REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: **32033/2020**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 17 July 2024

SIGNATURE

In the matter between:

LEGAL PRACTICE COUNCIL OF SOUTH AFRICA Applicant

and

BALDWIN BALOYI Respondent

Delivered*: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines.*

JUDGMENT

JANSE VAN NIEUWENHUIZEN, **J**

Introduction

[1] On 22 July 2020, the applicant launched an application claiming under Part A an order suspending the respondent from practicing as an attorney and

conveyancer, and under Part B an order removing the respondent's name from the roll of attorneys.

[2] Part A of the application was set down in the urgent court and on 11 August 2020, the court granted an order suspending the respondent from practice.

[3] This judgment pertains to Part B of the application for an order removing the respondent's name from the roll of attorneys.

Facts

Suspension application

[4] The respondent was admitted as an attorney on 30 October 2003 and practised, at the time that the application was brought, for his own account under the name and style of Baloyi Attorneys.

[5] The applicant received complaints against the respondent to the effect that he, firstly, failed to account to clients, and secondly, that he delayed the payment of trust funds. The applicant appointed a chartered account, Puseletso Hlogoana ("Hlogoana"), an auditor in the applicant's monitoring unit, to conduct an inspection of the respondent's accounting records and practice affairs and to investigate the complaints.

Investigation by Hlogoana

[6] Hlogoana attended at the respondent's offices on 31 May 2019 and requested the trust accounting records of the firm. The respondent advised Hlogoana that the records were maintained by an external bookkeeping firm known as Smith Accountants. The bookkeeper would submit the trust accounting records to the respondent on a quarterly basis.

[7] The respondent advised Hlogoana that he is struggling to reach his bookkeeper and thus his records are not up to date. At the time of Hlogoana's report in February 2020, the respondent had still not submitted his trust accounting records.

[8] Due to the respondent's failure to submit the records, Hlogoana obtained the firm's bank statements from Nedbank and established that the trust account held a credit balance in the amount of R 4 033 848.30 as at 28 February 2019.

[9] According to the applicant's records, the respondent did not submit his Attorneys Annual Statement on Trust Accounts and the audit report for the year 28 February 2019.

Offences

[10] On the strength of Hlogoana's report, the applicant concluded that the respondent contravened the following sections of the Legal Practice Act 28 of 2014 ("the Act") and rules of the Rules of the Legal Practice Council ("the Rules"):

10.1 Section 87(5), alternatively, section 37(2)(a) in that he failed to produce his accounting records for inspection;

10.2 Rule 54.9.1 which provides that a firm is required to retain its accounting records, and all files and documents relating to matters dealt with by the firm on behalf of clients for at least seven years from the date of the last entry recorded in each particular book or other document of record or file;

10.3 Rule 54.10 in that he failed to update his trust accounting records on a monthly basis;

10.4 Rule 54.6 read together with section 87(1) in that he failed to keep such accounting records as are necessary to fully and accurately state the affairs and business of the firm;

10.5 Rule 54.24.1 in that he failed to submit an Attorneys Annual Statement on Trust Accounts as well as an independent auditor's report to the former applicant within six months of the annual closing of the firm's accounting records;

10.6 Section 84(1) in that he is practising whilst not being in possession of a Fidelity Fund Certificate;

10.7 Rule 54.14.8 in that he did not ensure that the total amount of money in the trust banking account and trust cash at any date shall not be less than the total amount of the credit balances of the trust creditors shown in his accounting records; and

10.8 Rule 54.14.10 in that he failed to immediately report the firm's trust deficit to the applicant.

[11] The applicant, furthermore, alleged that the respondent's trust bank account had a trust deficit on 28 February 2018.

[12] In his answering affidavit, the respondent did not answer to the alleged contraventions. The respondent, however, did admit that he is practising without a Fidelity Fund Certificate since 2017. The respondent explained that he did submit the 2017 audit on 31 August 2017. A query was raised by the applicant and although he responded to the query, a Fidelity Fund Certificate was still not issued.

[13] The 2018 and 2019 audits were also submitted but were similarly met with queries from the applicant and the certificates were not issued. Although it is the duty of an attorney to ensure that he/she practices with a Fidelity Fund Certificate, the respondent concluded his explanation as follows:

> "The fact that I am guilty of practicing without a Fidelity Fund Certificate cannot entirely be blamed on me while the applicant was given such documentation and annual fees were received without same being returned since there was no certificates issued."

Complaints

[14] The complaints received from clients of the respondent's firm are dealt with infra.

Maite Mohale

[15] The crux of the complaint relates to the payment of monies received from the Road Accident Fund in favour of a minor child to the child's primary care giver, Mohale. Mohale complained that the Road Accident Fund paid an amount to the respondent on 28 March 2017, but that save for a payment of R 100 000, the respondent has not accounted to her nor made any further payments.

[16] Upon an inspection of the respondent's accounting records by Hlogoana, it appeared that the respondent had opened a trust account at ABSA Bank for the benefit of the minor child as per the instruction of the court order. The respondent provided proof of the following payments into the trust account: on 30 June 2017 - R 1 000 000; on 3 July 2017- R 1 000 000, on 26 March 2019 – R 500 000 and on 28 March 2019 an amount of R 419 785. The respondent also made a payment of R 100 000 to Mohale on 26 March 2019. The aforesaid payments amount to R 3 019 785.

[17] The respondent was confronted with the delay of two years in the payment of the outstanding balance into the ABSA account. The respondent, according to Hlogoana, advised that the delay was due to uncertainty in relation to the creation of the ABSA trust. The explanation does not accord with the fact that the respondent made the first payment into the ABSA account on 30 June 2017.

[18] Upon perusal of the respondent's trust bank account held with Nedbank, the account reflected a credit balance of R 520 801.85 on 17 February 2018, which decreased to R 404 905.22 on 21 February 2018. At that stage, an amount of at least R 1 019 785 was still due to Mohale, resulting in a trust deficit of at least R 498 983.15 on 17 February 2018 and R 614 879, 78 on 21 February 2018.

[19] The respondent did not answer to the trust deficits in his trust account. Instead of providing an explanation for this serious contravention, the respondent accused Mohale of laying a complaint against him because she wanted the money for herself. In respect of the two-year delay, the respondent stated that he has a busy practice, that the file got mixed up with the closed files and was stored away. It

was only when Mohale enquired as to the whereabouts of the money in January 2019, that he started searching for the file.

Debra Mangwane

[20] Mangwane instructed the respondent to lodge a claim on her behalf against the Road Accident Fund and entered into a 25% contingency fee agreement with the respondent. The claim was finalised on 2 November 2017 and an amount of R 448 360 was paid into the respondent's trust account on 24 April 2018.

[21] According to Mangwane, the respondent failed to communicate and/or account to her.

[22] Hlogoana obtained a trust bank statement from Nedbank and established that an amount of R 333 036 was paid to Mangwane on 15 November 2018, some seven months after he received the money.

[23] The respondent admitted that payment was delayed but did not provide any explanation for the delay.

Jonathan Fumani Makombila

[24] Makombila instructed the respondent on 28 March 2016 to lodge a claim on his behalf against the Road Accident Fund. In his complaint lodged with the applicant, Makombila stated that the respondent advised that a Trust be created to safeguard the award he would receive form the Road Accident Fund. Although Makombila initially agreed, he decided not to proceed with the creation of a Trust and demanded that the award be paid to him directly. He, however, did not receive any response from the respondent.

[25] The complaint was forwarded to the respondent. In a letter dated 21 January 2020, the respondent confirmed the instruction from Makombila and stated that the matter was finalised on 19 February 2019 in terms of a court order.

[26] In finalising the matter, the respondent referred to various medico legal reports. In some reports, it was recommended that any award, due to the severity of

the head injury suffered by Makombila, should be protected. The recommendation was discussed with Makombila and Makombila consented to the creation of the Trust to protect the money that he would receive from the Road Accident Fund.

[27] The respondent duly created a trust with ABSA Trust and attached confirmation of the aforesaid to the letter.

[28] Makombila responded to the aforesaid letter and confirmed that moneys were paid into the ABSA trust account, but stated that he was, in terms of the court order, entitled to an amount of R 800 000, which amount was, despite numerous requests, not paid to him.

[29] The respondent stated that the R 800 000 was not paid because Makombila did not provide him with any banking details. In his answering affidavit, the respondent stated the following:

> "I have no interests in the matter once the trust is created and funds have been transferred".

[30] It is not clear from the papers whether the respondent transferred the R 800 000 in question into the ABSA trust account.

F E Makhabele obo Siyani Makhabela

[31] On receipt of this complaint, the applicant's Investigation Committee directed the respondent to submit an own client bill to the committee on or before 31 January 2020. The respondent failed to comply with the directive and was afforded a further opportunity to comply by 6 March 2020. The respondent, once again, failed to submit the requested bill.

[32] In response, the respondent stated that he forwarded the client file to a cost consultant and he "*was informed that the bill was done and ready to be send to the Applicant's office on or before close of business on the 5th of August 2020.*" I pause to mention that the respondent's answering affidavit was commissioned on 4 August 2020.

Independent Actuaries and Consultants (Pty) Ltd

[33] The complainant appointed an attorney, Roelof Nel ("Nel"), to collect a debt due to the complainant by the respondent. According to Nel, he attempted to collect the debt since 2017 but the respondent has simply refused to respond to any correspondence.

[34] A copy of the complaint was sent to the respondent on five occasions during 2019 but no response was received. On 20 March 2019, the respondent addressed a letter to the applicant and requested an indulgence to answer to the complaint. No response was, however, forthcoming and on 3 September 2020, the applicant addressed a letter to the respondent advising him that due to his failure to provide the applicant with a response, the matter will be referred to the committee of the applicant.

[35] The respondent stated that the matter was settled between the parties and referred to a letter dated 24 April 2019 wherein he advised the applicant of the settlement.

Elias Mafanele

[36] The copy of Mafanele's complaint that was attached to the founding affidavit is illegible. The deponent to the applicant's founding affidavit, however, stated that Mafanele's complaint relates to the respondent's failure to advise him of the outcome of a court case that the respondent attended to on his behalf.

[37] The respondent answered that he did advise the applicant of Mafanele's decision to terminate his mandate. Mafanele's original client file was handed to Mafanele. In confirmation of the aforesaid, the respondent attached a letter addressed to the applicant dated 9 June 2020 to his answering affidavit.

Sinah Madiseng

[38] Madiseng terminated the respondent's mandate, and her new attorneys of record requested the contents of her file from the respondent. The respondent failed to respond to the request. The applicant forwarded the complaint to the respondent

and notwithstanding several requests for a response from the respondent, he failed to do so.

[39] The respondent stated that the matter became settled between the parties and attached a letter dated 20 July 2020 addressed to the applicant in which he advised the applicant of the settlement.

Sophie T Nkuna

[40] The respondent instituted a claim against the Road Accident Fund on behalf of Nkuna. The claim was successful and an amount of R 931 980 was paid to the respondent. According to Nkuna, she received R 670 985 from the respondent on 29 June 2015 with a promise that she would receive the balance in 2017. Despite numerous attempts to contact the respondent, he respondent simply failed to respond.

[41] According to the applicant, the complaint was forwarded to the respondent for his response but notwithstanding various reminders, the respondent simply failed to respond to the complaint.

[42] The respondent denied this allegation and attached his response to the complaint dated 19 August 2019 to his affidavit. The respondent, furthermore, attached proof of payment of the outstanding amount to Nkuna. The payment date was 2 March 2017.

W Mabogoane

[43] Mabogoane instructed the respondent during 2011/ 2012 to lodge a claim on her behalf against the Road Accident Fund. She stated that her claim did not progress and the last time that she heard anything from the respondent was in 2017. Mabogoane’s complaint was submitted on 7 December 2018.

[44] The respondent stated that he was unaware of the claim and added that his mandate in the matter was terminated in terms of a letter dated 12 December 2019.

Striking application

[45] Without filing a supplementary affidavit, the applicant enrolled Part B of the application for the striking off of the respondent's name from the roll of attorneys for hearing on 20 July 2021.

[46] The matter served before Mbongwe J and Makweya AJ. In a judgment prepared by Mbongwe J, with which Makweya AJ concurred, the court held that the facts before the court were insufficient for the proper adjudication of the striking application and the application was postponed *sine die.*

Supplementary affidavit

[47] Subsequent to the aforesaid order, the applicant appointed Estelle Veldsman ("Veldsman") to file a further report. Veldsman conducted an inspection and found that as soon as a capital amount was received in the respondent's trust bank account, several large round figures are immediately transferred to the business account. The transfers appeared to be unsubstantiated. Veldsman confirmed that there were no ledgers or accounting records to verify payments and transfers, which posed a significant limitation on the scope her investigation.

Further complaints

P J Musida

[48] The respondent instituted a claim against the Road Accident Fund on instructions of Musida. According to the complaint, an order was granted in favour of Musida in November 2019. Musida, however, did not receive payment from the respondent. Musida instructed Sigogo Inc to assist him in the matter and on 8 November 2021, Sigogo Inc addressed a letter to the LPC requesting Musida's client file. Notwithstanding a thorough search, Veldsman could not locate a client file for Musida.

[49] The respondent stated that his mandate was terminated and according to the court order, Musida was represented by V J Valoyi at the time of trial. From the aforesaid, the respondent surmised that the Road Accident Fund paid the award to V J Valoyi, which firm will be responsible to pay Musida.

N[...] F[...] S[...]

[50] S[...] lodged a complaint with the applicant on 14 October 2020. According to the complaint, a Trust was created for monies received from the Road Accident Fund and monthly payments were made until 2020 when the respondent chased S[...] away.

[51] The respondent confirmed that he instituted a claim on behalf of S[...]'s minor child and that an ABSA Trust was created on behalf of the minor. The respondent stated that after the creation of the Trust, he was no longer involved in the matter. It subsequently appeared that the relationship between S[...] and the ABSA trustees soured, and the respondent recalled that the family came to his offices seeking advice on the dissolvement of Trust. The respondent stated that he provided the necessary advice.

Vutomi Rikhotso

[52] Rikhotso submitted a complaint on 8 November 2020 stating that the respondent still owed him R 61 500.54 in respect of a claim against the Road Accident Fund. Veldsman could not locate Rikhotso's client file.

[53] According to the respondent, he explained to Rikhotso that an amount will be deducted from her claim to pay the advocate and upon receipt of the taxed costs from the Road Accident Fund, she will be reimbursed. The respondent attached the Bill of costs that was taxed on 29 May 2020 and stated that Rikhotso will be refunded once payment of the Bill has been received from the Road Accident Fund.

[54] The respondent added that counsel remains entitled to payment of his/her full invoice.

Rontgen and Rontgen Inc (SK Mvubu)

[55] The respondent came on record for Mvubu in her claim against the Road Accident Fund. The previous attorneys of record, Rontgen and Rontgen Inc, requested an undertaking for their fess and disbursements, which the respondent failed to provide.

[56] The respondent did not provide an explanation for his failure to respond to Rontgen and Rontgen Inc’s request. The respondent stated that his mandate was terminated and that the matter is being dealt with by Molefe Machaka Attorneys, who will be responsible for payment of the fees and disbursements of previous attorneys.

Advocate Ramabulana, Advocate Mutlaneng, Advocate Maluleke, Advocate N D Moses, Advocate Mulaudzi, Advocate Mashao and Advocate Motloung

[57] All the advocates were instructed by the respondent in various matters against the Road Accident Fund. The advocates duly submitted accounts in respect of the matters but have not received payment form the respondent. Veldsman could not locate the files pertaining to the various matters.

[58] In respect of the complaint by Advocate Ramabulana, the respondent stated that the Bill of Costs was prepared in one matter but remains unpaid because the matter went on appeal. The second complaint by the advocate relates to a matter in which the Bill of Costs that was drawn does not reflect the amount claimed by the advocate.

[59] The respondent stated that the complaint of Advocate Mutlaneng was resolved in May 2021 and attached the relevant correspondence to his answering affidavit.

[60] In response to the various unpaid invoices referred to by Advocate Maluleke, the respondent attached the various Bills of Costs to his answering affidavit and stated that the Bills have either been taxed and payment is awaited from the Road Accident Fund or the Bills still needed to be taxed.

[61] According to the respondent, the complaint of Advocate Moses was finalised by the LPC. The respondent attached correspondence to this effect.

[62] In respect of the complaint by Advocate Mulaudzi, the respondent stated that the accounts became settled after summons was issued by the advocate. Proof of the settlement is attached to the answering affidavit.

[63] The respondent denied that he instructed Advocate Mashao in the matter and attached the invoices of the two counsels that he instructed in the matter.

[64] The respondent stated that he paid Advocate Motloung and attached proof of the payments. According to the respondent, the advocate undertook to withdraw the complaint.

Muxe Chauke

[65] The respondent instituted a claim on behalf of Chauke against the Road Accident Fund. The respondent did not communicate with Chauke in respect of the claim. Upon enquiries at the Road Accident Fund, Chauke discovered that his claim was successful and that the reward was paid into the respondent's trust account on 26 April 2019. The respondent has, however, failed to account to Chauke and Chauke has not received payment from the respondent.

[66] The respondent explained that he could not get hold of Chauke after the matter was finalised. Chauke did eventually *"resurface"* and the monies were paid to him. Proof of payment is attached.

Mamwadhi Cost Consultants

[67] The cost consultants submitted a claim with the applicant for payment of an amount of R 393 488.77 in respect of services rendered to the respondent.

[68] The respondent pointed out that the complaint did not relate to misappropriation of monies. The cost consultants merely requested the LPC to assist in securing payment from the Road Accident Fund.

Bronwyn Ted Southon

[69] Southon' s matter against the Road Accident Fund was settled in the amount of R 1 051 484. Southon was incarcerated at the time and the respondent paid the amount to Southon's father, Harry. Notwithstanding various correspondence between Southon's mother, Shereen and the respondent, Southon has still not received his money from the respondent.

[70] The respondent stated that Southon disappeared without a trace. After the complaint was lodged, Southon attended at the offices of the respondent with his father and payment was affected into the account provided by Southon. Proof of payment is attached.

F J Makombila

[71] The respondent represented Makombila in a matter against the Road Accident Fund. The respondent created a Trust for Makombila and, after deducting legal fees, paid the award received from the Road Accident Fund into the Trust account. Makombila alleged that the respondent deducted more legal fees, to wit an amount of R 905 048, than were agreed upon between them.

[72] The respondent explained that he invested an amount of R 800 000 that was to be paid to Makombila directly in terms of the court order, into an investment account at Nedbank on the instructions of Makombila. Proof of payment is attached. The respondent, furthermore, attached proof of payment of the counsel's fees in the amount of R 105 000 to his answering affidavit.

Karl Els attorneys (Liberty Medical Fund ("the Fund"))

[73] The respondent instituted a claim against the Road Accident Fund on behalf of M M Mokhele. The Fund paid for Mokhele's hospital and medical treatment, and the respondent signed a written undertaking on 1 August 2013 to reimburse the Fund the aforesaid amount when the matter was finalised, and the costs recovered. Notwithstanding the undertaking, the respondent failed to provide any feedback to the Fund. The Fund enlisted the services of Karl Els Attorneys in an endeavour to recover the amount without any success.

[74] The respondent admitted that he gave an undertaking to the Fund and stated that the matter was finalised through an offer and acceptance. The offer did not mention past medical expenses, and he mistakenly paid the whole amount to the client.

Christopher Thabang Phokugoane

[75] The respondent received R 1 025 000 from the Road Accident Fund in respect of a claim he instituted on behalf of Phokugoane. Notwithstanding various undertakings by the respondent to pay the amount, Phokugoane has not received any payment from the respondent.

[76] The respondent did not respond to the merits of the complaint and simply stated that his mandate was terminated by PMK Tladi Attorneys.

L H Lekalakala obo the Gift Mashau Trust

[77] The respondent instituted a claim on behalf of Mashau against the Road Accident Fund. A Trust was created for Mashau and Lekalakala was appointed as Trustee. Subsequent to his appointment, Lekalakala discovered that an amount of R 394 162.96 was paid into the respondent's trust account by the Road Accident Fund in respect of a taxed bill of costs. Notwithstanding various requests that the monies be paid into the account of the Trust, the respondent failed to do so.

[78] The respondent explained that he had a meeting with Lekalakala in respect of the complaint. The meeting was also attended by the appointed trustee, Mr Mahlangu, and it was agreed that Mahlangu will be substituted by Lekalakala as trustee.

[79] The parties agreed to discuss the issue of finances at a follow-up meeting that never took place.

[80] The respondent disputed the correctness of the amount of R 394 162.96 and attached the taxed Bill of Costs reflecting that an amount of R 215 410.37 was taxed in respect of disbursements. The respondent stated that the client is not entitled to the amount in respect of disbursements.

Nancy Makhubela, M Oscar Mkhize and Musa Wiseman Chavalala

[81] All three complainants instructed the respondent to institute claims on their behalf against the Road Accident Fund. They have not received any updates from the respondent in respect of their respective matters. Upon investigation, Veldsman

could not locate the client files for either three, and reported that the status of the matters is unknown.

[82] The respondent explained that his mandate was terminated in the Makhubela matter by Molefe Machaba Attorneys, that the matter was finalised and that Makhubela has received payment in the matter.

[83] In respect of the Mkhize complaint, the respondent stated that Mkhize passed away and that he was not informed of the appointment of an Executor or Executrix of the deceased estate. The file remains open.

[84] The respondent could not trace Chavalala's name on the firm's client database.

Claims against the Legal Practitioner's Fidelity Fund

[85] Four claims had been lodged against the Fidelity Fund. Two claims in the amount of R 1 159 085.60 are not proceeding, and two claims in the amount of R 1 299 210.96 are pending. The claims are more than the amount held in the respondent's trust account and that is a *prima facie* indication of a trust deficit.

Legal Principles and discussion

[86] The Supreme Court of Appeal has recently in *Hewetson v Law Society of the Free State*,[1] confirmed the three stages of an enquiry into the fitness of a person to practice as an attorney, to wit:

> "[4] The first enquiry is to determine whether the offending conduct has been proven on a balance of probabilities. Once this is shown, the second enquiry is to determine whether the person is fit and proper, taking into account the proven misconduct. The final enquiry is to determine whether the person concerned should be suspended from practice for a fixed period or should be struck off the roll. The last two enquiries are matters for the discretion of the court, which involve a value judgment."

[1] 2020 (5) SA 86 (SCA) at para 4.

[87] The respondent has admitted that he failed to keep his trust account records up to date, which failure culminated in him practising without a Fidelity Fund Certificate from 2017.

[88] In respect of the various complaints lodged against the respondent, the respondent provided detailed responses in respect of each complaint. From the responses, it is clear that the respondent, in certain instances, failed to communicate and account to his clients and delayed in paying the amounts due to them. The respondent's version in respect of the various Trusts he created for his clients was not disputed and it seems that the complaints emanate from an ignorance of the manner in which a Trust is administered.

[89] The failure to pay counsel's fees is as a result of delayed taxation of Bills of Costs and thereafter awaiting payment from the Road Accident Fund. It appears that, upon receipt of payment of the Bills of Costs, payment was made to the various counsels.

[90] The facts do not establish, on a balance of probabilities, that the respondent misappropriated trust funds or that he was dishonest. The facts are rather a reflection of the chaotic state of the accounting records of the respondent's firm, his failure to communicate with clients and his failure to timeously account to clients. Furthermore, and at least in one instance, there was, for a period of time, a deficit in the firm's trust account.

[91] In view of the aforesaid established facts, the question arises whether the respondent is a fit and proper person to practice as an attorney.

[92] The facts establish that the respondent transgressed the following sections and rules regulating the attorneys' profession:

92.1 Section 87(5), alternatively, section 37(2)(a) in that he failed to produce his accounting records for inspection;

92.2 Rule 54.9.1 which provides that a firm is required to retain its accounting records, and all files and documents relating to matters dealt with by the firm on behalf of clients for at least seven years from the date of the last entry recorded in each particular book or other document of record or file;

92.3 Rule 54.10 in that he failed to update his trust accounting records on a monthly basis;

92.4 Rule 54.6 read together with section 87(1) in that he failed to keep such accounting records as are necessary to fully and accurately state the affairs and business of the firm;

92.5 Rule 54.24.1 in that he failed to submit an Attorneys Annual Statement on Trust Accounts as well as an independent auditor's report to the former applicant within six months of the annual closing of the firm's accounting records;

92.6 Section 84(1) in that he is practising whilst not being in possession of a Fidelity Fund Certificate.

[93] The transgressions are extremely serious. The public trusts an attorney to fulfil his/her mandate professionally, ethically and with the utmost care and diligence. An integral part of an attorney's duty to his/her clients is to keep proper accounting records. It is for this reason that the Act and Rules contain stringent measures to ensure an attorney fulfils his/her duty to his/her clients.

[94] Non-compliance culminates in an attorney's inability to obtain a Fidelity Fund Certificate, which failure places his/her clients and the profession as a whole at risk. The respondent's conduct falls far below the standard on which attorneys should be measured and I have no hesitation in finding that the respondent is no longer a fit and proper person to practice as an attorney for his own account.

[95] The next stage of the enquiry pertains to the appropriate sanction in the circumstances. The respondent submitted that an appropriate remedy would be an

order *“that I should be remitted to do Practice Management and Ethics as a course of action to remedy the concerns which the Legal Practice Council has.”*

[96] I do not agree. The proposed remedy demonstrates a clear lack of insight into the seriousness of the transgressions committed by the respondent.

[97] The fact that the respondent was not found to be dishonest would normally mitigate against a striking-off order. This much was confirmed by the Supreme Court of Appeal in *Summerley v Law Society, Northern Provinces:*[2]

> “[21] The further argument on behalf of the appellant was that, as a general rule, striking-off is reserved for attorneys who have acted dishonestly, while transgressions not involving dishonesty are usually visited with the lesser penalty of suspension from practice. Although this can obviously not be regarded as a rule of the Medes and the Persians, since every case must ultimately be decided on its own facts, the general approach contended for by the appellant does appear to be supported by authority (see eg *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A); *Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop* 1984 (1) SA 359 (A); *Law Society of the Cape of Good Hope v King* 1995 (2) SA 887 (C) at 892G - 894C; *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538I - 539A; *Law Society, Cape of Good Hope v Peter* [2006] SCA 37 (RSA) in para [19]). This distinction is not difficult to understand. The attorney's profession is an honourable profession, which demands complete honesty and integrity from its members. In consequence dishonesty is generally regarded as excluding the lesser stricture of suspension from practice, while the same can usually not be said of contraventions of a different kind.”

[98] In *casu,* the respondent’s lack of insight into the seriousness of his transgressions and his apparent inability to keep proper accounting records mitigates against a suspension for a fixed period of time. The respondent will need to satisfy the Legal Practice Council and this Court that he possesses the necessary

[2] 2006 (5) SA 613 (SCA) at para 21.

knowledge and skill to manage trust funds before he is allowed to practice for his own account.

[99] In the result, I am of the view that the respondent should be suspended from practicing for his own account and that he may only bring an application for the upliftment of his suspension if he can satisfy the Legal Practice Council and the Court that he possesses the necessary knowledge and skill to manage trust funds.

[100] This sanction entails that the respondent may still be employed by a firm of attorneys and, furthermore, affords the respondent an opportunity to enhance his bookkeeping skills.

Suspension order

[101] In view of the finding in respect of an appropriate remedy, the respondent's suspension from practicing as an attorney in terms of the court order dated 11 August 2020 is uplifted.

Order

[101] I propose the following order:

1. The respondent's suspension to practise as an attorney in terms of the court order dated 11 August 2020 is uplifted.

2. The respondent is suspended from practicing as an attorney for his own account.

3. In the event that the respondent seeks an upliftment of his suspension to practice for his own account, the respondent must demonstrate to the applicant and the court that he possesses the necessary knowledge and skill to do so.

4. The respondent is ordered to pay the costs of the application on an attorney client scale.

JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree.

KEKANA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

It is so ordered

DATES HEARD:
21 May 2024

DATE DELIVERED

17 July 2024

APPEARANCES

For the Applicant: Advocate A Van der Westhuizen
Instructed by: Iqbal Mahomed Attorneys

For the Respondent: Advocate MR Maphuta

Instructed by: MS Poto Attorneys