



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32362/2020

(1)	REPORTABLE: NO / YES
(2)	OF INTEREST TO OTHER JUDGES: NO / YES
.....	
NKOSI AJ	DATE: <u>14</u> MAY 2024

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

ANDRE STEFANUS MARAIS

Respondent

Delivery:- This judgement was delivered electronically by means of email to the legal representatives of the parties and uploaded on caselines. The judgement is deemed to be delivered on the 14 May 2024.

JUDGEMENT

NKOSI AJ



INTRODUCTION

- [1] This is an application to have the Respondent's name struck from the roll of Legal Practitioners, in particular, attorneys. The Respondent is currently on suspension following the order of this Court granted on 25 February 2021¹. The application is opposed basically on two broad grounds, namely, procedural fairness and lack of merit for the suspension and the contemplated striking off.

BRIEF BACKGROUND

- [2] The Applicant applied for the suspension of the Respondent from practice alternatively for his name to be struck from the roll of legal Practitioners. The application was served on the 4 August 2020. The Respondent delivered his notice to oppose the application on 20 August 2020 but failed to deliver his answering affidavit timeously. A notice of set down of the application was served on 15 September 2020 and it was appropriately set down for hearing on 25 February 2021. The Respondent's affidavit opposing the suspension application is dated 19 February 2021. However, it is not clear on record when was it delivered. The Court proceeded to hear the application and granted the suspension order.
- [3] The Court order of the 25 February 2021 instructs the Respondent to:
- “... Serve and file a condonation application for the late filing of his answering affidavit by 8 March 2015(sic) for the Honourable Court's consideration at the adjudication of the striking application”². The

¹ Caseline 020 - 13

² Caseline 020 - 14 para 2



Applicant was also ordered to file its replying affidavit to the condonation application by 29 March 2021. Further, to file its replying affidavit to the striking application by 30 August 2021.

- [4] It is apparent from the Court order that the Respondent filed his answering affidavit out of time but before the suspension order was granted. It is also clear that the answering affidavit did not contain the necessary explanation for its lateness and a prayer for condonation.
- [5] The Respondent failed to comply with the Court order and when he finally did, it was late. He cited ill health and several personal misfortunes as the cause of the delay. Before the strike out application could be heard by this Court, the parties had already reached an agreement to grant each other condonation for the late filing of the answering and the replying affidavits respectively. Of course, their agreement is subject to the Courts approval. We do not find any compelling reason to go against the parties' request. The application for strike out is severe in nature, it is the ultimate punishment that can be imposed on a Legal Practitioner and it affects the status of the Respondent. For those reasons, it is in the interest of justice to grant condonation.
- [6] The Respondent launched a counter application to rescind the suspension application for reasons which are to a large extent similar to those raised in his answering affidavit opposing the strike out application. He subsequently opted to withdraw the application on the basis that, whether the strike out application succeeds or not, his



rescission application would be moot more so, the said application is yet to be set down for adjudication by this Court.

REASONS FOR SUSPENSION

[7] The reasons for the Respondent's suspension are cited in the founding affidavit of the chairperson of the Legal Practice Council ("LPC")³ and they are:

- 7.1 The Respondent failed to maintain the highest standard of honesty and integrity;
- 7.2 The Respondent failed to treat the interests of his clients as paramount;
- 7.3 The Respondent failed to account faithfully, accurately and timeously for any of the amounts that were received and that came into his possession;
- 7.4 The Respondent failed to refrain from doing acts which could or might bring the legal profession into disrepute;
- 7.5 The Respondent contravened several provisions of the Attorneys' Act, Legal Practice Act, Rules for the Attorneys profession and/or South African Legal Practice Council Rules and the Code of Conduct; and

³ Caseline 003 – 14 to 003 - 15



7.6 The Applicant received serious complaints against the Respondent.

[8] These reasons emanate mainly from two complaints received by the Applicant against the Respondent and are dealt with in detail in the Applicant's founding affidavit. It would seem, based on these reasons, the Court was persuaded to grant the suspension order first and afford the Respondent an opportunity to oppose the strike out application.

[9] The Respondent opposes the application. It was argued on his behalf that these reasons were not properly and thoroughly investigated by the Investigating Committee. Further, that the procedure followed by the Investigating Committee in referring its decision to the Applicant's Council recommending that a suspension or strike out application be considered, was flawed and ultra vires.

ISSUES TO BE DETERMINED

[10] The parties have delivered a joint minute defining issues to be determined by this Court⁴.

[11] The Applicant's view of the issue to be determined is recorded as follows:

"The Applicant submits that sufficient evidence is available and that a proper case has been made out for the striking of the Respondent from the roll of attorneys"⁵.

⁴ Caseline 000 – 4 at para 10 and 11

⁵ Caseline 000 – 4 at para 10.1



[12] The Applicant submitted further that consequently the Respondent is not a fit and proper person to continue practicing as an attorney.

[13] According to the Respondent the issues to be determined are:

13.1 "The Respondent is of the view that the Applicant failed to make out a proper case for the striking of the Respondent's name from the Roll of Attorneys."⁶

13.2 "The Respondent will submit that the Applicant failed to do a proper - and thorough investigation into the allegations against the Respondent and has, more than two years after the suspension of the Respondent, still not done a proper investigation to report facts to Court and assist the Court to properly consider the application."⁷

[14] A determination whether the Respondent is fit to hold office as a legal practitioner will necessarily involve an enquiry into the procedure followed by the LPC leading to the suspension of the Respondent as well as the substance of the complaints received by the LPC. The procedure adopted by the LPC must conform to the test of procedural fairness. This precedes any inquiry into the substance of the merits of the application.

THE FIRST COMPLAINT- MR SEEDAT

⁶ Caseline 000 – 4 at para 11.1

⁷ Caseline 000 – 4 at para 11.2



[15] On the 12 October 2016 Mr Seedat lodged a complaint with the Applicant against the Respondent⁸. He informed the Applicant that:

- 15.1 during October 2016 he was seriously injured in a motor vehicle accident and his wife passed away in the same accident;
- 15.2 he instructed the Respondent to act on his behalf in his third-party claim against the Road Accident Fund ("RAF"). The Respondent was further instructed to act for the dependants of the deceased in the claim for loss of support against the RAF;
- 15.3 approximately 5 years later the Respondent informed him that an amount of R1 200 000.00 was paid by the RAF as compensation for his claim and that he would be paid R700 000.00 after deducting legal costs. The R700 000.00 was paid to him;
- 15.4 he requested a statement of account from the Respondent but never received it;
- 15.5 he proceeded to enquire directly from the RAF as to what payments were made by the RAF. He obtained a full expenditure sheet from the RAF which indicated a total amount of R3 980 254.52 which was paid over to the Respondent; and
- 15.6 Seedat indicated that he only received R700 000.00, R575 000.00 and R140 000.00 from the Respondent.

[16] The written complaint was forwarded to the Respondent with a request for his reply within the specified period. He failed to reply to the request.

⁸ (caselines 005-1)



Thereafter he was notified by the Applicant to appear before the Investigating Committee which is part of the Disciplinary Body of the LPC.

- [17] The purpose of his appearance, it would seem, was to answer to a charge relating to his failure to reply to the LPC correspondence requesting his reply to the complaint and also to discuss the complaint and obtain his response.
- [18] At the hearing, the Respondent was found guilty of failing to answer to correspondence and was sentenced to R4000,00 fine and further ordered to pay the *pro rata* costs of the hearing. Thereafter the Investigating Committee proceeded with the discussion relating to Mr Seedat's complaint.
- [19] The Respondent was afforded an opportunity to respond to Mr Seedat's allegations. He denied the allegations but could not substantiate his denial by producing relevant documentary proof. He Informed the Committee that he was unable to locate his records.
- [20] At the end of the discussion, the Investigating Committee made a recommendation to the LPC for the Respondent's suspension. There was no further and comprehensive investigation conducted by the investigating committee relating to Mr Seedat's complaint. There is no evidence obtained from the RAF to indicate how the payment is formulated and allocated.
- [21] Subsequently, the Respondent traced a substantial part of his records which shed light to the complaint and forwarded it to the LPC hoping



that the Investigating Committee would take these records into consideration in its investigation before a recommendation to the LPC is made. In essence, these records purportedly demonstrate to the LPC that all monies received in Mr. Seedat's matter were accounted for and paid to him in full. He kept on communicating with the LPC as and when he received further records of material nature. It is worth noting that these records were forwarded to the Applicant before the suspension application was heard and the Applicant has not made mention of the Respondent's financial records in its founding and supplementary affidavits.

THE SECOND COMPLAINT – MR L P MOHOLA

[22] The Applicant received a complaint from Mr. Mohola on 3 October 2018. Mr. Mohola alleges that:

- 22.1 he instructed the Respondent to recover money on his behalf and also to institute eviction proceedings;
- 22.2 he never received a progress report from the Respondent. He subsequently lodged a complaint with the LPC; and
- 22.3 according to LPC the complaint was forwarded to the Respondent on 24 October 2018 and it yielded no positive response. A follow up letter dated 10 December 2018 was sent to the Respondent. It also failed to elicit a positive response.

[23] Since then, the Respondent was never called to appear before a Disciplinary Body of the LPC and was never charged for any misconduct relating to Mr. Mohola's complaint.



FURTHER COMPLAINTS RECEIVED

- [24] After the suspension of the Respondent, the Applicant filed a supplementary affidavit in which it indicated that it had received two complaints against the Respondent. These complaints were filed by Mr. Ramogole and Ms. Van Zyl.
- [25] The complaint by Mr. Ramogole is dated 22 October 2021⁹ and received by the LPC long after the suspension of the Respondent. Regarding Ms. Van Zyl's complaint, it is not clear from the record when her complaint was lodged with the LPC. However, she alleges that she instructed the Respondent on 14 February 2020 to act for her in a legal matter. I therefore assume that her complaint must have arisen sometime after the suspension of the Respondent.
- [26] The Respondent has filed his own supplementary affidavit and disputed any wrong doing in the handling of Mr. Ramogole's and Ms. Van Zyl's matters. The veracity of the allegations in the Applicant's supplementary affidavits and the denials by the Respondent are yet to be tested. They were not part of the suspension application and they shall not be part of this strike out application purely for the sake of procedural fairness.

DISCUSSION

- [27] The Respondent was summoned to appear before the Investigating Committee for a discussion relating to Mr. Seedat's complaint. He has

⁹ Caseline 033 - 11



never been summoned to appear before a Disciplinary Body regarding the complaints by Mr. Mohola, Mr. Ramogole or Ms. Van Zyl. I shall now proceed to consider the issues raised by the parties and in doing so, I propose also to deal with the enabling provisions of the Legal Practice Act¹⁰ ("LPA") which regulate the function and the powers of the Investigating Committee.

[28] Section 37(3) provides:

"An Investigating Committee must, after investigating a complaint, if it is satisfied that: -

(a) the legal practitioner, or the candidate legal practitioner concerned may, on the basis of available prima facie evidence, be guilty of misconduct that in terms of the code of conduct, warrant misconduct proceedings, refer the matter to the Council for adjudication by a disciplinary committee."

[29] It is explicit from its name and the provisions of Section 37 (3) what the purpose and function of the Investigating Committee is. The Investigating Committee is required to investigate and make recommendation to council for misconduct proceedings by the Disciplinary Committee where circumstances permit.

[30] The investigation is not an event limited to a discussion conducted by the Investigating Committee but a process which also includes a meaningful interrogation of the allegations against the practitioner, a call for further submissions and evidence, interview with witnesses who may not have been party to the discussion. The investigation is not

¹⁰ Act no. 28 of 2014.



limited to the mechanism mentioned herein but the depth of the investigation will depend on the circumstances of each complaint.

[31] In *Mavudzi and another v Majola and others*¹¹ Sutherland DJP stated that:

“The LPC as the primary regulator of the profession, is vested with several powers by the LPA. The apparatus to discipline is extensive. The principal attributes to the apparatus is that a practitioner who is accused of misconduct must enjoy a fair procedure, inclusive not only of audi alteram partem but that there be an appropriate investigation of the allegations against the practitioner.”

[32] The LPC is a creature of statute and it performs public function. It is enjoined by Section 33(1) of the Constitution¹² to provide administrative action that is lawful, reasonably and procedurally fair. Any function that falls short of procedural fairness will invalidate the outcome. In *Masetlha v President of the Republic of South Africa*¹³ Ngcobo J in his dissenting judgment stated that:

“Another source of constraint on the exercise of public power is the rule of law which is one of the foundational values of our constitutional democracy. The rule of law principle requires that the actions of all those who exercise public power must comply with the law, including the constitution..... The common law principle of ultra vires is now underpinned by the constitutional doctrine of legality which is an aspect of the rule of law. Thus, what would have been ultra vires under the

¹¹ (49039 | 2021) [2022] ZAGPJHC 575, 2022 (6) SA 420 (GJ) 10 August 2022 at para 34

¹² Constitution of the Republic of South Africa Act 108 of 1996

¹³ *Masetlha v President of Republic of South Africa* 2008 (1) SA 566 (cc) at para 173



common law by reason of public official exceeding a statutory power is now invalid according to the doctrine of legality.”

- [33] The issue raised by the Respondent relates to the quality of the investigation conducted by the Investigating Committee of the LPC. It was argued on his behalf that the LPC failed to do a proper and thorough investigation into the allegations against him. The Applicant appears to have invoked the provision of Section 43 of the Act¹⁴ which states that:

“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.”

- [34] In *casu*, the Investigating Committee informed Council to institute urgent legal proceedings for the suspension of the Respondent. The question that arises is whether, the Investigating Committee had conducted a proper and thorough investigation of the allegations against the Respondent. The seriousness of the suspension sanction calls for a thorough and a proper investigation.

- [35] In Mr. Seedat’s complaint, the Investigating Committee was of the view that there was misappropriation of trust monies. The Respondent submitted financial records accounting for all the monies received and

¹⁴ Legal Practice Act



paid over to Mr Seedat. Payments to Mr. Seedat were supported by proof of payment and these records were forwarded to the Applicant before the suspension order was granted. However, there is no indication on record that the Investigating Committee did investigate the financial records received from the Respondent and that it verified the correctness of those records. The Applicant, with the assistance of the Respondent, could have compiled a reconciliation of the financial records received from the Respondent and the complainant and this could have benefited both parties rather than outrightly pursuing the course recommended by the Investigating Committee.

- [36] The approach adopted by the Investigating Committee goes against the cautions sounded by our Courts. In *Motswai v Road Accident Fund*¹⁵ Cachalia JA said:

“In this regard our Courts have stated emphatically that charges of fraud or other conduct that carries serious consequences must be proved by the clearest evidence or clear and satisfactory evidence or clear and convincing evidence or some similar phrase.”

In the absence of an appropriate investigation into the Respondent's responses to the complaints, it cannot be concluded that he received a procedurally fair hearing when the Investigating Committee conducted or failed to conduct its function.

- [37] In my view the investigation into Mr. Seedat's complaint was incomplete and the outcome thereof did not entitle the Investigating Committee to invoke the provisions of Section 43 of the LPA. A determination of

¹⁵ (766/13) [2014] ZASCA 104, 2014(6) SA 360 (SCA); [2014]4 All SA 286 at para 46)



whether theft of trust monies has occurred or that the allegations against the practitioner are serious, can only be achieved after a comprehensive and thorough investigation which includes a consideration of the Respondent's rebuttal.

- [38] The complaints by Mr Mohola, Mr. Ramagole and Ms Van Zyl were never investigated, yet the Applicant placed the complaints before Court seeking an order striking the respondent from the roll of legal practitioners. A mere allegation that the LPC has received many complaints against the Respondent does not entitle the Applicant to proceed and seek a suspension order against the practitioner. Each complaint has to be investigated thoroughly and appropriately. It is the outcome of a clear and objectively thorough investigation which should inform the LPC whether to proceed in terms of Section 43, Section 37(3) or Section 40 (3)(a)(iv)¹⁶.
- [39] The Applicant has also alleged that the Respondent failed to maintain the highest standard of honesty and integrity in that he practiced without a Fidelity Fund Certificate since end of December 2019¹⁷.
- [40] The source of this information is the Final Curator's report which states that:
- "The records of the Legal Practice Council reflect that Mr Marais last Fidelity Fund Certificate was issued under H.W Smith and Marais attorneys for the year ending 2019."*¹⁸

¹⁶ "40(3)(a) In the case of a legal practitioner – (iv) advise Council to apply to the High Court for – (aa) an order striking his or her name from the roll; (bb) an order suspending him or her from practice; (cc) (dd)....."

¹⁷ Caseline – 060-5

¹⁸ Caseline 069 – 4 at para 4.1



Nothing more is said about the Fidelity Fund Certificate. It is not mentioned whether the Respondent did apply for the Fidelity Fund Certificate and if so, what was the hold up.

- [41] The Curator's report further alleges that the Respondent practiced without a Fidelity Fund Certificate in that, according to Magistrate Neyt, the Respondent signed Court documents when he is suspended from practice.
- [42] The Respondent submitted that he applied for the Fidelity Fund Certificate and made enquires during the year 2020 before COVID. The Respondent further explained that the Court action was a personal matter and therefore he was entitled to sign the pleadings. These allegations were not investigated, the complaint is not clearly established. It needs to be investigated first before it is relied upon for the strike out application.
- [43] In the absence of a clear proof that the complaints against the Respondent were properly and thoroughly investigated, I am not persuaded that the Applicant has sufficient evidence for the striking of the Respondent from the roll of Attorneys. The consideration of procedural fairness takes precedence over a consideration of merits of the complaint. The Applicant has failed to make out a case for the order sought.
- [44] In the premises I propose that the following order is made:
- (i) Condonation of the late filing of the condonation application and the replying affidavits is granted.



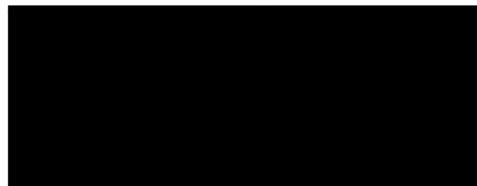
- (ii) The Application is dismissed.
- (iii) Each party shall pay his or its own costs.
- (iv) The Respondent is reinstated to the roll of practising Attorneys.



NKOSI AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree and it is so ordered:



BAQWA J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

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