



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE: 19 August 2024

SIGNATURE:.....

Case No. 082851/2024

In the matter between:

**GAUTENG PROVINCIAL COUNCIL OF THE
SOUTH AFRICAN LEGAL PRACTICE COUNCIL**

APPLICANT

And

SKHOSANA, MPHO GIVEN

RESPONDENT

Coram: Millar J

Heard on: 14 August 2024

Delivered: 19 August 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 19 August 2024.

Summary: *Application to suspend legal practitioner – failure to give notice of disciplinary hearing – investigating committee failing to ascertain that notice sent to wrong address - new evidence lead at hearing – findings made on such evidence adverse to practitioner without ever having been put to him – failure to notify practitioner of findings of committee despite obligation in terms of the Legal Practice Act to do so – when failures brought to the attention of the applicant, it proceeded with the application nonetheless – failure to give notice to practitioner reviewable under the principle of legality – application dismissed - findings of investigating committee reviewed and set aside – resolution authorizing institution of proceedings reviewed and set aside and matter remitted to a new investigating committee for hearing – applicant ordered to pay costs.*

ORDER

It is Ordered:

- [1] The application is dismissed.
- [2] The findings and decision of the investigating committee held on 20 March 2024 and the resolution of the applicant dated 18 June 2024, authorizing this application is reviewed and set aside.

[3] The complaint is referred back to the applicant to be enrolled before a newly constituted investigating committee for consideration of the complaint of Mr. Selowa subject to the following conditions:

[3.1] that notice to attend any hearing be delivered to the respondent by hand or alternatively, at the correct email address;

[3.2] that all persons who have made statements which are not confirmed under oath are to be subpoenaed to attend such hearing in the event that the investigating committee intends to rely on the contents of such statement/s.

[4] The applicant is ordered to pay the costs of the application and the counter-application on the scale as between party and party – scale B.

JUDGMENT

MILLAR J

[1] On 27 July 2024 and with only 3 week's notice, the applicant brought a two-part application against the respondent, a practicing referral advocate. Initially in part A, the applicant seeks an order for the suspension of the respondent from the roll of practitioners on an urgent basis and thereafter, in part B, for an order striking his name from the roll of legal practitioners.

- [2] The application was served on the respondent in the late afternoon of 24 July 2024 and he was given until 2 August 2024, some 10 days within which to give notice of his intention to oppose the application and to file an answering affidavit. He gave notice of intention to oppose on 31 July 2024 and thereafter filed his answering affidavit and counterapplication on 12 August 2024.
- [3] When the matter was first called on 13 August 2024, the applicant had neither filed any reply nor answered the counterapplication. The application was stood down to Wednesday 14 August 2024 to afford the applicant an opportunity to reply and deliver an answer. In the counterapplication, the respondent seeks to review and set aside the resolution authorizing the institution of the present proceedings. He also seeks an order that a new hearing before an investigating committee of the applicant, of which he will be given notice, be convened.
- [4] The applicant did not answer the counterapplication but did deliver a reply and from the founding affidavit and the reply, the applicant's version with regards to the counterapplication is apparent and it is for this reason, that I intend to deal in this judgment with both.
- [5] It is said that "*the road to hell is paved with good intentions*" and the facts underlying the applicant's application certainly, insofar as the respondent is concerned, resonate in this regard.
- [6] On 4 June 2021, Mr. E Selowa (Mr. Selowa) lodged a complaint against the respondent with the applicant. The applicant is the provincial office within whose jurisdiction the respondent conducts his practice and with whom the respondent is registered.
- [7] The complaint in its entirety was as follows:

"Since I paid him he was nowhere to be found. That's why I don't trust him anymore. What he was up to is money cause [sic] before payment we was speaking almost every day. I lost interest of buying property since I faced this case. I am facing difficulties because of him as I was invested on the property (family matters). He broke [sic] my plans. I'm in cautions [sic] since I come across this."

- [8] Attached to the complaint was a written agreement of sale for immovable property entered into between Mr. Selowa and Ms. G O Swartland (Ms. Swartland). In terms of that agreement of sale, Mr. Selowa purchased from Ms. Swartland a property located in Randfontein for the sum of R150 000.00. It was a specific term of the agreement that *"transfer of the property such be affected by a Conveyancing Attorney, appointed by the Purchaser"* and further that Mr. Selowa would pay all costs related to the transfer. The property was purchased *voetstoets* and occupation was given to him in terms of the agreement of sale on 1 December 2020. On 30 November 2020, the day the agreement was signed¹, Mr. Selowa paid R140 000.00 towards the purchase price into the bank account nominated in the agreement of sale.
- [9] The complaint was sent to the respondent on 10 August 2021 and he was given until 10 September 2021 to respond to the complaint. On 9 September 2021, he responded to the complaint. He pertinently recorded that he did not take instructions from Mr. Selowa to act on his behalf nor had he received instructions from any person to do so. His explanation in regard to his involvement in the matter was that around 7 November 2020, he had been asked by relatives to accompany them to Randfontein where someone was going to look at a property they were selling. Thereafter, the seller of the property had received various calls from interested persons, one of whom was Mr. Selowa. The seller had given Mr. Selowa his number and asked him to liaise with him as it was he who would

¹ The agreement itself does not have a date of signature but in terms of the common cause chronology of events, the agreement was signed, and payment made the same day. Mr. Selowa provided the applicant with a copy of his bank statement evidencing payment on 30 November 2020.

transport them to Randfontein and any arrangement had to suit him. A meeting was arranged for 30 November 2020 and they all met on that day.

- [10] Subsequent to negotiations for the sale of the property which was conducted by the seller, she and Mr. Selowa had agreed a purchase price. He had been furnished by the seller with a pre-typed agreement of sale and been asked to assist with making the changes to include the names of Mr. Selowa, the date of occupation, the purchase price and the banking details. He obliged.
- [11] Due to the fact that Mr. Selowa had wanted to take immediate occupation, he had informed the seller that he wished to pay money immediately in order to secure the property. He informed the seller that since he banked with Capitec Bank, he wanted to pay into a Capitec Bank account so that the funds would clear immediately. It was at this point that the seller informed him that she did not have a Capitec Bank account but in order to facilitate the payment, since the respondent himself had a Capitec Bank account, payment would be made into his account and then transferred to the seller as soon as she opened a Capitec Bank account – in this way she would also then receive the funds immediately.
- [12] The payment was duly made and received and subsequently payment made to the seller by the respondent. At the time that the respondent responded to the complaint, he indicated that the seller was at home in the Northern Cape on maternity leave but that he would obtain from her an affidavit as soon as she returned confirming that she had indeed received the payment. Such an affidavit was subsequently placed before the court in the present proceedings.
- [13] There were a number of other allegations made by Mr. Selowa relating to his apparent failed attempts to communicate with the respondent over the period following the signature of the agreement of sale and in this regard, the respondent produced screenshots of various communications on WhatsApp on 17 January 2021 and 19 March 2021 to dispel this.

[14] The respondent also attached an affidavit by Mr. S Hadebe confirming that he had been present on 30 November 2021 and had heard the discussion relating to how the payment was to be made to the seller. He was also present when the money cleared in the respondent's account on 30 November 2020 and when the keys to the property were handed to Mr. Selowa. It is apposite to mention that the respondent at all times disavowed any wrongdoing or unprofessional conduct. He specifically disavowed ever having misrepresented himself as the legal representative of any party or of being a conveyancer – facts which the written agreement of sale bear out.

[15] The response of the respondent was furnished to Mr. Selowa for his comment and in reply. The applicant was then furnished by Mr. Selowa with a 7-page statement by Mr. LP Mawelewele, a note by Mr. M Rakole confirming what had been said by Mr. Mawelewele together with a 4-page statement by himself. The respondent was at no stage given access to these further and more comprehensive statements for his comment or response.

[16] The applicant then wrote to the respondent on 17 February 2022 informing him that an investigating committee had considered the matter on that day. The decision of the committee was:

*"It was decided that the parties should attend a meeting for a **DISCUSSION** of the matter in terms of Rule 40 of the Rules of the South African Legal Practice Council.*

We shall revert with the date, time and place of the meeting in due course."

[17] The original complaint together with the aforementioned letter from the applicant were sent to the respondent at the email address reflected on his letterhead.

- [18] The next event in the matter occurred just over 2 years later. There is no explanation on the part of the applicant why nothing occurred from 17 February 2022 until 4 March 2024, when a letter was written informing the respondent that he was to attend a meeting of an investigating committee on 20 March 2024 at the applicant's offices.
- [19] The notification of the meeting was sent to a different email address and the physical address reflected on the letter also differed from that of the respondent. Needless to say, the respondent did not receive notification that the meeting of 20 March 2024 was going to be held and did not attend.
- [20] On 20 March 2024, an investigating committee consisting of Mrs. Saloojee, who chaired the meeting and Mr. Makgale and Mr. Njau met. Mr. Selowa was present. The committee purportedly considered all the material before it and examined Mr. Selowa and thereafter furnished a minute setting out its findings and its conclusions.
- [21] It is apparent from the minute that evidence was given by Mr. Selowa which differs materially from the version of the respondent and is also at variance with the written agreement of sale. There are, in addition, facts recorded which never formed part of the complaint and to which the respondent quite obviously did not have any opportunity to respond to.
- [22] Whether or not there is any merit to the complaint of Mr. Selowa, is not an issue that will be decided by this court. There are patent disputes of fact and variances which would need to be explained. For this reason, it certainly cannot be said that the misconduct of which the applicant complains the respondent has made himself guilty of, has been established on a preponderance of probabilities.²

² *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA).

[23] The committee found:

"This matter was set down for a discussion and both the complainant (Selowa) and the respondent Advocate (Skhosana) were notified to attend."

and

"Selowa attended and Skhosana was absent. The committee was satisfied that Skhosana had received proper notice of the hearing and had absented himself without cause."

[24] In terms of rule 41.1 of the Rules:³

"A disciplinary enquiry shall be commenced by way of a notice to the respondent requiring the attendance of that respondent at the enquiry before a disciplinary committee. The notice shall be sent by pre-paid post or by email or facsimile transmission or shall be delivered personally, and the enquiry shall proceed if the committee is satisfied that the notice has been received by the respondent." [my emphasis].

[25] It is somewhat surprising that neither the administrative officials, investigating committee, member of the provincial council, deponent to the founding affidavit or the attorneys of record for the applicant, made the observation that the notice to attend the discussion on 20 March 2024, had not been sent to the correct email address.

[26] This more so particularly since the email address to which the application was sent (as reflected on the notice of motion) is in fact the correct email address of

³ The Rules promulgated in terms of s91(1), 95(3) and 109(2) of the Legal Practice Act (LPA) 28 of 2014.

the respondent. A singular oversight may occur and be excusable but in the present matter, there is simply no explanation how such a manifest error was overlooked on multiple occasions by multiple professional persons.

- [27] Although the respondent in his answer pointed pertinently to this oversight, the reply on the part of the applicant was to “*note the concerns listed and acknowledge that the letter was sent to a different email address to that of the respondent*”. It is apposite to record that immediately on service of the application upon him, the respondent sent an email to the applicant drawing to its attention that he had never received notice of the discussion on 20 March 2024 and requesting that proof that notice had indeed been furnished to him be provided. This request remained unanswered and he was directed to file his answering affidavit. It seems somewhat inexplicable that the applicant then adopted the attitude aforementioned in its replying affidavit.
- [28] In light of the concession that the respondent had not been given notice of the date of the discussion, the applicant nonetheless persisted in seeking an order for the suspension of the respondent.
- [29] Its failure to recognize its own multi-level administrative procedural failure is a matter of concern. Besides having as its object *inter alia* the protection of the public⁴ and to enhance and maintain the integrity and status of the legal profession,⁵ it is also required to “*uphold and advance the rule of law, the administration of justice, and the Constitution of the Republic*”.⁶
- [30] The respondent, like any other person, is entitled to procedural fairness in a matter in which his very right to practice the profession of a referral advocate is at stake. This right is a constitutional right and while the applicant must act to

⁴ S 5(c) of the LPA.

⁵ *Ibid* s 5(f).

⁶ *Ibid* s 5(k).

protect the interests of the public, it cannot and must not do so at the expense of the rights of the legal practitioners that it is required to regulate.

- [31] In the present matter, with the material before the applicant and its investigating committee (prior to Mr. Selowa's evidence before it), there was certainly no *prima facie* case for either the suspension or the striking of the respondent from the roll. On the face of it, at its worst, it was an error of judgment in assisting the seller in the way that he did. On the evidence that is before this court and bearing mind the affidavit of the seller, there is nothing to indicate why Mr. Selowa did not appoint a conveyancer of his choosing to proceed to transfer the property into his name. The minute of the investigating committee would seem to suggest another reason on the part of Mr. Selowa but again this is something that must be properly tested.
- [32] The case changed materially in reply with the further statement of Mr. Selowa and the statement of Mr. Mawelewele, neither of which were furnished to the respondent. The minute of the committee records further evidence that is also not foreshadowed in either the initial or the subsequent statements.
- [33] This only serves to compound the prejudice to the respondent in not being given notice to attend.
- [34] The applicant does not appear to appreciate the shortcomings in regard to what transpired before the investigating committee. This is further exacerbated by the references in the founding papers to the "*affidavit of Mr. Mawelewele.*" It was not an affidavit and the respondent was given no opportunity to rebut it or challenge its veracity. To elevate it to the status of an affidavit and to then use it to try and obtain an order against the respondent which has such profound consequences is unfortunate.

[35] Insofar as the review is concerned, the applicant referred the court to the case of *Melato v South African Legal Practice Council*,⁷ a decision of the Free State High Court. The present matter is entirely distinguishable inasmuch as in the *Melato* case, the decision to institute proceedings was found to be not reviewable, was predicated on proper notice having been given and to the evidence that was considered being in the form of affidavits. Neither occurred in the present matter as set out above.

[36] There is another aspect. In terms of s 40 (1)(b):

“if a disciplinary committee finds that the legal practitioner, candidate legal practitioner or juristic entity is guilty of misconduct, it must-

- (i) *Inform the legal practitioner, candidate legal practitioner or representative of the juristic entity and the Council and Provincial Council of the finding; and*
- (ii) *Inform the legal practitioner, candidate legal practitioner or representative of the juristic entity of the right to appeal as provided for in terms of section 41.”*

[37] In the present matter, there is nothing on the papers before me to indicate that the respondent was ever notified of the findings of the investigating committee or of his right to appeal. Since the failure on the part of the applicant to discharge its obligations to the respondent has effectively rendered any right to appeal nugatory, the only avenue open to the respondent to seek redress is a review under the common law.⁸

⁷ 2021 JDR 1692 (FB).

⁸ *Mapholisa N.O v Phetoe N.O and Others* 2023 (3) SA 149 (SCA) at paras [17] and [21].

- [38] Furthermore, while the investigating committee recommended that proceedings be instituted in terms of s 43 of the LPA, there is no indication that either the committee or, for that matter, the applicant notified the Council⁹ of the recommendation. Compliance with these statutory prescripts is peremptory and it was incumbent upon the applicant to allege and prove such compliance. Neither occurred in this matter.
- [39] The applicant also raised as a belated complaint, that the respondent was in arrears with his annual subscriptions. On receiving the application, the respondent paid a significant portion of the outstanding subscriptions. Given the fact that it is unknown whether the requests for payment of the subscriptions were sent to the correct address of the respondent or not, no adverse finding on this aspect can be made by this court with what is before it. On the contrary, on the probabilities, the malady such as it is, is likely attributable to an administrative failure on the part of the applicant and not on the part of the respondent.
- [40] There is to my mind, no doubt that the respondent in this matter has found himself on the receiving end of a miscarriage of process. It is for this reason that I intend to make the orders that I do. Whether or not there is any merit to the complaint of Mr. Selowa, is something that falls to be determined before a newly constituted investigating committee. The respondent is to be invited to the new hearing and perhaps most pertinently, in the event that the committee intends to rely on statements that have not been deposed to on oath, that the respondent be given an opportunity to test that the veracity of those statements.
- [41] The last issue for consideration is that of costs. It is unclear why the applicant having sat on the matter for over 2 years since 2022, was galvanized to action in

⁹ S 43 provides "*despite the provisions of this Chapter, if upon considering a complaint, a disciplinary body is satisfied that a legal practitioner has misappropriated trust monies or is guilty of other serious misconduct, it must inform the Council thereof with a view to the Council instituting urgent legal proceedings in the High Court to suspend the legal practitioner from practice and to obtain alternative interim relief.*" While it is alleged that the power to bring the current proceedings by the applicant has been delegated to it by the Council, the reference to the Council in s43 when read together with the definition in the LPA, means the Council established in terms of s4 that is the national body – the South African Legal Practice Council.

March of 2024 and then proceeded with what can only be described as indecent haste to bring an application for his suspension from the roll. There is no explanation before the court. There is similarly no explanation for why when the respondent, after service of the application, requested proof that notice of the date of the discussion had been delivered to him, this was refused. The applicant, knowing this fundamental deficit, which was fatal to its case, proceeded to insist that the matter be argued.

[42] The respondent for his part, has co-operated fully with the applicant in this matter. Even in the present proceedings, notwithstanding the devastating consequences that the order sought would have against him, he nevertheless has sought in his counterapplication that the discussion be reconvened and that he be given an opportunity to clear the air. This to my mind, is how a professional person is expected to conduct themselves and he ought not to be mulcted with costs because of the manifest failures¹⁰ on the part of the applicant.

[43] In the circumstances, I make the following order:

[43.1] The application is dismissed.

[43.2] The findings and decision of the investigating committee held on 20 March 2024 and the resolution of the applicant dated 18 June 2024, authorizing this application are both reviewed and set aside.

[43.3] The complaint is referred back to the applicant to be enrolled before a newly constituted investigating committee for consideration of the complaint of Mr. Selowa subject to the following conditions:

¹⁰ See *Jiba and Another v General Council of the Bar of South Africa and Another* 2019 (1) SA 130 (SCA) at para [25].

[43.3.1] that notice to attend any hearing be delivered to the respondent by hand or alternatively, at the correct email address;

[43.3.2] that all persons who made statements which are not confirmed under oath are to be subpoenaed to attend such hearing in the event that the investigating committee intends to rely on the contents of such statement/s.

[43.4.] The applicant is ordered to pay the costs of the application and the counter-application on the scale as between party and party – scale B.



A MILLAR

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

HEARD ON: 14 AUGUST 2024

JUDGMENT DELIVERED ON: 19 AUGUST 2024

COUNSEL FOR THE APPLICANT: MS. B MPHOKANE
INSTRUCTED BY: MPHOKANE ATTORNEYS INC.
REFERENCE: MS. B MPHOKANE

COUNSEL FOR THE RESPONDENT: ADV. K KABINDE
INSTRUCTED BY: SERUMULA MT ATTORNEYS INC.
REFERENCE: MR. MT SERUMULA