requested time to file his outstanding papers. The outstanding papers consisted of Mr Mkhize’s written submissions in the LPC proceedings and Mr Mkhize’s further affidavit (filed subsequent to receiving the record) in the review application.

[30] The LPC highlighted that not only was Mr Mkhize out of time to file these papers, but that he has, on previous occasions, not complied with court orders setting timeframes to file papers. The LPC drew the Court’s attention to two previous court orders in this regard. On 2 June 2022, Tlhapi J granted an order, by agreement, that Mr Mkhize file his answering affidavit within 15 days of the Order. Mr Mkhize did not comply with this Order. Mr Mkhize filed his affidavit five months late. It was only when the LPC set the matter down that Mr Mkhize filed his

affidavit. Then again, on 25 October 2022, the Order of Thlapi and Neukircher JJ directed Mr Mkhize to file his replying affidavit and heads of argument in the review application and his heads in the LPC proceedings. Again, Mr Mkhize did not comply with this Order. On 18 July 2023, when the matter came before this Court - nine months after the order of Thlapi and Neukircher JJ - Mr Mkhize had still not complied with the order and was using the failure to file these pleadings as the basis for seeking a postponement.

[31] The Court engaged with Mr Mkhize at length before an order was made. The Court granted an order in the following terms –

- “1. The following arrangements have been made with regard to further progress in this matter. In respect of case number 13881/2021, which is the application by the applicant, being the Legal Practise Counsel against Adv Mkhize. We have agreed as follows:
 - (a) The respondent, Mkhize is to file his heads of argument and practise note, which are the all documents outstanding in respect of case number 13881. There is a notice rule 30 that Mkhize has filed and which will form part of the documents that will be uploaded on case line and obviously served on the other side. Mkhize is to file heads of argument and a practise note, a replying affidavit and note on chronology of events, file a reply. That would be by Friday 28 July 2023.
 - (b) Once so received, the LPC by the 4 August, which is the next Friday would file its supplementary affidavit to respond to the documents that Mkhize would have filed.
2. Importantly, it has been agreed between the parties that the matter once so filed, the matter will be decided on the papers. I am going to add a caveat to this: The agreement between the parties is qualified to the extent that in the event of one party not complying with the order that I have just made, the court will be proceeding to decide the matter on available papers.”

[32] The Court was clear: the matter would be resolved and this would be Mr Mkhize's last opportunity to file the outstanding papers in the LPC proceedings and the review application. The Court granted this Order in light of the consequences of the relief being sought from the Court. It weighed with the Court that a decision to strike someone from the roll of advocates is a matter which affects their livelihood. With this consideration in mind, the Court granted Mr Mkhize a last opportunity to place his version regarding the allegations against him before Court. Mr Mkhize was afforded a further eight court days to file the outstanding papers. Mr Mkhize expressed his need to finally conclude the matter and agreed that the Court could, after the filing of the papers referred to in the Order, determine the matters on the papers.

[33] The Court order of 18 July 2023 ordered Mr Mkhize to file his outstanding pleadings and upload a Rule 30 application by 28 July 2023. Mr Mkhize did not comply with this order. Instead of complying with the order Mr Mkhize filed what appeared to be a new rule 30 and rule 30A application on 31 July 2023. The "new" rule 30 and rule 30A applications, seeks to declare the steps taken by the LPC as irregular, interdict these proceedings from continuing and suspending the Order of this Court of 18 July 2023. The affidavit contains no allegations in relation to the suspension of the Court order. The affidavit is a duplication of the affidavit filed in previous proceedings before this Court, all of which were dismissed. The only new aspect is the relief in the notice of motion aimed at the order of this Court of 18 July 2023. However, no factual basis is presented for this case in the founding affidavit.

[34] On 25 August 2023, whilst this Court was seized with drafting this judgment, the LPC brought a complaint received from a Presiding Officer, to its attention. The complaint is in the format of correspondence received from a Presiding Officer. The correspondence makes three points. The first is that Mr Mkhize had appeared robed as a silk on two occasions subsequent to the hearing before this Court on 18 July 2023. Second, that the Presiding Officer inquired about Mr Mkhize's status and Mr Mkhize informed the Presiding Officer that he was a senior counsel as he had been practising since 2014. Third, as a result of how Mr Mkhize conducted himself in one of the matters, the Presiding Officer was concerned that Mr Mkhize had in fact been struck off the roll and inquired from Mr Mkhize whether he was still in good standing. Mr Mkhize informed the Presiding Officer that his matters with the LPC had been "sorted out".

[35] These are the relevant facts relating to the six complaints the LPC received against Mr Mkhize, as well as the manner in which these proceedings have been litigated. The Court must decide, factually, whether or not the alleged offending conduct has been established on a preponderance of probabilities.

MISCONDUCT

[36] The misconduct complained of, in the main, is that Mr Mkhize has failed to practice as a referral advocate. On 24 July 2014, Mr Mkhize was admitted to the roll of practising advocates. According to the records of the LPC, Mr Mkhize is to conduct his practice as a referral advocate, practising as a non-affiliate to any society or group of advocates. Mr Mkhize's offices are situated at Suite 3rd Floor, Marble Towers, 212-218 Jeppe & Von Wielligh Street, Johannesburg.

[37] The LPC's central allegation is that Mr Mkhize accepted instructions and deposits from clients directly without an attorney. This is in contravention of section 34 of the Legal Practice Act 28 of 2014 ("The LPA"). Section 34 of the LPA provides that:

"(2) (a) An advocate may render legal services in expectation of a fee, commission, gain or reward as contemplated in this Act or any other applicable law—

(ii) Upon receipt of a brief from an attorney; or

(iii) Upon receipt of a request directly from a member of the public or from a justice centre for that service, subject to paragraph (b).

(b) An advocate contemplated in paragraph (a) (ii) may only render those legal services rendered by advocates before the commencement of this Act as determined by the Council in the rules if he or she—

(i) is in possession of a Fidelity Fund certificate and conducts his or her practice in accordance with the relevant provisions of Chapter 7, with particular reference to sections 84, 85, 86 and 87;

(ii) has notified the Council thereof in terms of section 30 (1) (b) (ii)."

[38] The LPC contends that from these complaints and the responses received from Mr Mkhize, it is evident that Mr Mkhize accepts instructions directly from clients in contravention of section 34 of the LPC. In addition, Mr Mkhize is accused of engaging with his opponents and writing letters on behalf of his clients. I consider the individual complaints.

Ms Nkala

[39] The Court considers the facts presented. In relation to the complaint by Ms Nkala, the Court has the physical receipts showing Mr Nkala paid Mr Mkhize R 18 000. The receipts are objective evidence, and they are contemporaneous. The

receipts bear a stamp from Mr Mkhize's office. The receipts were signed by Mr Mkhize's secretary. The stamp used to sign the receipt is the same stamp which appears on Mr Mkhize's statement to the LPC. There is no dispute money was paid by Ms Nkala to Mr Mkhize's office. The money was not paid once off but rather on three different occasions.

[40] In addition, Mr Mkhize has presented the Court with a "Walk-ins Register".² The Walk-in Register indicates Ms Nkala attended Mr Mkhize's chambers on 8 November 2019 for a follow-up, in June 2019 for a follow-up and on 12 June 2019 for a follow-up, and on 20 June 2020 for a follow-up. These objective pieces of evidence, presented to the Court by Mr Mkhize, also tally with Ms Nkala's version that she attended Mr Mkhize's chambers.

[41] Mr Mkhize accepts that Ms Nkala paid him directly without the involvement of an attorney. Mr Mkhize concedes the direct payment of 9 July 2017 for R 10 000, 4 June 2019 for R 5 000 and 3 August 2020 for R 3 000. Mr Mkhize, however, seeks to avoid the conclusion of accepting briefs and monies without an attorney by alleging that the invoices were done by his administrators without his knowledge.

[42] Mr Mkhize's defence, even if accepted at face value – that his employees acted of their own volition – is insufficient to avoid a finding of misconduct. Mr Mkhize is responsible for the conduct of his employees. In Mr Mkhize's version, he is guilty of accepting briefs and money directly from clients without an attorney. Counsel cannot hide behind the conduct of those that assist them in practice to avoid the binding principles of their profession. It would counteract the

² Annexure MO.14

accountability the LPC's code seeks to create and the ethics of the profession, were Mr Mkhize's defence to be upheld.

[43] Mr Mkhize's failure to exercise control and apply the necessary oversight over his employees is not a defence, but in fact itself an act which itself falls short of the standards and ethics of his profession. Mr Mkhize cannot fail to exercise control over his employees and blame them for a breach of the referral rule. Counsel must be in control of their practice.

[44] In any event, Mr Mkhize's defence that his employees acted of their own volition is not consistently sustained. Mr Mkhize has presented three versions under oath regarding the direct payments received from Ms Nkala. First, that he never consulted with Ms Nkala. Second, that he consulted with her in the presence of Mr Mkhize's attorney.³ Third, that his administrator Ms Nkadimeng had a consultation with Ms Nkala without Mr Mkhize.⁴ Mr Mkhize's version before the Court contains contradictions.

[45] Moreover, the Court finds Mr Mkhize's defence fanciful. The Court considers that Mr Mkhize consulted with Ms Nkala; Ms Nkala paid for the consultation; paid for the services rendered by Mr Mkhize; received receipts for Mr Mkhize's services and returned and paid on two more occasions for assistance. Even on Mr Mkhize's version, he provided Ms Nkala with assistance in identifying what further documents were required. These facts all indicate that Mr Mkhize provided a service for which Ms Nkala paid. Despite these common cause facts, Mr Mkhize's defence is his administrators somehow incorrectly issued receipts

³ Annexure A3, Mr Mkhize's response to Ms Nkala's complaint at para 13.

⁴ 24 May 2022, urgent application para 30.

for these services. The defence that Mr Mkhize's employees accepted money for themselves, rather than on his behalf for Mr Mkhize's services, is, in these circumstances, fanciful.

[46] Mr Mkhize's defence is that his administrators accepted the money. In support of this version, he has provided the Court with confirmatory affidavits from his administrators. The Court concludes that these affidavits are unclear and do not assist the Court in its determination.⁵ In any event, these affidavits must be seen in context. Mr Mkhize has provided the Court with a WhatsApp exchange between him and Ms Nkadimeng (one of Mr Mkhize's administrators).⁶ In the WhatsApp exchange, Mr Mkhize tells Ms Nkadimeng that Ms Nkala –

“wants to take all of us down, we need to team [up] against her, so I need to protect you all including myself”.

[47] Ms Nkadimeng then asks “what happened that affidavit you said you will write then we will sign”. Mr Mkhize responds by saying he has prepared the affidavits and will indicate when she must sign them. It weighs with the Court that Ms Nkadimeng's motivation for signing the affidavit was to “team up” against Ms Nkala and to protect herself and that whatever she signed was drafted by Mr Mkhize to protect himself.

⁵ A confirmatory affidavit has been deposited by Ms Zwane in September 2022. It is a pro forma affidavit confirming the contents of Mr Mkhize's Affidavit insofar as it relates to Ms Zwane. The Affidavit by Ms Nkadimeng is curious. It is dated 7 September 2022 and states –

"I confirm that I received the amount of R 10 000 and R 3 000 on 9 July 2019 and 8 August 2019 under Advocate Mkhize confirmation."

It is unclear what "confirmation" means in this context. It could mean that Mr Mkhize confirmed the payments or perhaps that the Affidavit is done in confirmation of Mr Mkhize. The Court is therefore not clear on what exactly Ms Zwane and Ms Nkadimeng confirmed or wished to depose to.

⁶ Annexure M.04.

[48] The Court concludes that, in relation to the complaint from Ms Nkala, Mr Mkhize has committed an act of misconduct by accepting briefs and monies directly from the public. The objective evidence indicates on a preponderance of probabilities that Mr Mkhize accepted instructions and monies from the public without an attorney.

Ms Madela

[49] The LPC contends that the complaint by Ms Madela indicates that Mr Mkhize accepted instructions and monies directly from the public.⁷ The LPC has expressly made this allegation in its affidavit.

[50] Again, the Court has objective evidence in the form of a letter of engagement. The letter is on Mr Mkhize's letterhead, bears his signature and provides his banking details. The letter of engagement contains a charge of R 5 000 for Sheriff's fees. The only reasonable conclusion the court can draw is that Mr Mkhize demanded direct payment from a client. The charge of R 5 000 for Sheriff's fees is unfortunate.

[51] The Court concludes that, in relation to the complaint from Ms Madela, Mr Mkhize has committed an act of misconduct by accepting briefs and monies directly from the public. The objective evidence indicates on a preponderance of probabilities that Mr Mkhize accepted instructions and monies from the public without an attorney.

⁷ Supplementary Affidavit, para 21 and 22.

Ms Maloba, Ms Tshabalala, and Mr Suleiman

[52] The complaints all indicate payments made directly to Mr Mkhize and Mr Mkhize failing to execute his mandate. Mr Mkhize failed to respond meaningfully to these allegations.

[53] In relation to the complaint by Ms Maloba, the LPC contends that Mr Mkhize received instructions directly, was charged a fee for opening a file and has failed to account to his client since 2018.

[54] In relation to the complaint by Mr Suleiman, the LPC notes that Mr Mkhize informed Mr Suleiman on 29 December 2017 that he was in Cape Town, but he would arrange for him to collect his file in his chambers and further informed him that “all lawyers, sheriffs and courts are closed for the Holiday, I wonder which urgency you are referring to.” Mr Mkhize further asked Mr Suleiman to email him his banking details and promised to repay him once Mr Mkhize was paid. Mr Mkhize’s response to the LPC was that he was acting on the instruction of Ms Tersia Selamolela of Selamolela Attorneys. The LPC submits that this was dispelled by Mr Suleiman, who wrote to Mr Mkhize –

“I have never heard of such attorneys before. Either way, my banking details were previously submitted to Adv. Mkhize to process the refund”.

[55] The Court finds Mr Mkhize guilty of misconduct in relation to the complaints from Ms Maloba, Mr Suleiman and Ms Tshabalala, as well.

Mr Taunyane

- [56] Mr Mkhize filed a response to this complaint. The LPC highlights that in this response, Mr Mkhize admits to receiving R 61 000, which he says was used between him and four other people to travel to Cape Town to retrieve the file from Werksmans. The LPC contends that Mr Mkhize's statement in response to the complaint reveals that Mr Mkhize conducted himself in a manner reserved for Attorneys and Advocates with Trust Accounts as he addressed correspondence to his opponents on behalf of Mr Taunyane and 34 others.
- [57] Mr Mkhize provided a bare denial in this regard and failed to provide any further explanation or plead any facts in this regard.
- [58] The Court concludes that this complaint, also, has to be sustained.
- [59] Mr Mkhize could have provided the LPC or the Court with proof that these clients had approached Mr Mkhize through an attorney. In the normal course, an attorney briefing a counsel creates a significant paper trail. The attorney would brief the Counsel, generally in written form. Invariably there would be email exchanges and phone calls. Counsel would produce work – generally in written form and present an invoice to the attorney. The attorney would pay the invoice. It should be easy to prove that a brief went through an attorney through the presentation of a brief cover or letter of instruction, an invoice, a bank statement, an email discussing the matter, the drafting work done by counsel or a phone history showing phone calls.
- [60] All of these would have been easy to place before the Court, were they in existence.

- [61] No such evidence was presented, despite the three years Mr Mkhize has had since the launching of the proceedings to the hearing of the matter.
- [62] Even if, somehow, a brief existed, without any of these documents, the attorney could have deposed to a confirmatory affidavit explaining the brief. This also is entirely absent. The Court concludes that the absence of these documents indicates that there was no attorney involved in any of these matters.
- [63] Mr Mkhize's conduct of accepting money from the public, absent an attorney, Trust Account or Fidelity Fund Certificate means these clients, and their money, are unprotected and at risk. The referral rule shields the public against this harm.
- [64] The position adopted by our courts consistently is that a referral advocate cannot accept briefs directly from the public. Recently, in *LPC v Teffo*⁸ the Court reaffirmed that a referral advocate who consults with clients without acceptance of a brief from an attorney, but rather directly from clients, is a contravention of section 34(2)(a)(i) and paragraph 27.2 of the LPC's code of conduct. The sanction in the matter was that the advocate was struck from the roll.
- [65] The referral rule is not a "pointless formality" or an obstacle to efficient, professional practice, nor is it a protective trade practice designed to benefit the advocacy.⁹ The rule requires that an attorney initiates the contact between an advocate and his client, negotiates about and receives fees from the client, instructs the advocate specifically in relation to each matter affecting the client's interest, oversees each step advised or taken by the advocate, keeps the client

⁸ *The South African Legal Practice Council v Teffo* (10991/21) [2022] ZAGPPHC 666 (16 September 2022).

⁹ *Rösemann v General Council of the Bar of South Africa* [2003] 4 All SA 211 (SCA).

informed, is present as far as reasonably possible during interaction between the client and the advocate, may advise the client to take or not take Counsel's advice, administers legal proceedings and controls and directs settlement negotiations in communication with his client. However –

“An advocate, by contrast, generally does not take instructions directly from his client, does not report directly or account to the client, does not handle the money (or cheques) of his client or of the opposite party, acts only in terms of instructions given to him by the attorney in relation to matters which fall within the accepted skills and practices of his profession and, therefore, does not sign, serve or file documents, notices or pleadings on behalf of his client or receive such from the opposing party or his legal representative unless there is a Rule of Court or established rule of practice to that effect (which is the case with certain High Court pleadings but finds no equivalent in magistrates’ court practice). The advocate does not communicate directly with any other person, save opposing legal representatives, on his client’s behalf (unless briefed to make representations), does not perform those professional or administrative functions which are carried out by an attorney in or from his office, does not engage in negotiating liability for or the amount of security for costs or contributions towards costs or terms of settlement except with his opposing legal representative and then only subject to the approval of his instructing attorney.”¹⁰

[66] The rule is clear and longstanding. It is well-known and central to the profession. Mr Mkhize breached the rule. The misconduct is not a small issue. It is a breach of the rule that defines the work of advocates practising without Trust Accounts – as referral work.

[67] In addition to the issue of Mr Mkhize taking instructions and money directly from clients, Mr Mkhize failed to respond to the correspondence from the LPC on 12 March 2020 and 3 August 2020.¹¹ This is a common cause. In addition, in relation

¹⁰ Id at para 28.

¹¹ Founding Affidavit paras 6.5 and 6.6; Answering Affidavit (not deal with). See paras 6.3 – 6.8.

to three of the complaints – all brought by elderly women - Mr Mkhize also failed to execute his mandate.

[68] The Court concludes that Mr Mkhize, on more than one occasion, took instructions and money directly from clients, failed to respond to correspondence from the LPC, failed to execute his mandate and conducted himself in a manner reserved for attorneys. The Court is satisfied that the offending conduct has been established on a preponderance of probabilities.

FIT AND PROPER

[69] Once the Court is satisfied that the offending conduct has been established, the second inquiry is whether the practitioner concerned is a fit and proper person to continue to practise. This inquiry entails a value judgement, which involves weighing up the conduct complained of against the conduct expected of an advocate.¹² In this regard, the Court must exercise a discretion.¹³

[70] The conduct expected of advocates is to be of complete honesty, reliability and integrity.¹⁴

"...Advocates are required to be of complete honesty, reliability and integrity. The need for absolute honesty and integrity applies both in relation to the duties owed to their clients as well as to the courts. The profession has strict ethical rules to prevent malfeasance. This is for good reason. As officers of the Court, Advocates serve a

¹² *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at 51E-F.

¹³ *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 851C-E.

¹⁴ *Kekana v Society of Advocates of South Africa* [1998] ZASCA 54; 1998 (4) SA 649 (SCA) at 655I-656A.

necessary role in the proper administration of justice. Given the unique position that they occupy, the profession has strict ethical rules."¹⁵

[71] Mr Mkhize's conduct must be tested against this standard. Mr Mkhize has shown contempt for these proceedings. Our courts have held that once the LPC has brought the application, the Respondent is expected to play open cards, assist with the investigation and not attack the LPC but defend against the allegations. Mr Mkhize has not complied with this obligation. To highlight some of the language used, Mr Mkhize accuses the LPC of dismantling his practice and approaching the Court clumsily,¹⁶ tainting his professional reputation with lies,¹⁷ alleges that the "LPC either does not understand its own conduct or it is guilty of perjury",¹⁸ the LPC launched a counter application to "evade its own wrongfulness",¹⁹ the LPC "outrageously handled this in an unfair manner",²⁰ the LPC "will attempt by all means possible to manipulate the Court with false information",²¹ and the LPC is a "bogey of authority".²²

[72] Robust, uncomfortable and strident confrontations are part of the profession. Choice words are often found in papers before Court. However, Mr Mkhize attacked the institution of the LPC instead of addressing the allegations brought against him. This is not in accordance with what is expected of Counsel.

[73] Mr Mkhize has demonstrated an obstructive attitude aimed at preventing proper scrutiny of his conduct. Mr Mkhize's refusal to file an answering affidavit on time,

¹⁵ *Johannesburg Society of Advocates and Another v Nthai and Others* 2021 (2) SA 343 (SCA) para 1.

¹⁶ Condonation affidavit para 23 and 26.

¹⁷ Condonation affidavit para 29.

¹⁸ Condonation affidavit para 29.

¹⁹ Affidavit in support of the urgent application (May 2022) para 12.

²⁰ 24 May 2022 urgent application para 38.

²¹ 24 May 2022 urgent application para 44.

²² 24 May 2022 urgent application, annexure MO2.

refusal to file the necessary pleadings to permit the LPC proceedings and the review application move forward – falls short of the conduct of a fit and proper person.

[74] Mr Mkhize’s obstructive and abusive attitude has persisted to the end. Mr Mkhize, having asked for a postponement on 18 July 2023 to file papers to ensure the matter could be finally decided refiled an old rule 30 application. Mr Mkhize has, instead of placing facts relevant to his case before the Court and being given a last opportunity to do so, failed to place such facts before the Court. The application is res judicata and is not preceded by a notice to remove complaint and is therefore irregular. It was also filed out of time – in the context of a court order which indicated that if the order was not complied with, the case would be decided on the papers as they stand.²³ The Court was clear that if either party failed to comply with the court order, the Court would decide the matter on the papers that have been filed.

[75] What weighs most with the Court is that Mr Mkhize has – even after the hearing of 18 July 2023 - filed an interlocutory, devoid of merit and riddled with irregularity, instead of moving the matter forward. It is part of a pattern of Mr Mkhize’s behaviour. The Court finds it impossible to pass over without some notice what is an offence of a serious kind, namely that of interfering with the administration of justice “by taking an action which is bound to prevent the Court

²³ The Court ordered -

“Importantly, it has been agreed between the parties that the matter once so filed, the matter will be decided on the papers. I am going to add a caveat to this: The agreement between the parties is qualified to the extent that in the event of one party not complying with the order that I have just made, the court will be proceeding to decide the matter on available papers.”

granting a remedy.”²⁴ The Court finds that Mr Mkhize’s rule 30 has been filed with the ulterior purpose of avoiding finality in this matter. The rule 30 is an abuse of process.

[76] Mr Mkhize has treated the orders of this Court with contempt. Mr Mkhize did not comply with three court orders. First, he failed to comply with the order of Thlapi J by filing his answering affidavit in the LPC proceedings; second, he failed to comply with the order of Thlapi J and Neukircher JJ by filing the necessary pleadings in the review application and third he failed to comply with the order of this Court of 18 July 2023. The Court order of 18 July 2023 permitted Mr Mkhize to file specific further papers by 28 July 2023. Mr Mkhize failed to comply with the order of this Court of 18 July 2023 he only filed a rule 30 application and in any event did so outside the timeframes set by the court order.

[77] Mr Mkhize was in Court when all these orders were granted. He is aware of the orders; in fact, he had agreed to almost all of them. The orders were granted to Mr Mkhize's benefit to ensure he has every opportunity to place his facts before the Court. Yet, he has failed to comply with the Court orders. The obligation to obey court orders has "at its heart the very effectiveness and legitimacy of the judicial system and is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built.”²⁵ The Court cannot demand that court orders are complied with and then permit practitioners to ignore them. Every time Mr Mkhize failed to comply with a court order the matter was delayed and Mr Mkhize avoids scrutiny. Not only does Mr Mkhize not

²⁴ Li Kui Yu 1906 TS 181

²⁵ *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) at para 183. (Tasima I)

comply with court orders, he does so to evade being held to account for his conduct.

[78] Mr Mkhize has persistently failed to file affidavits and written submissions, resulting in the delay of the finalisation of these proceedings. Two conclusions are drawn from this. The first is that Mr Mkhize's statements in Court that he wishes for the matter to be finalised are not consistent with his conduct. Second, Mr Mkhize has to date not placed any further facts before the Court. Despite being given every opportunity to do so. The Court believes that if Mr Mkhize had wished to place his case before the Court or if facts existed that would dispel the allegations before the Court, he would have endeavoured to comply with the three court orders that permitted him an opportunity to file his papers, over and above the rights afforded to him by the Rules of Court.

[79] Mr Mkhize makes false allegations in open court. The exchange regarding Mr Mkhize's silk robe was unfortunate. The LPC contends it amounts to fraud. The Court is however more concerned with Mr Mkhize's false allegation that he had received his letters patent when he had not. Mr Mkhize even gave a false date of when he received the letters – being 2019. When confronted with this false representation, Mr Mkhize conceded he had not, in fact, received his letters patent. Worse, when Mr Mkhize was then confronted by having made a misrepresentation to the Court, he changed his version again, stating he was not aware that it is the President of the Republic which confers the honour of senior counsel through the issuance of letters patent. Mr Mkhize made false representations to the Court, repeatedly, during his application to be struck from the roll. The Court directly raised with Mr Mkhize that he had made a

misrepresentation to Court. The weight and consequences of this was lost on Mr Mkhize. To misrepresent the facts, to a Court of law, falls far below the standards expected of officers of the Court. This Court will enforce this standard in a way that permits no misunderstanding.

[80] Mr Mkhize has misconducted himself, repeatedly and egregiously. Mr Mkhize's misconduct is directed against the elderly and vulnerable members of society. He has avoided scrutiny of his conduct through a combination of dilatory efforts and repeated institution of proceedings and interlocutories. Mr Mkhize has been abusive in his language and dealings with the LPC and its legal representatives. Mr Mkhize does not adhere to court orders. Mr Mkhize misrepresents the truth in open court- during a hearing relating to his misconduct.

[81] Based on all these considerations, the Court, in exercising its discretion and for the reasons set out above, concludes that Mr Mkhize is not a fit and proper person to be a legal practitioner.

SANCTION

[82] As this Court is of the view that Mr Mkhize is not a fit and proper person to practise law, the third inquiry is whether, in all the circumstances, Mr Mkhize is to be removed from the roll of practitioners or whether an order striking/suspending him from practice for a specified period will suffice.

[83] The objectives of a sanction have been described as twofold: firstly, to discipline and punish errant professionals and, secondly, to protect the public.²⁶ Ultimately

²⁶ *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) at 16E-G.

this is a question of degree. In deciding whether a practitioner ought to be removed from the roll or suspended from practice, the Court is not, first and foremost, imposing a penalty. The main consideration is the protection of the public.²⁷

[84] Before imposing the severe penalty of striking, the Court must be satisfied that the lesser sentence of suspension will not achieve the purpose of the Court's supervisory power over its officers. This is similarly a matter for the discretion of the Court. Whether a 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,²⁸ the likelihood or otherwise of a repetition of such conduct and the need to protect the public.

[85] It weighs with the Court that the conduct complained of indicates a repetition of misconduct over a long period of time. The conduct complained of spans over a couple of years, in the case of Ms Nkala, for as long as three years.

[86] The Court also considers that this is not an incident of a moral lapse,²⁹ which the offending party admits and undertakes will not be repeated. It is, therefore, not a case in which a court is satisfied that the offending conduct will not recur. If anything, the affidavits in support of this application are replete with examples of the disdain with which Mr Mkhize perceives the Courts, even to the extent of disregarding their orders.

²⁷ *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) at 13-14; *Malan v The Law Society of the Northern Provinces* 2009(1) SA 216 (SCA) at p 219 par 7.

²⁸ *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T) at 108 D – E.

²⁹ *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA) para 16.

[87] Mr Mkhize appears resolute in his refusal to respond constructively to opportunities to respond meaningfully in these proceedings. Mr Mkhize's conduct in these proceedings and during the hearing of the matter all indicate that he lacks the moral fibre required of his profession. Mr Mkhize has sought to evade, frustrate and postpone the hearing and finalisation of this matter at every opportunity. Mr Mkhize lacks contrition. The breaches of the rules were multiple, repetitive and over a long period of time. Mr Mkhize's conduct has been contemptuous and egregious. Mr Mkhize has demonstrated a marked disregard for the authority of the Court. Mr Mkhize's non-compliance with Court orders that he agreed to and that are granted to his benefit to cure his non-compliance with the Rules of Court is persistent.

[88] The Court is mindful of the need to balance mercy with that of its duty to the public. However, if the Courts were to allow a desire to be merciful overrule a sense of duty to the public and the sense of importance attached to the integrity of the profession, the profession would be prejudiced and brought into discredit.³⁰ In this case, the Court has no basis on which it can be comforted that Mr Mkhize will not repeat the conduct complained of. The Court is also aware of the importance of holding professionals to the standards of their profession.

[89] The correspondence received from the Presiding Officer on 25 August 2023 indicates that Mr Mkhize has stubbornly persisted wearing a senior counsel's robe despite the exchange with this Court on 18 July 2023. The correspondence also indicates that Mr Mkhize continues to assert that he is a senior counsel when confronted by the Court. Lastly, the correspondence indicates that Mr Mkhize

³⁰ *Law Society v Du Toit* 1938 OPD 103.

misrepresented to a Court that this matter – being his suspension - has been “sorted out” when in fact the Court is still seized with the matter. These events are in dissonance with the conduct of a practitioner who has committed an error of judgment, and having been provided with clarity regarding his conduct, has absorbed the lesson and seeks to change his conduct.

[90] Mr Mkhize’s transgressions were serious. They warrant a serious sanction. In addition, the public is to be protected from Mr Mkhize. The Court has no reason to believe that rehabilitation or a suspended sanction would be useful.

[91] The Court considers that in imposing the sanction of striking Mr Mkhize from the roll of advocates, it is depriving someone of their ability to earn a living. It is a weighty consideration. On these facts, however, Mr Mkhize did not succumb to a sudden temptation, and his fall from grace was not in consequence of an isolated act. His was deliberate and persistent. The victims of his conduct were members of the public relying on him for assistance in moments of desperate need. It is not lost on the Court that many of the complaints were elderly women, three of them over the age of 60, and all were individuals.

[92] Based on the evidence before the Court, and for the reasons set out above, the Court believes the appropriate sanction would be to strike Mr Mkhize from the roll of practitioners.

MR MKHIZE’S REVIEW APPLICATION

[93] Mr Mkhize launched an application to review the LPC’s recommendation to refer the complaints to Court. Mr Mkhize has only filed a founding affidavit, and the matter has not moved forward as Mr Mkhize has demanded the Rule 53 record

from the LPC. The LPC has provided Mr Mkhize with the Rule 53 record, but Mr Mkhize demands a transcription of what had transpired at the LPC. Mr Mkhize's complaint in this regard has been dealt with by the Court. In the judgment of November 2022, Her Ladyship Justice Cowen held -

“[I]t is common cause that the LPC did supply a Rule 53 record on 8 November 2022. This was received by the Applicant. It was sent by email pursuant to an agreement between the parties – as Mr Mkhize explained in argument. Mr Mkhize, however, seeks a transcription of proceedings before Mr Jaco Fourie, whereas the LPC maintains that there is none, and that the record as supplied is the complete Rule 53 record. There is nothing before me to gainsay this. But in the circumstances of this case, to the extent that the Applicant wishes to prosecute the review on the basis that the LPC has failed to supply a complete Rule 53 record, he has various procedural and substantive remedies available to afford him substantial redress. These flow both from the rules and procedures of Court – which enable a party, *inter alia*, to apply for the production of a complete record, to obtain extensions of time, and, if need be a postponement – and through the laws of evidence, specifically the manner in which Courts can draw appropriate inferences from conduct of the alleged sort.”

[94] The Court, per Cowen J, held that Mr Mkhize had received the Rule 53 record.

[95] The LPC denies there is a transcription of the proceedings before Mr Jaco Fourie. Mr Fourie was the senior legal advisor within the LPC who wrote the Memorandum recommending a referral to the Court based on the complaint by Ms Nkala and Mr Mkhize's response to the complaint. The LPC's denial that there is a transcription makes sense as Mr Fourie had the written complaints before him from Ms Nkala's written complaint and Mr Mkhize's written response.

[96] In any event, in November 2022, the Court set out clearly to what remedies were available to Mr Mkhize if he believed the record was incomplete. Mr Mkhize has

not sought to use any of these procedural rights to obtain the transcription. Yet, again, before this Court on 18 July 2023 Mr Mkhize relied on the LPC's failure to provide him with the transcriptions as a reason for the review not moving forward.

[97] Mr Mkhize's persistent demand for the provision of a transcript (which does not exist), combined with the failure to take any steps to compel the provision of a transcript is unfortunate. Worse, Mr Mkhize then sought to rely on the LPC's "failure" to provide the non-existent transcript, to prevent the finalisation of the LPC proceedings.

[98] In any event, this is all distraction. The LPC's recommendation to refer the matter to Court is not reviewable. There was no hearing before a quasi-judicial or administrative Tribunal that preceded the recommendation. The recommendation is not a decision as it does not have a direct external legal effect. In *Carte Blanche Marketing CC and Others v Commissioner for SARS*,³¹ Carte Blanche sought to review a decision to refer a company for an audit. The Court dismissed the review on the basis that there was no decision to review. The Court relied on the authority of *Viking Pony Africa Pumps v Hidro-Tech Systems*³² that "it is unlikely that a decision to investigate and process of investigation, which excludes a determination of culpability could itself adversely affect the rights of any person, in a manner that has a direct external legal effect."

³¹ *Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service* (26244/2015) [2020] ZAGPJHC 202; [2020] 4 All SA 434 (GJ); 2020 (6) SA 463 (GJ) (31 August 2020)

³² *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC) at para 38.

[99] These principles have been applied in the context of LPC matters. In *LPC v Motlhabani*,³³ Mr Motlhabani sought to review the decision of the LPC to institute proceedings. The Court held that the LPC did not discipline, fine or suspend the Respondent. The Court held that -

“the exercising of a discretion to refer the respondent’s conduct to Court for the Court’s determination of her status as an officer of the court, does not fall within the definition of administrative action.”

[100] The Court, in *Motlhabani*, held that the decision which Mr Motlhabani sought to review – being the referral – does not constitute administrative action as it “is not a decision at all”.

[101] The Court concludes that Mr Mkhize is seeking to review a recommendation which is not susceptible to review. The Court dismisses Mr Mkhize’s application for review.

[102] The Court has applied the three-stage enquiry³⁴ and found that factually on a preponderance of probabilities, Mr Mkhize has committed misconduct. It has exercised a value judgment and concluded that Mr Mkhize is not a fit and proper person and having exercised its discretion, concluded that the appropriate sanction is dismissal.

³³ *Legal Practice Council v Motlhabani* (UM 148/2018) [2020] ZANWHC 76 (7 May 2020).

³⁴ *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) para 10 at 51C-I and *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) para 2 at 13I-14B)

ORDER

[103] The Court must consider the issue of costs. The LPC is, as a matter of law, entitled to its costs on an attorney and client scale if successful. There is no reason presented to depart from this general rule. If anything, the Court has been presented with multiple reasons to award costs in favour of the LPC in light of Mr Mkhize's persistent non-compliance with the rules and orders of this Court.

[104] In the result, I propose the following order:

- a) That ADVOCATE SENZO WISEMAN MKHIZE (hereinafter referred to as "the Respondent") is hereby removed from the roll of legal practitioners;
- b) That the Respondent immediately hand delivers his certificate of enrolment as a legal practitioner to the Registrar of this Honourable Court;
- c) 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 certificate is, be authorised and directed to take possession of the certificate and to hand it to the Registrar of this Honourable Court;
- d) The Respondent is prohibited from handling or operating on his banking accounts used in receiving monies for clients (referred to herein as creditors) as detailed in paragraph e infra;
- e) That Director/Acting Director and or Nominee of the Gauteng Provincial Office of the Applicant be appointed as *curator bonis* (hereinafter referred to as "curator") to administer and control the trust accounts of the Respondent, including accounts relating to insolvent and deceased estates

and any deceased estate and any estate under curatorship connected with the Respondent's practice as legal practitioner and also including (if applicable), the separate banking account opened and kept by the Respondent at a bank in the Republic of South Africa in terms of section 86 (1) & (2) of the Legal Practice Act 28 of 2014 and/or any separate savings or interest-bearing accounts as contemplated by Section 86(3):

- i) Immediately to take possession of the Respondent's accounting records, records, filed and documents as referred to in paragraph 6 and subject to the approval of the Board of Control of the Legal Practitioner's 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 deem necessary to bring to completion current transactions in which the Respondent was acting at the date of this Order;
- ii) Subject to the approval and control of the Legal Practitioners' Fidelity Fund Board of Control and where monies had been paid incorrectly and unlawfully from the undermentioned accounts, to recover and receive it, if necessary, in the interest of persons having lawful claims upon the account(s) and/or against Respondent in respect of monies held, received by Respondent in terms of Section 86(1)&(2) and/or Section 86(3), 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 credit of the account(s);

- iii) To ascertain from the Respondent's records the names of all persons on whose account the Respondent appears to hold or to have received monies (hereinafter referred to as "creditors") and to call upon the Respondent to furnish the Curator within 30 days of the date of this Order or within such further period as the Curator may agree to in writing with the names and addresses of, and amounts due to, all creditors;
- iv) To call upon such creditors to furnish such proof, information and/or affidavits as the Curator may require to enable him, acting in consultation with and subject to the requirements of the Legal Practitioners' Fidelity Fund Board of Control, to determine whether any such creditor has a claim in respect of money in the said accounts and, if so, the amount of such claim;
- v) To admit or reject, in whole or in part, subject to the approval of the Legal Practitioners' Fidelity Fund Board of Control, the claims of any such creditor or creditors, without prejudice to such creditors' right of access to the civil courts;
- vi) Having determined the amounts which he considers are lawfully due to creditors, to pay such claims in full but subject always to the approval of the Legal Practitioners' Fidelity Fund Board of Control;
- vii) In the event of there being any surplus in the account(s) of Respondent after payment of the admitted claims of all 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 86(5) of Act No 28 of

2014 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 Legal Practitioners' Fidelity Fund Board of Control, to Respondent, if he is solvent, or, if Respondent is insolvent, to the trustee(s) of Respondent's insolvent estate;

- viii) In the event of there being insufficient monies in the banking account(s) of the Respondent, in accordance with the available documentation and information, to pay in full the claims of 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 banking account(s) amongst the creditors alternatively to pay the balance to the Legal Practitioners' Fidelity Fund Board of Control;
- ix) Subject to the approval of the Chairman of the Legal Practitioners' Fidelity Fund Board of Control to appoint nominees or representatives and/or consult with and/or engage the service of attorneys, Counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as Curator; and
- x) To render from time to time, as Curator, returns to the Legal Practitioners' Fidelity Fund Board of Control showing how the account (s) of Respondent has or have been dealt with, until such time as the

Board notifies him that he may regard his duties as Curator as terminated.

- f) That the Respondent immediately delivers his accounting records, records filed and documentation containing particulars and information relating to:
 - i) Any monies received, held or paid by Respondent for or on account of any person while practising as a legal practitioner;
 - ii) 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;
 - iii) Any insolvent estate administered by Respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;
 - iv) 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;
 - v) Any close corporation liquidated in terms of the Close Corporation Act, 69 of 1984, administered by Respondent as or on behalf of the liquidator; and
 - vi) Respondent's practice as a legal practitioner 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;
- g) Should the Respondent fail to comply with the provisions of the preceding paragraph of this Order on service thereof upon her or after a return by the

person entrusted with the service thereof that he 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;

- h) That the Respondent be and is hereby removed from office as –
 - i) the executor of any estate of which the 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);
 - ii) 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;
 - iii) Trustee of any insolvent estate in terms of section 59 of the Insolvency Act, 24 of 1936;
 - iv) The liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, 61 of 1973 and read together with the provisions of the Companies Act 71 of 2008;
 - v) Trustee of any trust in terms of section 20(1) of the Trust Property Control Act, 57 of 1988;
 - vi) The liquidator or any close corporation appointed in terms of section 74 of the Close Corporation Act, 69 of 1984; and 9.7. Administrator appointed in terms of Section 74 of the Magistrates Court Act, 32 of 1944.

- i) That the *Curator* shall be entitled to:
 - i) 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;
 - ii) Require 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 the Respondent and/or the Respondent's clients and/or fund in respect of money and/or other property entrusted to the Respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereto;
 - iii) Publish this Order or an abridged version thereof in any newspaper he considered appropriate;
 - iv) Wind up the Respondent's practice;
- j) If there are any 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, 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 creditor(s) concerned for payment or recovery thereof;

- k) That a certificate issued by a director of the Attorney'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;
- l) That the Respondent be and is hereby directed: -
 - i) To pay, in terms of section 87(2) of Act 28 of 2014, the reasonable costs of the inspection of the accounting records of Respondent;
 - ii) To pay the reasonable fees of the auditor engaged by the Applicant;
 - iii) To pay the reasonable fees and expenses of the Curator, including travelling time;
 - iv) To pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the Curator as aforesaid;
 - v) To pay the expenses relating to the publication of this Order or an abbreviated version thereof;
 - vi) To pay the costs of the LPC application and the review application (under case numbers 13881/2021 and 13204/2022) including the costs of 18 July 2023, on an attorney-and-client scale;
- m) In the event of the Respondent failing to comply with any of the provisions referred to in this Order, the Applicant shall be entitled to apply through due and proper civil process commensurate with the principles of the Constitution of the Republic of South Africa, Act 106 of 1996, for the

appropriate relief against the Respondent including but not limited to an Order for the committal of the Respondent to prison for the Respondent's contempt of the provisions of the abovementioned paragraphs.

- n) Mr Mkhize's review application, launched under case number 13204/2022, is dismissed with costs on an attorney and client scale.
- o) Mr Mkhize's Rule 30 application, dated 31 July 2023, is dismissed.


I DE VOS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered


MPN MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date for the hand down is deemed to be 8 September 2023.

APPEARANCES

Counsel for the Applicant:

I Hlalethoa

Instructed by:

Mphokane Attorneys

Counsel for the Respondent:

In person

Date of the hearing:

18 July 2023

Date of judgment:

8 September 2023