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

Case No. 4394/2023

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL **APPLICANT**

and

ALWYN ABRAHAM MYBURGH **RESPONDENT**

CORAM: VAN ZYL, J, et MAJOSI, AJ

HEARD ON: 09 MAY 2024

DELIVERED ON: 20 MAY 2024

JUDGMENT

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[1] The Applicant herein seeks an order to strike the name of the Respondent from the roll of legal practioners in the High Court of South Africa after he was suspended from the said roll on the 14th of October 2021 by this court until such time he could show that he is a fit and proper person and obtained a Fidelity Fund Certificate. The current application is unopposed.

[2] The applicant is the South African Legal Practice Council, a statutory body established in terms of section 4 of the Legal Practice Act 28 of 2014 regulating the rules and exercising oversight over the conduct of legal practioners.

[3] The respondent is a male legal practioner, in practice since 1 September 1999, practicing under the name and style of Myburgh Attorneys Incorporated, with offices situated at 54 Reid Street, Westdene, Bloemfontein, Free State.

[4] The respondent was suspended from the roll of legal practioners on the strength of a complaint alleging misappropriation of trust fund money and non-compliance with section 84(1) and 84(2) of the Act until such time he could show that he is a fit and proper person to resume practice and obtained a Fidelity Fund Certificate under Free State High Court case number 1699/2021. A curator was also appointed to take control of the respondent's trust account.

[5] After the respondent was suspended, the Free State Legal Practice Council investigated the complaint through their Investigation Committee. During the investigation, the respondent deposed to an affidavit and denied that the said amount was paid into his account. To that end, the Applicant, on the 6 of April 2022, obtained a copy of the Respondent's bank statements to trace an amount of R 350 000.00 associated with the formal complaint which was allegedly paid into the trust account.

[6] It was found that this sum was indeed paid into the trust account of the respondent in two payments consisting of R 300 000.00 and R 50 000.00 respectively and the collective amount was used in various transactions without the necessary authorization of the complainant. Furthermore, the trust account had a mere balance of R 51 821.70. It was also noted that the trust account had been in deficit since the year 2016 and had dipped well below the amount that ought to have been available to trust creditors.

[7] This committee then recommended and resolved that the matter be referred to the Disciplinary Committee for a disciplinary hearing and that the respondent was to face several charges, *inter alia*, failing to separate and account for client's money and bringing the legal profession into disrepute.

[8] On the 24th and 28th April 2023, the disciplinary meeting proceeded in the absence of the respondent and he was found guilty on five charges of misconduct in terms of the Legal Practice Act Rules. Firstly, that R 350 000.00 of the complainant was part of a business transaction but was not paid into the business trust account.[1] Secondly, the said money was not paid over to the complainant on demand.[2]

[9] Thirdly, that the respondent mislead Council in an affidavit deposed to on the 27th January 2020 that he never received the money from the complainant and the money was not paid into his trust account.[3] Fourthly, he did not separate the money of the business from that of clients and lastly, that he failed as a legal practioner and firm to take reasonable steps to avoid a reasonable suspicion that his or his firm's integrity be compromised.[4]

[10] The sanction imposed for counts 1,2,4 and 7 by the Disciplinary Council was that an order be sought from the Free State High Court that the respondent's name be struck off the roll of legal practioners.[5] For count 3, he was ordered to pay a fine for misleading Council as well as the costs of the disciplinary hearing. In addition to this, the respondent made no means to set aside his suspension or to obtain a fidelity fund certificate as previously ordered on the 14 October 2021.

[11] Counsel for the Applicant submitted that the respondent committed these acts of misconduct willfully and with full appreciation of wrongfulness and he cannot be considered as a fit and proper person to continue to practice as a legal practioner and should his name must be struck off the roll.

[12] The test to be applied to determine if a practioner is a fit and proper person has been set out in Malan and Another v Law Society, Northern Provinces 2009 (1) SA 216 (SCA) para 4:

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[1] Rule 54.11 of the Legal Practice Act Rules.

[2] Rule 54.13. supra

[3] Code of Conduct Provision 16.4.

[4] Ibid, Provision 3.8.

[5] Sanction Report paragraph 17.

"First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. Second, it must consider whether the person concerned "in the discretion of the Court" is not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. And third, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice."

[13] This test was also applied in Jiba and Another v General Council of the Bar of South Africa and Another [6] and more recently, in Hewetson v Law Society of the Free State 2020 (5) SA 86 (SCA). The respondent's suspension has persisted since the 14th of October 2021 and in the absence of a Fidelity fund certificate, he cannot practice as an attorney. This in itself is a material breach of the rules and no attempt has been made to uplift the suspension. The application remains unopposed even after the applicant was granted leave to serve the application via substituted service.[7]

[14] There is no doubt that the misappropriation of trust account monies falls into ambit of misconduct by a legal practioner. When an investigation was conducted to establish the veracity of the complaint, the respondent under oath, deliberately mislead the applicant by stating that the complainant had no merit as such monies were never received from the complainant nor was there any record of such client at the law firm.

[15] Bank statements obtained on the 6th of April 2024 revealed that not only was the amount paid into the trust account of the respondent on the 23rd and 25th of August 2016, usage of the said funds was not for the benefit of the complainant, nor could it be accounted for. It was also never refunded to the complainant at his request. This is a clear indication that the respondent is dishonest and without authorization or cause, used the funds for his own benefit resulting in a deficit of the trust account. The cornerstone of the legal profession is honesty

[6] 2019 (1) SA 130 (SCA)

[7] Court order dated 7 March 2024.

and integrity. In my view, this appalling conduct by a practioner falls short of the required conduct that is expected as a legal practioner.

[16] The respondent's conduct under the prevailing circumstances warrants his removal from the roll as he cannot be considered to be a fit or proper person nor can he be allowed to continue to practice and line his own pockets with monies of trust creditors. The relief sought in the notice of motion seeks an order for removal from the roll of legal practitioners and costs in favour of the Applicant. For the sake of completeness, certain orders as granted on the 14 October 2021 under case number 1699/2021[8] will be incorporated in the order below to dispel any uncertainty relating to the administration and control of the trust banking account and the duties of the curator.

[17] Accordingly, the following order is made;

1. The name of the Respondent is struck from the roll of Attorneys/Legal practitioners.

2. The Director of the Free State Office of the Applicant is appointed as curator to administer and control the trust account of the Respondents comprising of the separate banking account opened and kept by Respondent at any bank or institution in terms od section 86(1) and (2) of the Act and or in a separate saving or interest bearing account as contemplated in section 86(3 and or 86(4) of the said Act, in which monies from such trust banking accounts have been invested by virtue of the provision of the said sub-sections or in which monies in any manner had been deposited or credited (the said accounts being herein referred to as "the trust accounts" the following powers and duties:

2.1 Subject to the approval of the Board of Control of the Fidelity Fund, to sign and endorse cheques and or withdraw from and

[8] Court order Loubser, J et Chesiwe, J paragraphs 6 – 6.10

generally to operate on the trust account(s), but only to such an 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;

2.2 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 any person having lawful claims against the trust account(s) and or against the Respondents in respect of monies held, received and or invested by the Respondents in terms of the aforesaid sections(hereinafter referred to as ("trust monies"), to take legal proceedings which may be necessary in respect of incomplete transactions in which the Respondents may have been involved and which may have been wrongfully and unlawfully paid from the trust account(s) and to receive such monies and pay same into the creditor of the trust account(s);

2.3 To ascertain from the Respondents' books of account the names of all persons on whose account Respondents appear to hold or have received trust monies (hereinafter referred to as "trust creditors") and to call upon Respondents to furnish him or her within 30(thirty)) days from the date of this order, or such further period as may be agreed to in writing, with the names, addresses and the amounts due to all creditors;

2.4 To upon such trust creditors to furnish such proof, information and affidavits as he or she may require to enable him or her, acting in consultation and subject to requirements of the Board of Control of the Fund, to determine whether any such trust creditor has a claim in respect of monies in the trust accounts, and if so, the amount such claim;

2.5 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 the trust creditors' rights of access to the civil courts;

2.6 Having determined the amounts which he or she considers lawfully due to trust creditors, to pay such claims in full, but subject to the approval of the Board of Control of the Fund;

2.7 In the event of there being a 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 respect of any interest therein referred to and secondly, without the prejudice of rights of creditors of the Respondents, the costs, the fees and expenses referred to in this order, or such portion thereof which has not already been separately paid by the Respondents to the Applicant and, if there is any balance left after payment in full of such claims ,costs, fees and expenses, to pay such a balance, subject to the approval of the Board of Control of the Fund, to the Respondents, if he is so solvent, or if the Respondent is insolvent, to the trustee of the insolvent estate.

2.8 In the event of there being insufficient trust monies in the trust account(s) to pay the claims of the creditors reflected in the books of the Respondent in full –

2.8.1 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 require the credit balance to be placed in credit of a special trust suspense account in the name of the Respondent, in the Fund's books;

2.8.2 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

2.8.3 to authorize the Board of Control of the fund to credit the credit balances referred to in sub- paragraph 2.8.1 above to its "paid claims account" when the fund has paid, admitted claims of the trust creditors in excess of such credit balances, provided that, notwithstanding the aforegoing, 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.

2.9 Subject to the approval of the Chairman of the Board of Control of the Fund, to appoint nominees or representatives and or consult with and or engage the services of attorneys and or counsel, accountants or other persons where considered necessary, to assist such curator in the execution of duties; and

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

3. The Respondent shall pay costs of this application on an attorney and client scale.

[redacted]

MAJOSI O.R, AJ

I concur

[redacted]

VAN ZYL, C, J

On behalf of the Applicant	Mr. C.C Boucher
Instructed by:	Jacobs Boucher Attorneys BLOEMFONTEIN
On behalf of the Respondent	No appearance