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

Case no: **3312/2022**

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

In the matter between:

THE LEGAL PRACTICE COUNCIL	Applicant
and	
LEBOHANG MICHAEL MOKHELE	Respondent

CORAM: MATHEBULA J *et* MTHIMUNYE AJ

HEARD ON: 08 AUGUST 2022

JUDGMENT BY: MTHIMUNYE AJ

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII on 14 September 2022. The date and time for hand-down is deemed to be on 14 September 2022 at 14H00.

[1] This is an urgent application by the South African Legal Practice Council ("LPC" alternatively "the applicant") for the following orders:

(i) That the rules of court in terms of time and service be dispensed with and this application be heard on urgency basis.

(ii) That the respondent be suspended from practising as an attorney pending finalisation of disciplinary proceedings instituted or to be instituted against him by the applicant, alternatively, pending an application to be launched by the applicant to have the respondent's name struck from the roll of legal practitioners of the High Court of South Africa; and that he be prohibited from handling or operating any trust banking accounts in his practice.

(iii) That the respondent immediately surrenders and delivers to the Registrar of this court his admission certificate, failing which that within two (2) weeks the sheriff be authorised to take possession of the said certificate and hand it over to the Registrar of this court.

(iv) That a Curator Bonis ("the curator") be appointed to administer and control all the trust accounts of the respondent, with the customary ancillary orders.

[2] The applicant is a body corporate established in terms of Section 4 of the Legal Practice Act of 2014 ("the LPA"), a body corporate with full capacity and exercising jurisdiction over all legal practitioners and candidate legal practitioners as contemplated in the LPA. The respondent is Mr Lebohang Michael Mokhele, an attorney practising in Bloemfontein under the name and style of LM Mokhele Incorporated, a firm conducting the practice of attorneys in terms of the provisions of Section 34(5)(a) of the LPA, which firm the respondent is the sole director.

[3] The applicant bases this application on four (4) complaints lodged with the applicant against the respondent by four of the respondent's erstwhile clients i.e. Mr TW Mokoena, Mr PM Thulo, Mr XM Yawa and Ms NA Radebe. The applicant

submits that it has objective and compelling evidence that the respondent has committed acts of misconduct warranting him to be struck off the roll of legal practitioners.

[4] Chief amongst these acts of misconduct are the allegations against the respondent concerning misappropriation of trust funds entrusted to him by Mr PM Thulo and Ms NA Radebe and his failure to ensure that his trust banking account is not, at any time, in debit.

The Complaints

[5] Mr Mokoena had instructed the respondent to assist him with a Rule 43 application, to file an application for the upliftment of the notice of bar and to oppose a writ of execution against him. The respondent failed to carry out any of these mandates resulting in a complaint being lodged against him with the applicant. He faced 4 charges i.e. failure to treat the interests of his client as paramount, failure to carry out work in a competent and timely manner, bringing the legal profession into disrepute by misrepresenting the client's instructions and failure to respond to communication received from opposing party's legal representative within a reasonable time. The respondent pleaded guilty to two charges and the other two were withdrawn. The respondent was fined R24 000 for these transgressions and the matter was put to rest.

[6] The second complaint pertained to the instructions from Mr Thulo for assisting him with his wife's deceased estate. The respondent requested a deposit of R40 000.00 which Mr Thulo paid on 24 March 2020. On 8 April 2020 the respondent's trust account balance was R36 501.48 but the respondent had done nothing on the matter until he withdrew as an attorney of record on 07 March 2021. The respondent failed to account for the monies paid by Mr Thulo which led to Mr Thulo lodging a complaint with the applicant on 31 May 2021. The applicant sent a letter to the respondent notifying him of the complaint on 14 June 2021, and a reminder on 23 July 2021. The respondent failed to respond to both letters. The applicant referred the matter to its Investigating Committee and notified the

respondent on 16 September 2021 that the matter was set down for 7 December 2021.

[7] On 13 December 2021 the Investigations Committee recommended that the complaint be referred to the applicant's Disciplinary Committee. The respondent was served with a charge on 08 March 2022 to appear on 28 March 2022. Following receipt of the charges, the respondent concluded a settlement agreement with Mr Thulo on 15 March 2022 in terms of which the respondent would refund and pay Mr Thulo all the monies paid into the respondent's trust account in exchange for Mr Thulo withdrawing his complaint against the applicant. In this regard Mr Thulo was to send a letter of withdrawal to the applicant attaching the settlement agreement. Subsequently, Mr Thulo refused to withdraw the complaint and the disciplinary hearing against the respondent commenced on 28 March 2022. It was partly heard and postponed to continue on 15 August 2022 for cross-examination of Mr Thulo by the respondent.

[8] The third complaint is in respect of Mr XN Yawa who instructed the respondent in December 2020 to assist him with a matter concerning his customary marriage and a deceased estate. The respondent's instructions were to file a petition to the Supreme Court of Appeal. On 22 February 2021, the respondent issued an invoice for R165 000.00 for services that he claimed to have rendered. After negotiations, the respondent reduced the amount to R45 000.00 which Mr Yawa paid into his account on 26 February 2021. On 27 February 2021 an amount of R69 500.00 was transferred from the trust account to a certain MA Duma, which resulted in the trust balance of R2 189.91. It was clear that half of the monies paid to this MA Duma belonged to Mr Yawa and this was therefore a trust shortfall. At that stage, the respondent was even not entitled to any fees as no work had been done. The respondent did nothing on this matter and in August 2021 Mr Yawa confirmed with officials of this court and the Supreme Court of Appeal that no petition for appeal was filed. When Mr Yawa lodged a complaint with the applicant, the applicant sent letters to the respondent, to which they received no response.

[9] The fourth complaint is in respect of Ms NA Radebe who had instructed the respondent to launch an application for review on behalf of a joint venture called

Kiwango Infrastructure Consortium JV Divento S.A Suppliers (Pty) Ltd against Maluti-a-Phufung Local Municipality in respect of a tender process outcome where the JV was an unsuccessful bidder. The respondent requested a deposit of R150 000.00 which Ms Radebe paid in 4 instalments. The respondent launched the application for review and thereafter failed to update the complainant on the progress. At some point he informed Ms Radebe that the matter had been heard and the court had ruled that Maluti-a-Phofung must appoint the JV and pay certain monies, and a sheriff had been instructed to implement the order.

[10] After some time with no progress, Ms Radebe, being unhappy with the treatment she was receiving from the respondent, asked for a statement of account for the services rendered and a refund of the balance. The respondent neither rendered a statement of account nor refunded Ms Radebe, which led to Ms Radebe lodging a complaint with the applicant. Again the respondent never bothered to respond to the applicant's letters in this regard. The respondent and the complainant are now embroiled in a legal action instituted by Ms Radebe in the Bloemfontein Magistrates Court. During the oral hearing of the matter the respondent was asked about the statement of account which he referred to in his papers (but not attached) as Annexure 'LM10'. He explained that this may have been an oversight and requested time to go uplift same from his offices. In about an hour he returned with the same dated 25th February 2022. In its supplementary heads, the applicant has argued that this was prepared on the date of trial and the court was asked to draw this inference against the respondent.

[11] In summary, the respondent's transgressions as alleged by the applicant are that the respondent has had shortfalls in his trust account between 8 and 20 April 2020 in respect of monies entrusted to him by Mr Thulo. Again between September and November 2021 there was a shortfall in respect of the monies entrusted to him by Ms Radebe. On 27 February 2021 the same situation reigned in respect of the trust monies entrusted to him by Mr Yawa which shortfalls he failed to report to the applicant as is required by the Code of Conduct for Legal Practitioners; that the respondent is overreaching his clients; that he fails to account to his clients for the monies entrusted to him; that he does not carry out clients' mandates and misleads

his clients on progress; and that he fails to respond to lawful and reasonable requests from or to account to the application lodged against him.

[12] The complaint against Mr T W Mokoena was finalised on 14 December 2021 and was put to rest. The disciplinary proceedings against the respondent in respect of Mr Thulo were still ongoing on the date of hearing and the applicant was still to institute disciplinary proceedings against the respondent in respect of Mr Yawa and Ms Radebe's complaints. Despite these charges emanating from incidents that occurred over a year ago, we were informed that the charge sheets have not been served against the respondent. This means that the matters against him are not ripe for hearing.

[13] The applicant further alleges that subsequent to launching this application, the respondent has been interfering with complainants because Mr Thulo visited the applicant's offices and reported that he had received death threats for wanting to take the respondent's practising licence away. Mr Yawa has also alleged that the reason he entered into a settlement agreement with the respondent in March is because the respondent had contacted him on 9 March 2022 alleging that the applicant had instructed him to refund the monies paid by Mr Yawa and to return all documents relating to the mandate that was initially given to him by Mr Yawa in exchange for Mr Yawa withdrawing the complaint against the respondent. Although the settlement agreement was entered into on 18 March 2022, the applicant alleges that this fact only came to its attention on 26 July 2022 after this application was launched and thus was only mentioned in their supplementary papers. On 03 August 2022 Mr Yawa deposed to an affidavit that on 30 July 2022 he had received death threats because of having lodged a complaint against the respondent.

[14] For these reasons, the applicant seeks an order to suspend the respondent pending the finalisation of the disciplinary proceedings; alternatively, pending an application by the applicant for the striking off of the respondent. This is an order with potentially far-reaching consequences for a practitioner whose livelihood is dependent on the practice of his profession. Necessary caution is required from the court in matters of this nature.

[15] The respondent opposes this application on the basis that, firstly the only urgency is that which is self-created by the applicant as there is no risk of misappropriation of funds as alleged by the applicant and such allegations are not supported by any evidence. The issue of urgency was dealt with at the beginning of the proceedings and the parties agreed that the matter be heard on such basis. The respondent further argued that the deponent to the applicant's founding affidavit has relied on hearsay evidence as he had no such knowledge of the facts he avers and no confirmatory affidavits were attached to his founding affidavit. This was however cured by the applicant in its supplementary papers.

[16] Further, the respondent submits that the applicant, as the *custom morum* can easily achieve through its own processes the orders it seeks from this court as empowered by the LPA. Further, the respondent points out that the Mokoena complaint has been disposed of and its inclusion herein by the applicant is mala fide and misleading. This court agrees that the first complaint is water under the bridge and there is no reason for this court to refer thereto any further in this judgment.

[16] At the commencement of the proceedings, this court broached the question of an order where the applicant is granted oversight over the trust account and all other accounts the respondent holds in trust in his capacity as an attorney, without suspending the respondent. This oversight will be pending the finalisation of the disciplinary proceedings, which disciplinary proceedings should be time bound. At the finalisation of the disciplinary proceedings and depending on the findings, the applicant would be allowed to approach this court on the same or amplified papers for an appropriate order against the respondent.

[17] The respondent was amenable to enter into an agreement to that effect and that it be made an order of court. The applicant's view was that such an order was incompetent as a Curator could not be appointed whilst the practitioner is not suspended. Given such divergent views, this court invited both counsel to file supplementary heads of argument ("heads") addressing this issue.

[18] Heads were filed and the applicant persisted that such an order would be incompetent citing Section 89 of the Legal Practice Act of 2014 which provides:

> “The High Court may, on application made by the council or the board, and on good cause shown, prohibit any legal practitioner referred to in section 84 (1) from operating in anyway his or her trust account, and may appoint a *curator bonis* to control and administer that trust account, with any rights, power and functions in relation thereto as the Court may deem fit.”

This section empowers the court to bar a practitioner from practicing on good cause shown by the Council.

[19] The LPC has brought this application on the bases of four complaints. One was finalised by the LPC and has fallen off. One of the complaints is still before Council and has not been finalised. The LPC is still in the process of instituting disciplinary proceedings against the respondent in respect of the other two complaints. Neither the LPC nor this court knows what the outcome of the said disciplinary proceedings will be and yet this court is asked to suspend the respondent. The applicant has intimated misappropriation of funds on the basis that the respondent would make transfers from the trust to the business account without issuing a statement of account. The respondent when called upon to proffer an explanation shies away from the issues. He is less than candid with the applicant and this court. The irresistible conclusion is that there was such a trust shortfall.

[20] In its supplementary heads the applicant submits that this application is not brought under section 89 of the LPA and if a curator is appointed without the respondent being suspended, the curator will only serve to ‘babysit’ the respondent whilst the public remains at risk as he might submit invoices misrepresenting that he has performed some work when in fact he had not done so. Also, argues the applicant, the responded may be tempted to receive monies into his business account, which will further expose members of the public as such monies are not protected and cannot be refunded by the Legal Practitioners Fidelity Fund. This assertion is not supported by any evidence.

[21] In respect of the appointment of a curator bonis, section 90(1)(c) of the LPA provides:

> “If any legal practitioner referred to in Section 84(1) is struck off or suspended from practice; the High Court may, on application by the Council, Board or by any person having an interest in the Trust Account or trust account practice, appoint a *curator bonis* to control and administer that account, with any rights, powers and functions as the court may deem fit”

[22] On the basis of this section the applicant argued that unless a practitioner is struck off or suspended from practice, a *curator bonis* cannot be appointed. This however does not necessarily mean that the applicant can only have access or exercise oversight over the practitioner’s trust account when the practitioner is suspended or struck off the roll of practitioners. The applicant, is, as correctly argued by the respondent, empowered by the LPA to inspect the accounting records of any trust account of a law firm to ensure compliance. Section 87(2)(a) of the Legal Practice Act provides that:

> “The Council may, itself or through its nominee, at the cost of Council, inspect the accounting records of any trust account practice in order to satisfy itself that the provisions of section 86 and subsection (1) are being complied with.”

[23] Further, section 84(6) of the Legal Practice Act allows the applicant to withdraw the practitioner’s fidelity fund certificate where there has been non-compliance with the provisions of the Act. This section provides:

> “The Council may withdraw a Fidelity Fund Certificate and, where necessary, obtain an interdict against the legal practitioner concerned if he or she fails to comply with the provisions of the LPA or in any way acts unlawfully or unethically”.

[24] By its own admission, the applicant admits that the order it seeks is interim pending finalisation of disciplinary proceedings against the respondent, which proceedings this court is of the view that can be finalised within stipulated time limits. The difficulty of the submissions on behalf of the applicant is that the relief is sought for purposes of conducting further investigations. That can be done by invoking other

provisions of the governing Act. At the finalisation thereof, and depending on the findings thereof, the respondent can then approach this court for an order prohibiting the respondent to practice. The delay on the part of the applicant to institute proceedings against the respondent is not well explained.

[25] In the **Law Society of the Northern Provinces v Morobadi (1151/2017) [2018] ZASCA 185,** the Supreme Court of Appeal in para 25 held as follows:

> "…In general it is correct that the Council may proceed with the application for the striking off of the practitioner or for his or her suspension from practice without pursuing a formal charge before a disciplinary committee if in its opinion, having regard to the nature of the charges, a practitioner is no longer considered to be a fit and proper person."

[26] This court finds no factual basis to conclude that the offending conduct has been established given that the disciplinary proceedings of the applicant have not been finalised on the one complaint and not been initiated on the other two. The basis upon which the applicant seeks a suspension order against the respondent has not been established. Undoubtedly, the applicant is agitated by the flippant approach adopted by the respondent in their dealings with each other. It raises eyebrows and the respondent must be reined in to act in accordance with the prescripts of this noble profession. These matters must be brought to finality.

[27] In the result, the following **orders** are made:

1. The matter is heard as urgent and the applicant's non-compliance with the rules of this Honourable Court's relating to service time periods and forms is condoned.
2. The application is dismissed.
3. The applicant is ordered to finalise the disciplinary proceedings against the respondent by 31 October 2022.
4. The parties may supplement their papers, if so advised, on the matters emanating from the enquiry.
5. No order as to costs.

DP MTHIMUNYE AJ

I concur and it is so ordered,

MA MATHEBULA J

On behalf of applicant:	Adv M S Mazibuko
	Chambers, Bloemfontein
Instructed by:	Amade & Company Inc
On behalf of respondent:	Adv T Mpahlwa
	Chambers, Sandton
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