



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

Reportable:	NO
Of interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **1119/2020**

In the matter between:

THE LEGAL PRACTICE COUNCIL

Applicant

and

LLOYD GEORGE CHARLES LIELIES

1st Respondent

LGC LIELIES ATTORNEYS

2nd Respondent

CORAM: DAFFUE J *et* MTHIMUNYE AJ

HEARD ON: 20 JANUARY 2022

DELIVERED ON: 08 FEBRUARY 2022

JUDGMENT BY: DAFFUE J

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 13:00 on 08 February 2022.

I INTRODUCTION

- [1] This is an application by the Legal Practice Council ("LPC") for an order striking off an attorney from the roll of attorneys, alternatively, that he be suspended from practising as an attorney for such period and on such conditions as the court may deem fit, together with the customary ancillary relief.

II THE PARTIES

- [2] As mentioned *supra*, the LPC is the applicant in this application. It bears mentioning that although the erstwhile Law Societies established in accordance with the now repealed Attorneys Act¹ have been disposed of, it will be seen later that the history of this matter originated prior to the commencement of the new Act, to wit the Legal Practice Act² that now regulates the affairs of all legal practitioners, including attorneys. The Legal Practice Act came into operation on 1 November 2018. Since then the LPC possesses authority to launch applications for striking off or suspension of attorneys.
- [3] The first respondent is Mr Lloyd George Charles Lielies, an attorney and sole practitioner practising in Welkom under the name and style of LGC Lielies Attorneys, cited as the second respondent. I shall hereinafter refer to Mr Lielies as the respondent.

III THE COMPLAINTS

- [4] The LPC's submission that the respondent is not a fit and proper person to practise as attorney is based on distinct grounds. In the first place its predecessor, the Free State Law Society, has received numerous complaints, the latest of which were summarised in the founding affidavit.³ Many of these complaints were not fully investigated and I do not intend to rely on any allegations in this regard in order to come to a conclusion in this judgment. It is also alleged that since the establishment of the LPC it has been "flooded with complaints", reliance having been placed in the founding affidavit on ten such complaints.⁴ Again, these had not been fully investigated by the time that the application was issued on 6 March 2020 and consequently, I shall not rely on these to come to any conclusion, save for cursory remarks to be made during the evaluation of the evidence.

¹ 53 of 1979

² 28 of 2014

³ Para 8 on pp 23 – 27 of bundle 1

⁴ Para 13.9 on p 41 of bundle 1

- [5] The LPC's more relevant complaint for purposes hereof is the respondent's non-compliance with sections 42 and 78 of the now repealed Attorneys Act, read with rule 16B promulgated under that Act. It is not necessary to quote the relevant sections or rule 16B. It is sufficient to mention that it is the LPC's case that the respondent failed to file unqualified audit reports, that he was not issued with Fidelity Fund Certificates ("FFC's") for a number of years and that he therefore practised in contravention of section 41 of the Attorneys Act and made himself guilty of a criminal offence as stipulated in section 83(10) of the same Act.⁵ It is furthermore the LPC's case that the respondent continued to practise without a FFC for all the years since the establishment of the LPC, to wit the 2018, 2019 and 2020 financial years and he is still practising as such.⁶ The LPC's deponent to the founding affidavit submitted that the various complaints against the respondent "are almost irrelevant" insofar as the respondent's practising without a valid FFC is "unprofessional conduct of the highest degree" and *per se* justifies his striking off the roll.⁷ It should be mentioned at this stage already that due to the time lapse to be explained later, the FFC for the 2021 financial year is now outstanding as well.

IV THE LITIGATION BETWEEN THE PARTIES THUS FAR

- [6] The litigation between the parties has dragged out for nearly two years. In order to bring the reader in the picture, I provide the following summary:

- 6.1 As mentioned the application was issued on 6 March 2020.
- 6.2 The respondent gave notice of intention to oppose, but filed his answering affidavit on 28 May 2020 only, *ie* two months later. It is accepted that the lockdown measurements implemented in order to curb the Covid 19-virus played a role in this regard.
- 6.3 On 2 July 2020 the respondent filed a supplementary answering affidavit.

⁵ Paras 9, 10, 11 and 12 of the founding affidavit on pp 28 – 38 with particular reference to the 2016 and 2017 financial years

⁶ Para 12.1 – 12.4 on pp 33 & 34 and para 13 on pp 38 - 41

⁷ Para 12.2 on p 34

- 6.4 The LPC's replying affidavit was filed on 7 August 2020. Herein it was reiterated that the reason for disclosing the numerous complaints against the respondent "never was to ventilate the merits of each complaint in these proceedings, but rather to show the justification of the decision to lodge an application for the First Respondent to be struck from the roll of attorneys".⁸ The deponent continued to state that the respondent has been practising on his own version "for at least the past 4 years without the Fidelity Fund Certificate" and that "complaints against him keep pouring in."⁹ It is also stated that the respondent did not "deny that he receives money from members of the public or clients and that members of the public do not enjoy any coverage, for the reason that he is not in possession of a Fidelity Fund Certificate since at least 2017 to date."¹⁰
- 6.5 The matter was set down for hearing on 21 January 2021 when it was postponed by agreement to 22 April 2021 with directions pertaining to the filing of further affidavits.¹¹ A further supplementary answering affidavit was indeed filed on behalf of the respondent to which the LPC replied with a supplementary replying affidavit.
- 6.6 On 22 April 2021 the matter was again postponed by agreement to 7 October 2021. Leave was granted to the parties to supplement their papers yet again. Further by agreement, an investigation by an independent auditor was directed in respect of the respondent's trust account relating to his audit reports lodged with the LPC for the 2018, 2019 and 2020 financial years.¹² The court order attached to the papers does not contain the appropriate preamble, but it is accepted that the order is incomplete. The LPC supplemented its papers and also filed the first report by the appointed auditor. The respondent did not file a supplementary affidavit at that stage.

⁸ Para 2.4 p 852 of bundle 1

⁹ Paras 4.3 & 5.1 p 854 of bundle 1

¹⁰ Para 11 p 859 of bundle 1

¹¹ P 1 bundle 2

¹² P 4 & 5 bundle 3

6.7 On 7 October 2021 the matter was again postponed to the opposed roll of Thursday, 20 January 2022 when the matter was heard by me and my colleague, Acting Judge Mthimunya. On 7 October 2021 the respondent was directed to provide the LPC with legible hard copies of the documentation previously presented to the LPC for audit purposes. Again, the parties were given a further opportunity to file supplementary affidavits relating to the aspects in the audit report. On 18 November 2021 the second report of the appointed auditor was filed with the LPC's further supplementary affidavit. On 7 December 2021 the respondent filed his supplementary affidavit in response to the court orders of 22 April and 7 October 2021. The LPC responded by filing yet again another affidavit on 6 January 2022.

6.8 Once all the affidavits and annexures thereto were filed, bundle 1 consisted of 876 pages, bundle 2 of 72 pages and bundle 3 of 275 pages. As said, it took the parties nearly two years to have the application finally argued and bearing in mind the crisp issue to be considered, unnecessary paper work has been generated.

V THE APPLICABLE LAW

[7] Section 22(1) of the now repealed Attorneys Act stipulated that an attorney may "on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he practices –

(d) if he or she, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney."

[8] It is trite that applications in terms of section 22(1)(d) of the repealed Act involved a threefold enquiry.¹³ In my view the Legal Practice Act has not changed the manner in which applications for striking off or suspension are to be adjudicated notwithstanding the detailed provisions contained in this Act.

¹³ *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) at para [2] and numerous SCA judgments thereafter

- [9] Chapter 4 of the Legal Practice Act, deals with professional conduct and the establishment of disciplinary bodies in ss 34 – 44 thereof. Notwithstanding the establishment of disciplinary bodies, the procedure for dealing with complaints of misconduct and the further procedure to be followed in disciplinary hearings (including appeals), the powers of the High Court remain intact, as was the case in terms of the repealed Attorneys Act. Section 43 of the Legal Practice Act reads as follows:

“43. Urgent legal proceedings.- Despite the provisions of this Chapter, if upon considering a complaint, a disciplinary body is satisfied that a legal practitioner has misappropriated trust monies or is guilty of other serious misconduct, it must inform the Council thereof with the view to the Council instituting urgent legal proceedings in the High Court to suspend the legal practitioner from practice and to obtain alternative interim relief.”

Section 44 reads as follows:

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

- [10] The first enquiry referred to in *Budricks supra* is aimed at determining whether the applicant has established the offending conduct relied upon on a balance of probabilities. Secondly, it has to be determined whether the attorney, in the light of the misconduct proven, is not a fit and proper person to continue to practise as such. In considering the second requirement the court exercises a discretion which in the words of Scott JA in *Jasat v Natal Law Society*¹⁴:

“... involves in reality a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment.”

Finally, and only if it is found that the attorney is not a fit and proper person as mentioned, the court must decide in the exercise of its discretion whether the attorney deserves the ultimate penalty of being struck off the roll or whether an order of suspension from practice will suffice.

¹⁴ 2000 (3) SA 44 (SCA) at 51E-F; *Budricks supra* at 14A.

[11] Applications for striking off are considered to be *sui generis*. They are proceedings of a disciplinary nature and not ordinary civil proceedings as reiterated in *Hepple and Others v Law Society of the Northern Provinces*.¹⁵ The LPC, as was the case in respect of the Law Societies earlier in respect of the attorneys' profession, does so *custos morum* as the guardian of morals of the legal practitioners' profession. It performs a public duty as recognised nearly a century ago.¹⁶ The LPC's role can also be seen as that of a *nuntius* as stated in *Hassim v Incorporated Law Society of Natal*.¹⁷ It merely places facts relating to alleged unprofessional conduct before the court for consideration by it in order for the court to exercise its discretion as to the appropriateness of a sanction to be imposed in the event of the commission of the transgression being established.

[12] As a general rule the ultimate sanction of striking off is reserved for attorneys who have acted dishonestly whilst transgressions that don't involve dishonesty are usually visited with the lesser penalty of suspension from practice. If dishonesty is found, the circumstances must be exceptional before a court will order suspension instead of striking off.¹⁸ However, in *Summerley v Law Society, Northern Provinces*¹⁹ Brand JA made it clear that the so-called general rule referred to *supra* cannot be regarded as a rule of the Medes and the Persians and continued as follows:

"The distinction is not difficult to understand. The attorney's profession is an honourable profession, which demands complete honesty and integrity from its members. In consequence dishonesty is generally regarded as excluding the lesser stricture of suspension from practice, while the same can usually not be said of contraventions of a different kind.

¹⁵ [2014] 3 All SA 408 (SCA) at para 9

¹⁶ *Solomon v The Law Society of Good Hope* 1934 AD 401 at 408 – 409

¹⁷ 1977 (2) SA 757 (AD) as 767C – G

¹⁸ *Law Society, Cape of Good Hope v Peter* [2006] SCA 37 RSA at para [19] in which case exceptional circumstances were found

¹⁹ 2006 (5) SA 613 (SCA) at para 21

- [13] In *Malan and Another v Law Society of the Northern Provinces*²⁰ Harms ADP stated the following:

"Obviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal ... Where dishonesty has not been established the position is as set out above, namely that a court has to exercise a discretion within the parameters of the facts of the case without any preordained limitations."

- [14] In the light of the kind of proceedings, *ie* they are *sui generis* and of a disciplinary nature as illustrated in *Hepple supra*, the SCA confirmed the duty resting on an attorney in these proceedings in the following *dictum*:²¹

"It follows therefore that where allegations and evidence are presented against an attorney they cannot be met with mere denials by the attorney concerned. If allegations are made by the law society and underlying documents are provided which form the basis of the allegations, they cannot simply be brushed aside; the attorneys are expected to respond meaningfully to them and to furnish a proper explanation of the financial discrepancies as their failure to do so may count against them."

- [15] Attorneys confronted with applications for striking-off must be cautious of not trying to blame the LPC, its functionaries, auditors and lawyers without any foundation. The following remarks by Harms ADP in *Malan supra*²² are apposite:

"Furthermore, instead of dealing with the merits of the allegations, the appellants conducted a paper war and they attacked the Society and its officers, they attacked the Fidelity Fund and they attacked the attorneys who had to take over their files – in short, their approach on the papers was obstructionist... These factors are 'aggravating' and not extenuating because they manifest character defects, a lack of integrity, a lack of judgment and a lack of insight."

- [16] Harms ADP went further and observed in *Law Society of the Northern Provinces v Mogami*²³ that it had become a common occurrence for persons accused of wrongdoing to accuse the accuser and seek to break down the institution involved instead of properly confronting the allegations. He

²⁰ 2009 (1) SA 216 (SCA) at para 10

²¹ *Hepple supra* at para 9; *Malan supra* at paras 27 - 28

²² Paras 27 - 28

²³ 2010 (1) SA 186 (SCA) at para 26

emphasised that courts cannot countenance such a strategy. I shall deal with this observation again when I consider the evidence.

- [17] In *Law Society of the Northern Provinces v Mabando*²⁴ the Law Society's appeal against an order of the High Court succeeded and the practitioner was struck from the roll of attorneys.²⁵ The court considered the approach of the practitioner and I merely quote the following:

"In October 2000, the First Respondent scandalously and in stereotypically errant debtor style dispatched a letter to Mr van Zyl allegedly enclosing a cheque that in fact was not attached. In the case of Mr van Zyl, the amount due was paid approximately five years after the complaint was laid and then was paid in two instalments some nine months after the Appellant had ordered him to so, following on the disciplinary enquiry. In the ordinary course, the amounts collected and due to the instructing attorney or client would have had to be retained in a trust account. Considering the common cause facts the inference is inescapable that the amounts were not so retained — a grave and usually fatal error on the part of any attorney." (emphasis added)

The court continued:²⁶

"To this day, the First Respondent continues to demonstrate a remarkable lack of insight concerning the professional and ethical standards expected of an attorney. Lastly, even at the time of the hearing, the First Respondent showed a remarkable lack of contrition and unaccountability."

- [18] Sections 78 of the repealed Attorneys Act provided as follows:

"s 78 Trust accounts

(1) Any practising practitioner shall open and keep a separate trust banking account at a banking institution in the Republic and shall deposit therein the money held or received by him or her on account of any person.

(2)...

(3) ...

(4) Any practising practitioner shall keep proper accounting records containing particulars and information of any money received, held or paid by him or her for or on account of any person,

...

²⁴ [2011] 4 All SA 238 (SCA)

²⁵ At para 54

²⁶ At para 55

- [19] Now, the relevant sections in the Legal Practice Act dealing with trust accounts are:

“84 Obligations of legal practitioner relating to handling of trust monies

(1) Every attorney or any advocate referred to in section 34 (2) (b), other than a legal practitioner in the fulltime employ of the South African Human Rights Commission or the State as a state attorney or state advocate and who practises or is deemed to practise –

(a) for his or her own account either alone or in partnership; or

(b) as a director of a practice which is a juristic entity, must be in possession of a Fidelity Fund certificate.

(2) No legal practitioner referred to in subsection (1) or person employed or supervised by that legal practitioner may receive or hold funds or property belonging to any person unless the legal practitioner concerned is in possession of a Fidelity Fund certificate.

(3) The provisions of subsections (1) and (2) apply to a deposit taken on account of fees or disbursements in respect of legal services to be rendered. (Emphasis added)

86 Trust accounts

(1) Every legal practitioner referred to in section 84 (1) must operate a trust account.

(2) Every trust account practice must keep a trust account at a bank with which the Fund has made an arrangement as provided for in section 63 (1) (g) and must deposit therein, as soon as possible after receipt thereof, money held by such practice on behalf of any person.

(3)

(4)

(5)

(6)

(7) (Emphasis added)

87 Accounting

(1) A trust account practice must keep proper accounting records containing particulars and information in respect of –

(a) money received and paid on its own account;

(b) any money received, held or paid on account of any person;

(c) money invested in a trust account or other interest-bearing account referred to in section 86; and

(d) any interest on money so invested which is paid over or credited to it.

(2)

(3)

(4)

(5)

(6) (Emphasis added)

93 Offences and penalties

(1) – (7)

(8) Any person who contravenes section 84 (1) or (2) or section 34, in rendering legal services
(a) commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and imprisonment;

(b) is on conviction liable to be struck off the Roll; and

(c) is not entitled to any fee, reward or reimbursement in respect of the legal services rendered.

(9)²⁷

[20] In *Botha v Law Society, Northern Provinces*²⁷ Cloete JA considered the uncalled for criticism by the practitioner and his lack of co-operation with the Law Society, but eventually found that striking-off as ordered by the High Court was inappropriate. The practitioner was suspended from practice for one year which suspension was suspended on certain conditions.

[21] In *Law Society of the Northern Provinces v Viljoen*²⁸ the Law Society unsuccessfully appealed two judgments from two different judges of the High Court compelling the Law Society to issue FFC's to the particular attorneys from two different firms. In that case the Law Society, after receiving numerous serious complaints against the attorneys, instituted proceedings for their striking off. Both the High Court and the Supreme Court of Appeal held that the secretary of the Law Society incorrectly decided against issuing the FFC's. The SCA reasoned as follows:²⁹

" [7] ... It suffices, in my view, to state that the first appellant had received various complaints against the respondents, in both matters, which it regarded as serious. Following thereupon, the first appellant instituted proceedings in the North Gauteng High Court, Pretoria, for the respondents' names to be struck off the roll of attorneys on the basis that they are no longer fit and proper to continue practising. Having had sight of the appellants' affidavits, I harbour no doubt that the allegations made against the respondents are serious, and, if proven to be true, might justify a striking-off of the respondents' names by the court.

[10] Counsel were agreed that, although the resolution does not amount to a suspension from practice of a legal practitioner, the practical effect thereof is that a practitioner who has not been issued with a fidelity fund certificate is not allowed to practise on his own

²⁷ 2009 (1) SA 227 (SCA) at para 10 & further

²⁸ 2011 (2) SA 327 (SCA)

²⁹ Ibid at paras 7, 10, 14 & 16

account or in partnership. It is trite that any legal practitioner who practises without a fidelity fund certificate is committing a professional misconduct.

[14] The authority of the second appellant to issue fidelity fund certificates is clearly circumscribed by s 42(3)(a). This section sets out two requirements to be met by a legal practitioner for him or her to qualify for a fidelity fund certificate. The first requirement is that such a practitioner must satisfy the secretary that he or she has discharged all his or her liabilities to the society in respect of his or her contribution and, secondly, that he or she has complied with any other lawful requirement of the society. Once the two requirements have been met, s 42(3)(a) compels the second appellant to forthwith issue the fidelity fund certificate in the prescribed form to the applicant.

[16] It is important to bear in mind that a practitioner is enjoined by s 42(1) to apply for a fidelity fund certificate in the prescribed form. A perusal of the prescribed form makes it clear, from the questions that such a practitioner has to answer, that the major focus is on the question whether the practitioner is managing his trust accounts in strict compliance with the rules of the society, and not whether he or she is fit and proper to practise. This is underscored by the request to a practitioner in the prescribed form to disclose the balances in his or her trust account at the end of each quarter of the year. Furthermore, this is bolstered by the requirement that such a practitioner shall submit his or her audited financial statements. It is clear to me that this enquiry is intended solely to assess any risk attendant on the secretary issuing a fidelity fund certificate so as to ensure that the Fidelity Fund is not overexposed. Manifestly, this has nothing to do with issues of ethics or whether such a practitioner is fit and proper to continue to practise. The enquiry regarding the fitness of a practitioner to continue to practise is the preserve of the courts."

VII EVALUATION OF THE EVIDENCE, THE SUBMISSIONS BY THE PARTIES AND APPLICATION OF THE LEGAL PRINCIPLES

First requirement: Was the offending conduct relied upon by applicant established?

[22] I referred above to the numerous affidavits filed herein totally contrary to the established principles, but each time by order of court and as agreed to by the parties. In my view this matter should have been finalised more than a year ago.

- [23] Before dealing with what I called the crisp issue to be adjudicated, to wit the respondent practising without a valid FFC, I am bound to mention an aspect that appears on the face of it to be serious and disconcerting. In response to the complaints lodged by clients as set out in the LPC's founding affidavit, the respondent attached in several cases so-called "withdrawal affidavits" by the complainants apparently prepared by himself. These read word for word the same and were deposed to by the various complainants before the same commissioner of oaths. In each case the complainants confirmed the respondent's version that they had withdrawn their complaints.³⁰ In other matters, settlement agreements between him and the complainants were relied upon.³¹
- [24] In the LPC's original replying affidavit filed on 7 August 2021 to which I referred above, the deponent mentioned another eight complaints received from the respondent's clients. In addition, the LPC's Investigating Committee made a recommendation to the LPC's Provincial Council who resolved on 4 October 2021 to launch another application to the High Court for the respondent's suspension in regard to five further complaints received.³²
- [25] The respondent has much to say about the report of Me De Jonge of PKF auditors dated 19 May 2017 attached to the founding affidavit.³³ Several discrepancies existed in the respondent's trust account at the time, but it would serve no purpose to deal with these. I am also aware of the criticism and objections raised by the respondent's former auditor, Mr Marais. The respondent also mentioned that his accounting records for the period 1 March 2011 to 29 February 2016 had to be drafted by Roos & Kie and that existing discrepancies were rectified.³⁴ Thereafter he appointed new auditors. According to him the PKF report was overtaken by events in that his books were subsequently updated and re-audited by Mazars and De Jager Auditors

³⁰ See inter alia bundle 1, paras 9.11 & 9.23 on pp 203 & 205 with annexures; para 13.9 on p 226 & further with annexures LGC 48 – LGC 50 on pp 772 - 786

³¹ Annexures LGC10 on p 262 & ACM37 on p 585A in bundle 1

³² Para 7.1 of supplementary affidavit: bundle 3 p 264

³³ Annexure H on p 78 & further in bundle 1

³⁴ Answering affidavit: bundle 1, para 11.14 on p 215

whose reports were submitted to and accepted by the erstwhile Law Society.³⁵ A FFC for the year ending 31 December 2016 was indeed issued.³⁶

- [26] The LPC's allegations that the respondent was practising without FFC's for the following years and ending on 31 December 2020,³⁷ was met by a response that he had instructed his auditor to prepare all outstanding audit reports.³⁸ In the supplementary answering affidavit dated 2 July 2020 the respondent averred that he had received an email from his auditor confirming that the audit reports for 2018 and 2019 had been completed and that the LPC had granted a "lee way" for the filing of the 2020 audit report.³⁹
- [27] Upon receipt that the 2018 and 2019 reports had been received by the LPC, the respondent applied for the 2020 FFC which was issued to him on 25 November 2020.⁴⁰ The LPC explained that acknowledgment of receipt of the audit reports did not equate to confirmation of the correctness and approval thereof. These still had to be examined; also that the FFC which could be obtained on line, was incorrectly issued and therefore withdrawn.⁴¹ The respondent who argued the matter before us in person again relied upon the *Viljoen*-judgment of the SCA quoted in detail above as he did in his so-called replying affidavit filed on 18 March 2021. According to him the requirements for issuing of the FFC's have been met and the responsible person, to wit the Trust Interest Portfolio Officer correctly issued an FFC for 2020. There is a dispute in this regard, but it is evident that the LPC's Provincial Council had resolved on 1 February 2021 to withdraw the FFC as it was incorrectly issued.⁴² As will be explained later herein, this court cannot now issue a *mandamus* directing the LPC to issue the required FFC's in the absence of a proper application by the respondent, substantiated by acceptable testimony.

³⁵ Ibid para 13.12 in bundle 1 p 221

³⁶ Annexure LGC 29 p 294

³⁷ Para 12.3 on p 34 in particular

³⁸ Para 13.4 on p 219

³⁹ Para 11.2 p 821

⁴⁰ Paras 5 & 6 of affidavit dated 4 February 2021 in support of application to file yet a further affidavit, bundle 2 pp 12 & 13

⁴¹ Paras 4 & 5 of the supplementary replying affidavit, bundle 2 pp 23 - 25

⁴² Resolution attached as SRA. HKMD 2 on p 25 of bundle 2

In any event, the respondent was not issued with a FFC for the year ending 31 December 2021.⁴³

[28] As mentioned and following upon the court order of 22 April 2021 the auditor, Kotie Kruger filed two reports, confirmed under oath. The respondent failed to deal with the merits of the reports and particularly failed to rely on the evidence and expert testimony of any of his auditors to show any alleged factual incorrectness and/or unsubstantiated opinions.

[29] Instead of dealing with the merits of the auditor's findings, the respondent argued that his constitutional rights had been infringed. He relied upon several procedural issues which I deem not necessary to consider. Fact of the matter is that he had ample opportunity to file supplementary affidavits over a period of four months since receipt of the reports as directed by agreement in the orders of 22 April and 7 October 2021. His latest supplementary affidavit filed on 7 December 2021 consists of not less than 56 pages. It contains much argument, but nothing to show that Kotie Kruger's concerns are not valid. The respondent replied as follows to one of Kotie Kruger's conclusions, to wit that trust monies were not accounted for in the accounting records in that these were either not banked, or not otherwise recorded⁴⁴ and I quote *verbatim*:⁴⁵

"152. The contents of this paragraph are denied. Fee and mandate agreements were signed by the complainants. We respectfully place on record that in terms of Sec 45 adequate steps were taken to rectify the irregularity of not prompt depositing Trust monies...."

The denial of Kotie Kruger's conclusion and the reference to fee and mandate agreements became clear during oral argument, to which I shall refer hereunder.

[30] Kotie Kruger started with investigations of the respondent's books, but it soon became clear to him that much more information and/or documents were required to conduct a proper forensic investigation.⁴⁶ He *inter alia* sought

⁴³ Ibid para 7, bundle 2 on p 25

⁴⁴ Para 5.7 of the second report, bundle 3 on p 91

⁴⁵ Para 152, bundle 3 on p 149

⁴⁶ Letter to LPC dated 4 May 2021, bundle 3 p18

back-ups of the accounting records from the 2015/2016 financial year, alternatively the ledgers, trial balances, cash books, journals as well as the trust and business bank statements for those years. Needless to say, the respondent refused to tender any documentation pertaining to the years prior to the 2018 financial year and insisted that his business bank account was irrelevant to the enquiry.⁴⁷

[31] I do not intend to deal exhaustively with any of the two reports of Kotie Kruger and shall restrict myself to the following:

- 31.1 The audit firm, AC Marais issued an unqualified audit opinion on 8 November 2016 in respect of the 2016 financial year, but the auditors, Mazars who re-audited the 2016 financial year issued a qualified audit opinion on 22 March 2018, indicating that the trust accounts were not maintained in compliance with the Attorneys Act and the rules issued thereunder.⁴⁸
- 31.2 The audit firm, De Jager Inc issued a qualified audit opinion on 9 January 2018, stating that opening balances could not be confirmed with the previous year's closing balances, but as Kotie Kruger indicated, this report is dated almost two months before the respondent's annual statement on trust accounts and before the date of the re-audit report referred to in the previous sub-paragraph.⁴⁹
- 31.3 The audit firm, Gert Jordaan Inc issued an unqualified audit opinion on 1 July 2020 in respect of the 2018 financial year. However, Kotie Kruger raised several question marks in respect of this unqualified report. Cash deposits of only R153 310.00 were received in the trust bank account, but payments relating to disbursements and to trust creditors out of the trust bank account amounted to over R1 million.⁵⁰ Kotie Kruger made the point that this supporting documentation for

⁴⁷ Letter of 31 May 2021, bundle 3 p 21/2

⁴⁸ Paragraph 3.4 of both reports on pp 38 & 72 respectively

⁴⁹ See para 3.5 of both reports on pp 39 & 73 respectively

⁵⁰ Paragraphs 3.6 of both reports on pp 39 & 73 respectively

journals were not available and the total fee transfers from trust to business could not be verified with the business bank account.⁵¹

- 31.4 The audit firm, Gert Jordaan Inc issued another unqualified audit opinion, again on 1 July 2020 in respect of the 2019 financial year. The total cash deposits in the trust bank account amounted to only R7 450.00. No journal transfers from trust to business occurred.⁵²
- 31.5 The audit firm, Ramathe Inc issued a qualified audit opinion on 20 January 2021 in respect of the 2020 financial year. What is extremely strange from Kotie Kruger's report is that no cash deposits were received for this financial year and no trust receipts were issued at all. The total fee transfers from trust to business amounted to R119 191.30, the transfers could not be verified without the business bank statements.⁵³
- 31.6 Kotie Kruger's summary of findings is significant and surely called for a proper explanation.⁵⁴ The following aspects are emphasised:
- 31.6.1 The total fee transfers from trust to business decreased from R1 139 852.40 in the 2018 financial year to a mere R119 191.30 in the 2020 financial year;
- 31.6.2 The trust cash deposits decreased from R150 020.00 in the 2018 financial year, to nil rand in the 2020 financial year;⁵⁵
- 31.6.3 The audit report for 28 February 2017 was qualified on the basis that the opening balances could not be confirmed with the previous year's closing balances, and several questions in this regard needed to be posed to the auditor who presented the 2017 audit report;⁵⁶

⁵¹ 2nd Report on pp 75 & 76

⁵² 2nd Report pp 79 & 80

⁵³ Paragraphs 3.8 of the 2nd report p 80

⁵⁴ Paragraph 4 of the 2nd report pp 81 - 84

⁵⁵ See paras 4.2 and 4.4 of the 2nd report

⁵⁶ Paragraph 4.7 of the 2nd report p 84

31.7 Kotie Kruger concluded *inter alia* as follows:⁵⁷

31.7.1 Fee transfers from trust to business bank account decreased significantly and the question was asked as to how business/practice expenses were covered in the process;

31.7.2 Trust cash deposits decreased significantly since the LPC started conducting investigations and the question to be asked is whether trust funds were deposited into the business bank account;

31.7.3 Different versions of book-keeping systems were maintained and this will impact on the reliability of evidence and reliance on internal control;

31.7.4 A full investigation could not be conducted in order to determine if any trust monies were deposited into the business bank account as the respondent refused to provide copies of the statements of his business bank account.

[32] If respondent wanted the court to believe that he was *bona fide* and truthful and that he had nothing to hide, he should have presented this court with a meaningful explanation, backed up by his auditors' versions under oath. There was more than one auditor at various times. As stated in *Hepple supra*, it was expected of the respondent to respond meaningfully to allegations made and to furnish a proper explanation. He could not merely brush aside the requests of the independent auditor and/or ignore the factual findings of Kotie Kruger.

[33] I am of the view that applicant has established the offending conduct relied upon on a balance of probabilities. In fact, it is common cause that the respondent has been practising all these years without FFC's being issued to

⁵⁷ Paragraph 5 of the 2nd report pp 90 - 93

him, to wit for the years 2017, 2018, 2019 and 2020. The FFC for the 2021 year is also outstanding.

- [34] The respondent made the point in his supplementary affidavit, bearing in mind the provisions of sections 37 & 41 of the Legal Practice Act, that the complaints against him had to be finalised and even in the event of findings of misconduct by the disciplinary committee, he had the right of appeal. Therefore, in so far as the internal process provided for in chapter 4 of the Legal Practice Act has not been exhausted, the LPC could not approach this court for an application to strike him off, alternatively suspend him from the roll of attorneys.⁵⁸ I do not agree, relying on the authorities quoted *supra*.

Second requirement: Is respondent a fit and proper person to practise as an attorney?

- [35] Respondent's various affidavits are replete with accusations against the LPC, the Law Society before November 2018, and their functionaries which are really unfair and uncalled for. He even accused the independent auditor for being guilty of contempt of court.⁵⁹
- [36] I am satisfied that the respondent has demonstrated a remarkable lack of insight concerning the professional and ethical standards expected of an attorney. Obstructionism, denials and evasions have no place in matters of this nature and it was expected of respondent to put full facts before the court as reiterated in *Law Society, Northern Provinces v Sonntag*.⁶⁰ When respondent was asked during oral argument for an explanation why the balance in his trust account and transfers from the trust account decreased so tremendously, he spontaneously replied that it was due to the lock-down as a consequence of the Covid 19 pandemic. When I pointed out that the country was not in lock-down before the end of the 2020 financial year, he responded that he was making use of "fee and management agreements" with clients. This answer is in line with an allegation made in one of his affidavits. I did not

⁵⁸ Paragraphs 41 – 44 on bundle 3 pp 111 - 113

⁵⁹ Para 45 of the supplementary affidavit, bundle 3 p 113

⁶⁰ 2012 (1) SA 372 (SCA) at paras 17 – 20 as well as the authorities quoted *supra*

understand what he meant when reading the affidavit, but it was explained during argument. It is the respondent's case that he is doing predominantly criminal work. When instructed by a client to assist, he will enter into such agreement and accept the fee in his business account. This is clearly wrong and exactly what the legislature wants to prevent.⁶¹ The fee is not earned until the work is done. I borrow from the judgment in *Mabando* the following words with which I respectfully align myself:

"Considering the common cause facts the inference is inescapable that the amounts were not so retained — a grave and usually fatal error on the part of any attorney."

- [37] There is in my view no doubt that the respondent is not a fit and proper person to practice as an attorney at this stage. He has been carrying-on in the same vein for a number of years and is not prepared to accept that his conduct is unprofessional. Clients who entrust him with their monies in the belief that these are paid into his trust account and that in the event of misappropriation of such funds the Fidelity Fund would settle their claims will encounter unpleasant surprises. As mentioned, it is not only unprofessional conduct for an attorney to practice without a Fidelity Fund Certificate, but the conduct is also illegal and thus constituting a criminal offence. The second requirement has been met.

Third requirement: The appropriate sanction: striking-off or suspension from practice?

- [38] In the exercise of my discretion I have to decide whether respondent deserves the ultimate penalty of striking-off or whether a suspension from practice will suffice and in the event of a suspension, on what conditions.
- [39] I have considered the totality of the evidence as well as the authorities quoted, but the following factors play a particular role in the exercise of my discretion:

- 39.1 Respondent, not a young person anymore, may find it difficult to get suitable employment if struck from the roll.

⁶¹ See again section 84(3) read with section 84(1) & (2) and 86(1) & (2)

- 39.2 The respondent lodged audit reports for 2018, 2019 and 2020, although qualified. I accept that he held the view, incorrectly so, that his trust bookkeeping was in order, that the LPC without sufficient cause refused to issue FFC's and that he was entitled to practise.
- 39.3 A suspension will not close the doors of practice for ever and as clearly held in *Viljoen supra*, if the respondent can convince the court when a *mandamus* is sought in future that he has complied with the requirements for FFC's to be issued to him, there is no reason why the suspension shall not be uplifted, unless the LPC is able to present proof of other serious transgressions.
- 39.4 Although respondent stubbornly attacked the LPC and functionaries and provided the court with evasive and argumentative answering affidavits, thereby demonstrating a lack of insight - conduct not expected of an attorney accused of misconduct as indicated by the authorities referred to *supra* - I am of the view that respondent probably believed that attack was the best form of defence. I am of the opinion that he should not be penalised with the ultimate sanction, but in saying that I should not be understood to say that striking-off may not be an appropriate sanction in similar circumstances. The matter *in casu* can be distinguished from the allegations made by the practitioners in *Malan supra*, whilst the facts are more in line with those in *Botha* and *Summerley supra*.

[40] In conclusion, the LPC has proven the offending conduct. There cannot be any doubt that the respondent is not a fit and proper person to practise as an attorney in the prevailing circumstances. Finally, and although this is perhaps a borderline case, I am satisfied that a lifeline may be thrown to the respondent and therefore instead of striking off, the respondent should be suspended from practice. If he is allowed to practice without a FFC this court will be closing its eyes to unprofessional and criminal conduct which may have serious consequences for the public in general, but the respondent's existing and prospective clients in particular. This means that he will have to satisfy the

court in the future that he is a fit and proper person to resume practising as an attorney.

- [41] Mr Sander submitted on behalf of the LPC that if the court is not inclined to strike the respondent from the roll, leave should be granted to it to apply to the court on the same papers, duly amplified, for striking off. I indicated earlier that unnecessary paper work has been produced. If facts are established in future warranting a striking off, the LPC may always approach the court with a fresh application. The judges dealing with that application will confine themselves to the facts presented to them instead of trawling through more than a thousand unnecessary pages.
- [42] The respondent is also not without a remedy. If his books are in order and he is in a position in future to lodge unqualified audit reports for all relevant years, he may well seek relief by way of a *mandamus* to direct the issuing of FFC's and lifting of his suspension.

VIII COURT ORDERS

- [43] Therefore the following orders are made:

1. The Respondent, Lloyd George Charles Lielies, is suspended from the practice of an attorney.
2. 2.1 The Respondent shall surrender and deliver to the Director of the Free State Provincial Office of the South African Legal Practice Council ('the Director') in Bloemfontein his certificate of enrolment as an attorney.
- 2.2 Should the Respondent fail to comply with the provisions of the preceding sub-paragraph of this order within 2 (two) weeks from date thereof, the Sheriff of the district in which such certificate of enrolment is found, is empowered and directed to take possession thereof and deliver same to the Director.

3. The Respondent is ordered to deliver his books of account, records, files and documents containing particulars and information relevant to:

- 3.1 any moneys received, held or paid by the Respondent for or on account of any person;
- 3.2 any moneys invested by the Respondent in terms of section 86(3) and/or section 86(4) of the Legal Practice Act, 28 of 2014 (hereinafter referred to as "the Act") or previously under section 78 of the now repealed Attorneys Act;
- 3.3 any interest in moneys so invested, which was paid over or credited to the Respondent;
- 3.4 any estate of a deceased person, or any insolvent estate, or any estate placed under Curatorship of which the Respondent is the Executor, Trustee or Curator, or which the Respondent is administering on behalf of the Executor, Trustee or Curator of such estate; and
- 3.5 the Respondent's practice as an attorney,

to the *curator bonis* ("Curator") appointed in terms of paragraph 9 hereof, provided that as far as such book of account, records, filed and documents are concerned, the Respondent shall be entitled to have access to them, but always subject to the supervision of such Curator or a nominee of such Curator.

4. Should the Respondent fail to comply with the provisions of the preceding paragraph of this order within 2 (two) weeks after service thereof upon him, or after a return by a 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 of the district in which such books of account, records, files and documents are, is empowered to take possession thereof and deliver them to such Curator.

5. Such Curator shall be entitled to hand over to the persons entitled thereto all such records, files and documents as soon as she has satisfied herself that the fees and disbursements in connection therewith have been paid or satisfactorily secured or that same are no longer required by the Curator.
6. A written undertaking by a person to whom the records, files and documents referred to in paragraph 5 above are handed, to pay such amount as may be due to the Respondent, either on taxation or by agreement, shall be deemed to be satisfactory security for the purposes of the preceding paragraph hereof, provided that such written undertaking incorporates a *domicilium citandi et executandi* of such person.
7. Such Curator is empowered to require that any such file, the contents of which she may consider to be relevant to a claim, or possible or anticipated claim, against her and/or the Respondent and/or the Respondent's clients, and/or the Legal Practitioners' Fidelity Fund (herein referred to as "the Fund") in respect of money and/or other property entrusted to the Respondent, be re-delivered to such Curator.
8. The Respondent is interdicted and prohibited from operating on his trust account(s) as defined in paragraph 9 hereof.
9. The Director, being Ms Tumelo Leope, is appointed as Curator to administer and control the trust account(s) of the Respondent, comprising of the separate banking accounts opened and kept by the Respondent at a bank in terms of section 86 of the said Act and/or any separate savings or interest-bearing accounts as contemplated by section 86(3) and/or section 86(4) of the said Act, (including accounts opened in accordance with the corresponding sections of the repealed Attorneys Act, 53 of 1979) in which moneys from such trust banking accounts have been invested by virtue of the provisions of the said sub-section or in which moneys in any manner have been deposited or

credited (the said accounts being herein referred to as "The trust account(s)") with the following powers and duties:

- 9.1 subject to the approval of the Board of Control of the Fund to sign and endorse cheques and/or withdrawal forms and generally to operate upon the Trust account(s), but only to such extent and/or for such purpose as may be necessary to bring to completion current transactions in which the Respondent was acting at the date of this order;
- 9.2 subject to the approval and control of the Board of Control of the Fund to recover and receive and, if necessary in the interest of persons having lawful claims against the Trust account(s) and/or against the Respondent in respect of moneys held, received and/or invested by the Respondent in terms of the aforesaid sections (hereinafter referred to as "Trust moneys"), to take legal proceedings which may be necessary in respect of incomplete transactions in which the Respondent may have been involved and which may have been wrongfully and unlawfully paid from the Trust account(s) and to receive such moneys and to pay same to the creditor of the Trust account(s);
- 9.3 to ascertain from the Respondent's book of account the names of all persons on whose account the Respondent appears to hold or to have received Trust moneys (hereinafter referred to as "the Trust Creditors") and to call upon the Respondent to furnish her within 30 (thirty) days from the date of this order, or such further period as he may agree to in writing, with the names, addressed of and amounts due to all Trust Creditors;
- 9.4 to call upon such Trust Creditors to furnish such proof, information and affidavits as she may require to enable her, 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 moneys in the Trust account(s) and if so, the amount of such claim;

- 9.5 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 creditors, without prejudice to such Trust Creditors' right of access to the Civil Courts;
- 9.6 having determined the amounts which she considers are lawfully due to Trust Creditors, to pay such claims in full, but subject always to the approval of the Board of Control of the Fund;
- 9.7 in the event of there being any surplus in the Trust account(s) after payment of the admitted claims of all Trust Creditors in full, to utilize such surplus to settle or reduce, as the case may be, firstly, any claim of the Fund in terms of section 86(5)(a) of the said Act in respect of any interest therein referred to and secondly, without prejudice to the rights of creditors of the Respondent, the costs, fees and expenses referred to in this order, or such portion thereof as has not already been separately paid by the Respondent to the Applicant and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the Board of Control of the Fund, to the Respondent. If he is solvent, or, if the Respondent is insolvent, to the Trustee of his insolvent estate;
- 9.8 in the event of there being insufficient trust monies in the Trust account(s) to pay the claims of Trust Creditors reflected in the books of account of the Respondent in full –
 - 9.8.1 subject to the approval of the Board of Control of the Fund to close the Trust account(s) and pay the credit balances to the Fund and to require the credit balances to be placed to the credit of a special Trust suspense account in the name of the Respondent in the Fund's books;

9.8.2 to refer the claims of all Trust Creditors to the Board of Control of the Fund to be dealt with in terms of the provisions of the said Act, and

9.8.3 to authorise the Board of Control of the Fund to credit the credit balances referred to in sub-paragraph 9.8.1 above to its "Paid Claims Account" when the Fund has paid, in terms of section 55 of the said Act admitted claims of the Trust Creditors in excess of such credit balances, provided that, notwithstanding the afore going, the said Board shall be entitled in its discretion, to transfer to its "Paid Claims Account" the amount or amounts of any claim or claims as and when admitted and paid by it;

9.9 subject to the approval of the Chairperson of the Board of Control of the Fund to appoint nominees or representatives and/or consult with and/or engage the services of attorneys and/or counsel and/or accountants and/or other persons, where considered necessary, to assist such Curator in the execution of the duties of the Curator, and

9.10 to render from time to time, as Curator, returns to the Board of Control of the Fund, showing how the Trust account(s) have been dealt with, until such time as the said Board notifies him that she may regard her duties as terminated.

10. The Respondent is hereby directed:

10.1 to pay the fees and expenses of the Curator, such fees to be assessed at the applicable rate as determined by the Board of Control of the Fund, including travelling time;

10.2 to pay the reasonable fees and expenses charged by any persons consulted and/or engaged by the Curator as aforesaid;

10.3 within 1 (one) year of him being requested to do so by the Curator, or within such longer period as the Curator may agree to in writing, to satisfy the Curator, by means of the submission of taxed bills of costs, or otherwise, of the amount of the fees and disbursements due to the Respondent in respect of his 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 Creditors concerned for payment or recovery thereof.

11. That the Respondent is hereby removed, during the period of suspension, from office as -

11.1. 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);

11.2. 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;

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

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

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

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

11.7. administrator appointed in terms of section 74 of the Magistrates' Court Act, No 32 of 1944;

12. The Respondent shall pay the costs of this application on the attorney and client scale.



JP DAFFUE J

I concur.



D MTHIMUNYE AJ

On behalf of applicant: Adv A Sander
Instructed by: Horn & Van Rensburg Attorneys
BLOEMFONTEIN

On behalf of respondent: In person

