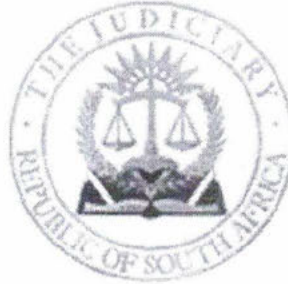


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: B306/2023

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: YES
3. REVISED: NO

DATE: 13 MAY 2024

SIGNATURE OF JUDGE:

A handwritten signature in black ink, which appears to be "D. J.", is written over a solid black rectangular redaction box.

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

LETHABO MONGEZI MABENA

First Respondent

M L MABENA ATTORNEYS INCORPORATED

Second Respondent

JUDGMENT

Flatela J

Introduction

[1] This is an opposed application for the removal of the First Respondent's name from the roll of legal practitioners. The matter served before us on 27 February 2024. The First Respondent appeared in person.

[2] The First Respondent is a legal practitioner as defined in the Legal Practice Act, Act 28 of 2014. He was admitted and enrolled as an attorney on 27 May 2019. He commenced practicing as a sole practitioner under the name and style of M L Mabena Incorporated Attorneys on 22 July 2019. Prior to opening his law firm, the First Respondent practiced as a professional assistant at T M Chauke Incorporated Attorneys for less than two months between 28 May 2019 and 21 July 2019.

[3] During 2021, the Applicant received a number of complaints of misconduct against the First Respondent from members of the public who had purchased properties from bogus estate agents and deposited the purchase prices into the First Respondent's trust banking account. The complainants were advised by the estate agents that the First Respondent's firm would attend to the transfer of the properties into their names. The transfers did not take place. The trust creditors sought refund of the monies deposited into the First Respondent's trust account and were advised by the First Respondent that the monies were paid over to Albat Investments and Baikanyi Properties.

[4] Preliminary investigations conducted by Mr. Ashwin Reddy (Reddy), an accountant and an auditor commissioned by the Applicant to investigate firm's accounting records revealed that during the period between October 2020 and March 2021, the First Respondent received various deposits totalling R3 942 024.00 in respect of nine property transactions. The First Respondent was noted to have transferred an amount of R3 260 214 to what appears to have been a fraudulent syndicate. As a result, the First Respondent's firm had a trust deficit in the amount of R3 260 214 as a result of the payments made in these apparently fraudulent transactions.

[5] On 07 March 2023, the Applicant brought an urgent application seeking the First Respondent's immediate removal from the roll of a legal practitioner, alternatively, his suspension. The Applicant set out various contraventions by the First Respondent of the Legal Practice Act, the Rules for the Attorneys Profession and the South African Legal Practice Council Rules. The contraventions included, *inter-alia*, failure to maintain highest standards of honesty and integrity, failure to pay his annual fees payable to the Applicant, failure to reply to all communications that required an answer within a reasonable time; failure to respond timeously and fully to requests from the Applicant

for information and or documentation he was able to provide, failure to comply timeously with directions from the Applicant, failure to manage the trust account with the highest standards, failure to comply with the provisions of the Financial Intelligence Centre Act to report a trust deficit to the Applicant immediately; failure to perform professional work with such a degree of skill, care of attention and quality or standard as may be reasonably be expected of an attorney.

[6] The court granted an order suspending the First Respondent from practice as a legal practitioner pending the Applicant's investigations. The Respondents were ordered to furnish the Applicant with the firm's trust accounting records, files and documents by 28 March 2023.

[7] Subsequent to the granting of the court order, the Applicant appointed Ms Pather as a curator to conduct further investigation on the First Respondent. Ms. Pather reported to the Applicant that the First Respondent had failed to hand over his enrolment certificate to the Applicant when requested to do so; the First Respondent failed to furnish Ms. Panther with a comprehensive list of the firm's trust creditors, audit report, and accounting records; and that First Respondent refused to cooperate with Ms. Pather, The First Respondent did not hand over all the files from his firm, he brought 9(nine) files and the First Respondent gave the remainder of files to other attorneys. The winding up of the firm did not proceed as the First Respondent was not co-operating with the curator.

[8] The Fidelity Fund had advised that the First Respondent was registered as a defaulting attorney as there were three claims to the amount of R1 190 000.00 lodged by Ms Mutungutungu, Ms Hlatywayo and Mr Madonsela.

[9] Although the Applicant lists various complaints against the First Respondent, the gravamen of the case against him is that he masqueraded as a Conveyancer, took deposits from the complainants for property transactions and paid them over to unrelated third parties without authorization from the complainants.

[10] The First Respondent denies these allegations. He states that he had no relationship with the complainants, they were not his clients as defined in Rule 35 of the

Legal Practice Rule; therefore, the fiduciary duty does not arise in this matter. The monies that were deposited to his trust account by the complainants were not entrusted to him by the complainants. He says before the monies were deposited, Albat would contact him telephonically to alert him of the deposits that Albat would make, and he would be given instructions to retain the funds until further instructions.

[11] The First Respondent contends that in September 2020, he was approached by individuals known to him as Thato, Phuti, Esther Diale and Mr Sebata, who claimed to have an investment company, Albat Investments. They were considering appointing the First Respondent as their attorney. The First Respondent was requested to furnish them with his company profile, Fidelity Fund Certificate, and confirmation of his trust account details.

[12] Importantly, the First Respondent was not provided with any details regarding Albat and the type of matters they required assistance with. The First Respondent was also informed that monies would be deposited into his firm's trust account, and they required the First Respondent to invest these monies in an interest banking account until he was provided with further instructions. The parties signed no letters of engagement. Nevertheless, the First Respondent agreed to this proposal, and he concluded an oral agreement to that effect.

[13] Similarly, the First Respondent was approached by one Esther Dolamo of Baikanyi Moreneng Properties, who appointed him as a debt facilitator. She, too, requested the First Respondent to furnish them with his company profile, Fidelity Fund Certificate, and trust account details, which were furnished to her.

[14] The First Respondent says that he is a victim of fraudsters who took advantage of his inexperience as an attorney and his young age (28). He says he did not know that these two companies' property scammers scammed members of the public. The First Respondent contends that Albat and Baikanyi Properties used their details without authorization to swindle the members of the public. He had since opened a criminal case against them and had employed tracing agents to trace them.

[15] The First Respondent contends that he made an error of judgment due to his age and naivety in legal practice. He maintains that he is still fit and a proper person to

practice and has learned a harsh lesson. He is willing to practice under the supervision of a senior attorney and be barred from handling trust funds for such a period as the court deems appropriate.

Legal Principles

[16] It is trite that applications such as the present are proceedings of a disciplinary nature and are *sui generis*.¹ In *Solomon v Law Society of the Cape of Good Hope* ² the court held as follows:

'Now in these proceedings the Law Society claims nothing for itself. . . It merely brings the attorney before the Court by virtue of a statutory right, informs the Court what the attorney has done and asks the Court to exercise its disciplinary powers over him. . . The Law Society protects the interests of the public in its dealings with attorneys. It does not institute any action or civil suit against the attorney. It merely submits to the Court facts which it contends constitutes unprofessional conduct and then leaves the Court to determine how it will deal with this officer.'

[17] The approach of courts in the application is well established. The principles were neatly summarised in *Jasat v Natal Law Society* ³ as follows:

- a. Firstly, the court has to determine whether the alleged offending conduct has been established on a balance of probabilities,
- b. Secondly, consideration must be given to the question of whether, at the discretion of the court, the First Respondent is not fit and proper to continue to practice as a legal practitioner;
- c. The third issue that the court is required to consider is whether, in all the circumstances, the name of the First Respondent should be removed from the roll of legal practitioners or whether an order suspending the First Respondent from practice as a legal practitioner would suffice.

[18] Having discussed the legal principles applicable in this matter, I now turn to the facts as pleaded, which the court must consider when embarking on the first inquiry.

¹ *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 393D-E.

² 1934 AD 401 at 408-409

³ 2000 (3) SA 44 (SCA) ([2000] 2 All SA 310) at para 10

Complaint by A S Stein Attorneys on behalf of Mr. G. Madonsela

[19] According to Stein Attorneys, Mr. Madonsela was interested in purchasing an immovable property, and a certain estate agent, Mr. Mmoto, facilitated the purchase and introduced the complainant to the seller of the property, Mr. Mathabatsse. Mmoto advised the complainant that the First Respondent would attend to the transfer and registration of the immovable property into his name. He was furnished with documents to sign and was advised to effect payment of the purchase price into the First Respondent's trust account. On 24 November 2020, Madonsela deposited the purchase price of R 470 000.00 (Four Hundred and Seventy Thousand) into the Second Respondent's trust account. The First Respondent failed to execute the mandate given to him, and the transaction was subsequently canceled.

[20] Madonsela later visited the First Respondent's office at its new address, 157 Monument Road, Kempton Park, but he never spoke to the First Respondent; he was advised that he was in court.

[21] Stein Attorneys contacted the First Respondent, who confirmed that the purchase price was paid into his firm's trust account. On instructions of Albat ("Albat"), the purchase price was subsequently paid over to Albat, who indicated that they would be investing the purchase price. The instructions were received orally, no paperwork was prepared in this regard, and no consent was obtained from the complainant for the First Respondent to invest the purchase price in that way.

[22] A complaint was referred to the Applicant, who forwarded it to the First Respondent for comments. The First Respondent denied having worked with the estate agent Mmoto. He says that the Deed of Sale referred to by the complainant was a fraudulent document that was not prepared by him or anyone from his office.

[23] The First Respondent blames the complainant for not contacting him or his firm before signing the alleged deed of sale and before depositing the purchase price into his trust account. He states that he received no instructions from the complainant.

[24] The First Respondent avers that on 22 November 2020, Albat informed him that they were going to deposit an amount of R 470 000.00 into the First Respondent's trust account. On 24 November 2020, the First Respondent received instructions from Albat to effect payment of an amount of R 455,000.00 to an account number furnished by Albat.

[25] After meeting with Madonsela's attorneys, the First Respondent discovered that Albat was part of a syndicate that misrepresented to the public that they were attorneys and conveyancers who fabricated documents to swindle members of the public. The same deed of sale was similar to the Deed of Sale that was used to scam victims who lodged complaints against Adv Abram Moela and Mrs. M.S Nkanyane of Nkanyane Attorneys. The First Respondent filed a confirmatory affidavit from one Mrs. Sophy Mokgadi Nkanyane, who deposed to an affidavit stating that she, too, were victim of scammers. The Deed of Sale referred to in the complaint is the same deed of sale that was used to defraud members of the public using her practice number, and she confirmed that the same group of scammers that defrauded Mabena also defrauded her. She confirmed that she also submitted her company name, Fidelity Fund certificate, and Trust Account confirmation from the bank. Adv Abram Moela filed a similar confirmatory affidavit with similar contents.

[26] Upon realizing that he was scammed, The First Respondent opened a criminal case under case no: 288/5/2021 against Albat. The First Respondent also employed the services of three private investigators to locate Albat's whereabouts. The First Respondent denies that he was dishonest and that he never benefited from the transaction.

Complaints by Ms. Hlatshwayo

[27] On 7 June 2021, the Applicant received a similar complaint against the First Respondent from Ms. Hlatshwayo. On 14 October 2020, Ms. Hlatshwayo instructed the First Respondent to attend to the transfer of immovable property under her name. She was assisted by an estate agent named Sebolaishi Makgalo. She signed the deed of sale and deposited an amount of R 450 000.00 into the First Respondent's firm's trust account to effect the transfer of the immovable property into her name. Like others, Ms.

Hlatshwayo visited the estate agent's office, where she signed the documents, but she found the offices locked.

[28] Ms. Hlatshwayo contacted the First Respondent and requested a refund of the R450 0000 which she had paid into his trust account.

[29] In an affidavit dated 12 October 2021, the First Respondent denied that Ms. Hlatshwayo was his client. Similar allegations as with Madonsela were repeated regarding Ms. Hlatshwayo.

[30] The First Respondent says that on 14 October 2020, Albat informed him that they had paid R450,000 into the First Respondent's firm's account and that he should wait for their further instructions. On 16 October 2020, the First Respondent received instructions from Albat to effect payment of R435,000 into a Bank account number furnished by Albat.

[31] Similar allegations made regarding Albat were repeated. The First Respondent employed the services of three private investigators to assist in locating Albat's whereabouts.

Complaint by Ms. Theresa Nobela

[32] On 15 June 2021, the Applicant received a similar complaint against the First Respondent. Ms. Nobela advised that, during October 2020 / November 2020, her late mother deposited an amount of R 430 000.00 into the First Respondent's firm's trust account to effect the transfer of the immovable property into her name. The property was not transferred to her late mother's name. The transaction was concluded through an agent named **Sebolaishi**. The complainant now claims repayment of the amount of R 430 000.00, which her late mother had paid in the First Respondent's trust account. Ms. Nobela stated that she attempted to contact the agent to no avail. She also visited an office in Glen Marais where her mother had previously signed the documents but found that the offices were vacated.

[33] In an affidavit dated 12 October 2021, the First Respondent, *inter alia*, explained that neither the complainant nor the late Ms. Nobela was ever his client and that the late Ms. Nobela has never instructed his firm to attend to any matter on her behalf.

[34] On 25 October 2020, Albat informed the First Respondent that they had paid R430,000 into the First Respondent's firm's account and that he should wait for their further instructions. On 28 October 2020, the First Respondent received instructions from Albat to effect payment of R415,000 into a Bank account furnished by Albat.

[35] Similar allegations were made regarding Albat. The First Respondent employed the services of three private investigators to assist in locating the whereabouts of Albat.

Complaint by Ms. Brenda Shadi Mutungutungu

[36] On 09 December 2020, the Applicant received a complaint from a certain Ms. Mutungutungu. The complainant signed two offers to purchase immovable property with the assistance of Baikanyi Moreneng Properties (Baikanyi). The complainant deposited R120,000 and R150,000 into the First Respondent's trust bank accounts. Baikanyi furnished the trust account details to the complainant, which was on the First Respondent's firm letterhead.

[37] The complainant indicated that Baikanyi could not be reached and that all her calls were blocked. The complainant visited Baikanyi offices and found same deserted. The complainant decided to contact the Respondents' offices to demand a refund. The First Respondent confirmed that Baikanyi Properties was his client and that he had transferred the amount of R270,000, which the complainant had deposited into the firm's trust account to Baikanyi. The First Respondent advised the complainant that he could not assist her as she was not his client.

[38] The First Respondent says that on 9 November 2020, Ms. Dolamo informed him that the debtors would deposit two payments into his firm's trust account amounting to R270,000. The First Respondent confirmed that on 16 November 2020, two deposits were made into his trust account in the amounts of R150,000 and R120,000. On 17 November 2020, the First Respondent received instructions from Dolamo to effect payment of an amount of R255,000 into a First National Bank account. Dolamo further instructed the First Respondent to retain an amount of R15,000 as a facilitation fee.

[39] Mr Reddy consulted with the First Respondent per his mandate, and he provided the Applicant with a report with findings. Reddy states that the First Respondent's firm is registered as an accountable institution with the Financial Intelligence Centre Act (FICA) Act 38 of 2001.

[40] Concerning the large sums of money that the First Respondent withdrew and paid to Albat, Mr Reddy found that in the first instance, the First Respondent contravened the provisions of the Financial Intelligence Centre Act (FICA) which is applicable to legal practices as accountable institutions. The First Respondent failed to take steps as required in section 21 and in accordance with its Risk Compliance Programme to obtain information in order to determine whether future transactions that will be performed in the course of the business relationship concerned are consistent with the institution's knowledge of that prospective client, including information describing—

- the nature of the business relationship concerned;
- the intended purpose of the business relationship concerned; and
- the source of the funds which that prospective client expects to use in concluding transactions in the course of the business relationship concern.

[41] The First Respondent failed to establish the nature of the client's business and the ownership of Albat and Baikanyi Moreneng

[42] The First Respondent failed to conduct ongoing due diligence which includes monitoring transactions undertaken through the course of the relationship; and he failed to monitor the source of funds and the background of all unusually large transactions as well as an unusual pattern of transactions as envisaged by section 21C.

[43] The First Respondent failed to obtain the information as required in section 21A, yet he continued to transact with Albat and or Baikanyi and the individuals associated with them.

[44] The First Respondent admitted that he failed to comply with the provisions of FICA but he says, he contacted the Applicant's offices and spoke to someone called Sharon who advised him to go ahead with the proposed transaction as long as he had a mandate from his clients and funds were legitimate.

[45] Mr. Reddy concluded that the First Respondent had contravened the provisions of paragraph 18.14 of the Code of Conduct in that he failed to perform professional work or work of a kind commonly performed by an attorney with such degree of skill, care or attention, or such a quality standard, as may reasonable be expected of an attorney.

[46] The Act and / or Legal Practice Council relating to the keeping and maintaining of accounting records and the obligation to ensure that at any given time the trust balances do not exceed trust monies and trust accounts do not have debit balances

apply in this matter. He recommended that his report be referred to the Disciplinary Department. He was, however, of the opinion that the firm did not pose a significant risk to trust creditors or the Attorneys Fidelity Fund.

Trust Position

[47] Mr. Reddy stated that in the absence of the firm's accounting records, he was unable to establish the Firm's trust position. He highlighted that the First Respondent submitted an independent audit report for the period ending 28 February 2022 to the Applicant as required by Rule 54.23 and 54.24 wherein the auditor expressed an unqualified audit opinion that the trust account was well maintained in all material respects in compliance with the Act or Rules. Mr. Reddy stated that the audit report submitted to the Applicant is incorrect and it is clearly inappropriate in that it omitted that the First Respondent paid a cumulative amount of R3 260 214 to the fraudulent syndicate which caused the trust deficit. He recommended the matter be referred to the Independent Regulatory Board for Auditors for further consideration of the auditor's conduct.

[48] Mr. Reddy found that considering the trust deficit, the firm poses a risk to the Legal Practitioners Fidelity Fund.

[49] The Applicant contends that the First Respondent contravened the following rules:

- a. Rule 3.1 of the Rules in that he failed to maintain the highest standard of honesty and integrity;
- b. The Applicant states that the First Respondent is in contravention of clauses 16.1., 16.2 and 16.3 Clause 16.1 of the Code of Conduct in that he failed, within a reasonable time, to reply to all communications that require an answer unless there was good cause for refusing an answer;
- c. Rule 54.12 of the Rules in that he failed, within a reasonable time, after the performance or earlier termination of the mandate received from the complainant, to furnish the complainant with a written statement of account setting out with reasonable clarity: details of all amounts received by him in connection with the matter, appropriately explained;

particulars of all disbursements and other payments made by him in connection with the matter; fees and other charges charged to or raised against the client and, where any fee represents an agreed fee, a statement that such fee was agreed upon and the amount so agreed; the amount due to or owed by the client.

- d. Rule 54.13 states that he failed to pay the amount due to the complainant within a reasonable time and failed to take adequate steps to verify the bank account details provided to him by the client prior to making any payment.
- e. Rule 54.14.14.1 of the Rules in that he failed to ensure that withdrawals from the firm's trust account were made only to or for a trust creditor;
- f. Rule 54.19 of the Rules in that he failed to ensure that the provisions of the LPA and the Rules relating to trust accounts are complied with;

[50] In his defense and relying on section 35 of the Legal Practice Act as amended, the First Respondent contends that the complainants were not his clients as defined by the Act. Rule 35 of the Legal Practice Rule, read with Rule 95(1) (Zc), provides that "client means the user or intended user of legal services to be provided by an attorney; instructions by an attorney may be in writing or may be verbal. The First Respondent denies masquerading as a Conveyancer and taking deposits from the complainants, as alleged by LPC. He states that the complainants are unknown to him, and no letters of engagement were entered into between his firm and the complainants; no agreements and no powers of attorney were signed between the parties to engage the First Respondent's services.

[51] Reliance was placed by the First Respondent on Section 35(7) of the Legal Practise Act as amended, which states that a letter of engagement must be signed by clients on all new instructions as prescribed by the Act, but is not limited to the following: Confirmation of the instruction, information relating to the firm and its working, indication of who will be dealing with the relevant matter; an outline of costs associated with the instruction as well as arrangements around outstanding services.

[52] The First Respondent states that, in the absence of the letter of engagement between his firm and the complainants, there was no attorney-client relationship. The First Respondent did not contravene the provisions of Rule 54, which he believed is applicable in cases where one is dealing with clients.

[53] The First Respondent's defence is untenable. An attorney is expected to have a high standard of trustworthiness when managing the account.⁴ Even if it were to be accepted that the complainants were never his clients as envisaged by Rule 35 of the LPC, the First Respondent still owes the trust creditor a legal duty to deal with funds in his trust account with a high standard of care.

[54] The First Respondent was at pains in explaining how his firm accepted cash deposits from unknown individuals without instructions from them and how he made payments to third parties without the authorization of the trust creditors. The First Respondent contends that he believed that Albat deposited the monies. There is simply no merit in this allegation. On his facts, the First Respondent stated that he would be informed telephonically by one member of Albat that money will deposit into his trust account but within a day or two, they would instruct him to withdraw it and pay it over to Albat or different accounts without complying with the rules.

[55] Pursuant to instructions from Albat, the First Respondent paid the monies, less R15 000(Fifteen Thousand Rand) to Albat or to third parties designated by Albat. At the time of inspection by Reddy an amount of R230,810 remained in the firm in respect of nine fraudulent transactions. The First Respondent could not explain why the R15 000 remained in the trust account if he was never paid in respect of the transactions.

[56] It is clear that, the First Respondent's trust account was used as a conduit for money laundering. The First Respondent admittedly provided the information to unknown individuals with his firm's documents, company profile, trust account details, and Fidelity Fund Certificate, but he did not know his client's business. The First Respondent did not keep any of the company documents in compliance with the

⁴ *Law Society, Transvaal v Mathews* 1989(4) SA 389 (T) at 393I-J

Financial Intelligence Centre Act. It is difficult to conclude that the First Respondent was an innocent victim.

Complaint by EE Sethole Attorneys

[57] On 29 December 2021, the Applicant received a complaint from EE Sethole Attorneys, who were instructed to institute proceedings against RAF on behalf of a certain Miss Sarah Globe. The firm issued a summons in the Magistrate Court, Pretoria. The firm attended to the matter until settlement negotiations with the RAF were reached. In a letter dated 18 October 2019, The First Respondent advised EE Sethole Attorneys that he was now on record as an attorney of record and that their mandate was terminated. The First Respondent undertook to pay all their legal costs upon finalization of the matter, but he failed to communicate further with the firm. The attorneys complained to the Applicant that the First Respondent failed or neglected to answer the correspondence addressed to him by the attorneys.

[58] The First Respondent later confirmed that the matter was still pending and that the undertaking that the payment would be honored upon settlement still stood. The Applicant states that the First Respondent is in contravention of clauses 16.1., 16.2 and 16.3 Clause 16.1 of the Code of Conduct in that he failed, within a reasonable time, to reply to all communications that require an answer unless there was good cause for refusing an answer;

[59] Clause 18.18 of the Code of Conduct in that he failed to pay the complainant for legal services done on behalf of his clients;

[60] Rule 54.12 of the Rules in that he failed, within a reasonable time, after the performance or earlier termination of the mandate received from the complainant, to furnish the complainant with a written statement of account setting out with reasonable clarity: details of all amounts received by him in connection with the matter, appropriately explained; particulars of all disbursements and other payments made by him in connection with the matter; fees and other charges charged to or raised against the client and, where any fee represents an agreed fee, a statement that such fee was agreed upon and the amount so agreed; the amount due to or owed by the client.

[61] Rule 3.1 of the Rules in that he failed to maintain the highest standard of honesty and integrity.

Failure to pay LPC's Annual Fees

[62] The Applicant also alleges that the Respondent has failed to pay his annual fees payable to the Applicant for the years 2021 and 2022, in the total amount of R 5 750.00. In this regard, the Applicant contends that the First Respondent contravened rules 4.1 and 6 of the Rules, which are read together with Clause 3.16 of the Code of Conduct. The First Respondent has denied this allegation and stated that he has paid his annual fees for the periods, albeit late. The First Respondent stated that he was paying his annual fees and had been issued with the Fidelity Fund Certificates for the years 2020, 2021 and 2022.

[63] A legal practitioner must comply with the provisions of the Legal Practice Act, the Attorneys Act, and the Rules for the Attorneys Profession, especially regarding a client's money that is placed into his/her custody and control. Trust money does not form part of a legal practitioner's assets.

[64] Having considered all the facts, the court is satisfied that the offending conduct has been proven on a balance of probabilities.

Is the First Respondent Fit and Proper Person?

[65] The court must consider whether or not, in all the circumstances, the First Respondent is fit and proper to be allowed to practice as an attorney. This is a value judgement.

Curator's report

[66] Subsequent to the granting of the court order of 7 March 2023, Ms. Suraysha Pather was instructed to investigate the firm's accounting records, records files and records. Ms. Pather provided the applicant with a report dated 18 May 2023.

[67] The First Respondent came to the Applicants' offices on 18 April 2023. The issue pertaining to the First Respondents' files, audit reports and accounting records was discussed with the First Respondent.

[68] Ms. Pather reported that the First Respondent only handed over to her nine (9) office files. The First Respondent indicated that the remainder of the office files had been given to two other attorneys who had served with him on a panel, and the client had been informed of his suspension.

[69] The First Respondent was unable to furnish Ms. Panther with the firm's index and the client's list of active, inactive, agent and closed matters.

[70] On 14 March 2023, instructions were given to Nedbank to place on hold the trust account of the First Respondent's firm.

[71] During the meeting, the First Respondent furnished Ms. Pather with his Client Ledger, Fees reports and Trust Cashbook. However, the First Respondent failed to furnish the Applicant with his comprehensive accounting records and audit reports. The First Respondent also refused to submit a list of the firm's trust creditors. Ms. Panther was unable to proceed with the winding down of the First Respondent's practice.

[72] Ms. Pather also reported that, according to Legal Practice Practitioners Fidelity Fund, the First Respondent is registered as a defaulting attorney. The LPF also confirmed that three complainants lodged claims, and as of 03 April 2023, the attorneys' firm trust account had a credit balance of only R53,000.48, which confirms that there are insufficient funds in the firm's trust account to service the firm's trust creditors.

[73] The Applicant contends that the First Respondent contravened a number of sections of the LPA Rules of Conduct, including -

- a. Clause 16.4 of the Code of Conduct in that his failure to cooperate with the inspection hampered the ability of the Council to carry out its functions;

- b. Section 37(2)(b) of the LPA, in that he persisted in his failure to produce a book, document, or article for an inspection in terms of Section 37(2)(a);
- c. Rule 54.14.8 of the Rules in that he failed to ensure that the total amount of money in the firm's trust banking account, trust investment account and trust cash at any date is not less than the total amount of the credit balances of the firm's trust creditors;
- d. Rule 54.14.10 of the Rules in that he failed to report the firm's trust deficit to the Applicant, and
- e. Clause 18.14 of the Code of Conduct in that he failed to comply with the provisions of the Financial Intelligence Centre Act, he failed to perform professional work or work of a kind commonly performed by an attorney with such degree of skill, care of attention, or such quality or standard, as may reasonably be expected of an attorney.

[74] The First Respondent failed to produce his firms' accounting records, Both Reddy and Panther were unable to complete their investigations.

[75] The First Respondent and his auditors submitted audit reports that did not reflect the true status of the trust account. He also failed to cooperate with the curator, and despite numerous requests from Applicant to be furnished with documentation, such were ignored, and the curator's investigation was limited. The First Respondent failed to appreciate the role he played as an enabler of his clients' money laundering activities. Instead, he blamed the victims for not contacting him before they deposited the money into the trust account. During the hearing, the First Respondent still did not understand why he was being suspended or why the Applicant wanted to remove his name from the roll when he never misappropriated trust money.

[76] It is now settled that the law expects from legal practitioner *uberrima fides*, the highest possible degree of good faith in his dealings with his client, which implies that at all times his submissions and representations to client must be accurate, honest and frank.

[77] In *Vassen v Law Society of the Cape of Good Hope*⁵ the court said -

"It must be borne in mind that the profession of an attorney, as of any other officer of the Court, is an honourable profession which demands complete honesty, reliability and integrity from its members; and it is the duty of the respondent Society to ensure as far as it is able, that its members measure up to the high standards demanded of them. A client who entrusts his affairs to an attorney must be able to rest assured that the attorney is an honourable man who can be trusted to manage his affairs meticulously and honestly."

"When money is entrusted to an attorney or when money comes to an attorney to be held in trust, the general public is entitled to expect that that money will not be used for any purpose than that for which it is being held, and that it will be available to be paid to the persons on whose behalf it is held whenever it is required."

Sanction

[78] Thirdly, the court must enquire whether the First Respondent should be struck from the roll of attorneys or whether an order suspending him from practice, or any other sanction would be appropriate.

[79] The First Respondent has requested the court to take into consideration his lack of experience in the administration of trust account by virtue of the number of years in the profession. He stated that there are senior attorneys that are willing to take him under their wings. He has requested the court not to remove or suspend him. He requests that he be allowed to continue practising but he must be barred from managing the account. He says correctly so there is no financial benefit that was derived by him. He states that numerous legal practitioners have fallen prey to such syndicate. He says he was taken advantage of because he was young, inexperienced, and naïve. He states upon coming to realisation that Albat and Baikanyi were defrauding members of

⁵ 1998 (4) 532 (SCA)

the public using his details, he refunded one N C Rihlampfu his purchase price of R450 000.

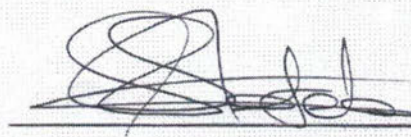
[80] Having assessed the evidence in its totality, the court finds that the First Respondent is not fit and proper person to continue practising as an attorney.

[81] Under the circumstances, the Applicant is entitled to the relief sought in their draft order.

Order

[82] In the result, we make the following order:

1. The First Respondent's name is struck from the roll of legal practitioners;
2. The order appended marked X is made an order of court.



L FLATELA

JUDGE OF THE HIGH COURT



C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

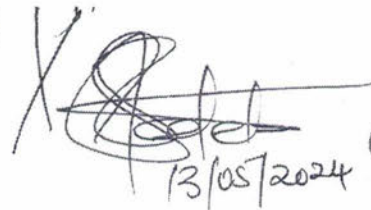
On behalf of Applicant: M Moolman

Instructed by: Damons Magardie Richardson Attorneys

On behalf of Respondents: Mr. L Mabena in Person

Judgment Reserved: 27 February 2024

Judgment Delivered: 13 May 2024


13/05/2024

021-1

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: B306/2023

On this the 27th day of FEBRUARY 2024.

Before the Honourable Justice Van Der Westhuizen and the Honourable Madam Justice Flatela.

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

LETHABO MONGEZI MABENA

First Respondent

M L MABENA ATTORNEYS INCORPORATED

(Registration number: 2019/350638/21)

Second Respondent

This Order is made an Order of Court by the Judges whose names are reflected hereon, duly stamped by the Registrar of the Court and is submitted electronically to the parties or their legal representatives by e-mail. This Order is further uploaded to the electronic file of this matter on Case Lines by the Judges or their Secretaries/Registrars. The date of this Order is deemed to be **27 FEBRUARY 2024**.

021-1

DRAFT ORDER OF COURT

Having read the papers filed of record and having heard the attorney for the Applicant,

IT IS ORDERED

1. That the name of **LETHABO MONGEZI MABENA** (hereinafter referred to as the First Respondent) be removed from the roll of legal practitioners of this Honourable Court.
2. That the First Respondent immediately surrenders and delivers to the registrar of this Honourable Court his certificate of enrolment as a legal practitioner of this Honourable Court.
3. That in the event of the First Respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate and to hand it to the Registrar of this Honourable Court.

4. That the Respondents be prohibited from handling or operating on the trust accounts as detailed in paragraph 5 hereof.
5. That Ignatius Wilhelm Briel, the Director of the Gauteng Provincial Office of the Applicant, be appointed as *curator bonis* (curator) to administer and control the trust accounts of the Respondents, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with the First Respondent's practice as a legal practitioner and including, also, the separate banking accounts opened and kept by Respondents at a bank in the Republic of South Africa in terms of section 86(1) & (2) of Act No 28 of 2014 and/or any separate savings or interest-bearing accounts as contemplated by section 86(3) and/or section 86(4) of Act No. 28 of 2014, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said sub-sections or in which monies in any manner have been deposited or credited (the said accounts being hereafter referred to as the trust accounts), with the following powers and duties:
 - 5.1 immediately to take possession of the Respondents' accounting records, records, files and documents as referred to in paragraph 6 and subject to the approval of the Legal Practitioners' Fidelity Fund Board of Control (hereinafter referred to as the fund) to sign all forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be

necessary to bring to completion current transactions in which the Respondents were acting at the date of this order;

- 5.2 subject to the approval and control of the Legal Practitioners' Fidelity Fund Board of Control and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against the Respondents in respect of monies held, received and/or invested by the Respondents in terms of section 86(1) & (2) and/or section 86(3) and/or section 86(4) of Act No 28 of 2014 (hereinafter referred to as trust monies), to take any legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions, if any, in which the Respondents were and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);
- 5.3 to ascertain from the Respondents' accounting records the names of all persons on whose account the Respondents appear to hold or to have received trust monies (hereinafter referred to as trust creditors) and to call upon the Respondents to furnish him, within 30 (thirty) days of the date of service of this order or such further period as he may agree to in writing, with the names, addresses and amounts due to all trust creditors;

- 5.4 to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of the Legal Practitioners' Fidelity Fund Board of Control, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of the Respondents and, if so, the amount of such claim;
- 5.5 to admit or reject, in whole or in part, subject to the approval of the Legal Practitioners' Fidelity Fund Board of Control, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;
- 5.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the Legal Practitioners' Fidelity Fund Board of Control;
- 5.7 in the event of there being any surplus in the trust account(s) of the Respondents after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce (as the case may be), firstly, any claim of the fund in terms of section 86(5) of Act No 28 of 2014 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of the Respondents, the costs, fees and expenses referred to in paragraph 10 of this order, or such portion thereof as has not already been

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

- 5.8 in the event of there being insufficient trust monies in the trust banking account(s) of the Respondents, in accordance with the available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which may be available in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the Legal Practitioners' Fidelity Fund;
- 5.9 subject to the approval of the chairman of the Legal Practitioners' Fidelity Fund Board of Control, to appoint nominees or representatives and/or consult with and/or engage the services of legal practitioners, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and
- 5.10 to render from time to time, as curator, returns to the Legal Practitioners' Fidelity Fund Board of Control showing how the trust account(s) of the

Respondents has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.

6. That the Respondents immediately deliver the accounting records, records, files and documents containing particulars and information relating to:
 - 6.1 any monies received, held or paid by the Respondents for or on account of any person while practising as a legal practitioner;
 - 6.2 any monies invested by the Respondents in terms of section 86(3) and/or section 86(4) of Act No 28 of 2014;
 - 6.3 any interest on monies so invested which was paid over or credited to the Respondents;
 - 6.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by the Respondents, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;
 - 6.5 any insolvent estate administered by the Respondents as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;

- 6.6 any trust administered by the Respondents as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;
 - 6.7 any company liquidated in terms of the provisions of the Companies Act, No 61 of 1973 read together with the provisions of the Companies Act, No 71 of 2008, administered by the Respondents as or on behalf of the liquidator;
 - 6.8 any close corporation liquidated in terms of the Close Corporations Act, 69 of 1984, administered by the Respondents as or on behalf of the liquidator; and
 - 6.9 the First Respondent's practice as a legal practitioner of this Honourable Court, to the curator appointed in terms of paragraph 5 hereof, provided that, as far as such accounting records, records, files and documents are concerned, the Respondents shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.
7. That should the First Respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on the First Respondent (as the case may be), the sheriff for the district in which such accounting records, records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator.

8. That the curator shall be entitled to:
 - 8.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;
 - 8.2 require from the persons referred to in paragraph 8.1 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or the Respondents and/or the Respondents' clients and/or fund in respect of money and/or other property entrusted to the Respondents provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;
 - 8.3 publish this order or an abridged version thereof in any newspaper he considers appropriate; and
 - 8.4 wind-up of the First Respondent's practice.
9. That the First Respondent be and is hereby removed from office as:

- 9.1 executor of any estate of which the First 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);
- 9.2 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;
- 9.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;
- 9.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973 and read together with the provisions of the Companies Act, No 71 of 2008;
- 9.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;
- 9.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984; and
- 9.7 administrator appointed in terms of Section 74 of the Magistrates Court Act, No 32 of 1944.

10. That the Respondents be and is hereby directed:
 - 10.1 to pay, in terms of section 87(2) of Act No. 28 of 2014, the reasonable costs of the inspection of the accounting records of the Respondents;
 - 10.2 to pay the reasonable fees of the auditor engaged by Applicant;
 - 10.3 to pay the reasonable fees and expenses of the curator, including travelling time;
 - 10.4 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;
 - 10.5 to pay the expenses relating to the publication of this order or an abbreviated version thereof; and
 - 10.6 to pay the costs of this application on an attorney-and-client scale.
11. That if there are any trust funds available the Respondents shall within 6 (six) months after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, shall 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 First 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 creditor(s) concerned for payment or recovery thereof;

12. That a certificate issued by a director of the Legal Practitioners' Fidelity Fund shall constitute *prima facie* proof of the curator's costs and that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.

BY ORDER OF THE COURT

REGISTRAR

ATTORNEYS FOR THE APPLICANT:

DAMONS MAGARDIE RICHARDSON ATTORNEYS

APPEARING FOR THE APPLICANT:

MS MARI MOOLMAN

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