



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

DATE: 30 September 2024

Case No. 2023-068293

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

JAN GYSBERT LOUW

First Respondent

JUDITH WILLIAMS

Second Respondent

KATLEGO POOE

Third Respondent

YOLANDI MARGUERITE WATSON

Fourth Respondent

NHLABATHI GYS LOUW INC

Fifth Respondent

Summary

Where the facts underlying an application to strike off a legal practitioner are likely to be contested or obscure, the Legal Practice Council will generally be required to convene a disciplinary committee in terms of Chapter 4 of the Legal Practice Act 28 of 2014 before approaching a court for a striking off order. A court nonetheless retains the power, in terms of section 44 (1) of the Act, to entertain a striking off application without a disciplinary inquiry having taken place.

JUDGMENT

WILSON J (with whom SUTHERLAND DJP agrees):

- 1 The applicant, the LPC, applies for an order striking the first to fourth respondents from the roll of legal practitioners. The first to fourth respondents are attorneys employed by the fifth respondent, Nhlabathi Gys Louw. They were once directors of the firm, but have each relinquished their directorships as a result of the events giving rise to this application.

The misconduct alleged

- 2 The application is based substantially upon a dishonest scheme apparently conceived of and executed by the first respondent, Mr. Louw, when he was the *de facto* managing partner of the firm. The scheme involved understating the firm's annual fee income by paying the firm's expenses directly from its trust account, and drawing down the professional fees due to the firm after the firm's expenses had been deducted from them. This permitted the firm to state its annual fee income at just below R50 million. At the relevant time, the firm's true fee income was in excess of R100 million.
- 3 The purpose of this scheme was to avoid attracting the more onerous Broad Based Black Economic Empowerment (BBBEE) requirements that would have been applied to the firm had its reported fee income exceeded R50 million, and with which the firm could not comply. Given that the firm relied, in large part, on conveyancing instructions from major financial institutions, a failure to comply with the BBBEE requirements routinely applied by those institutions would probably have reduced drastically the number of instructions the firm could expect to receive.

- 4 There is no serious dispute before us that this scheme is dishonest and that Mr. Louw implemented it deliberately to achieve the purpose I have set out. Beyond that, however, the facts on which the LPC claims a striking off order become considerably murkier. For one thing, the understatement of the firm's fees is but one of several species of misconduct alleged in the papers against the firm. These range from essentially bribing estate agents to send conveyancing instructions to the firm, touting, tax evasion and failure to keep proper accounts. The LPC makes no attempt on the papers to differentiate between the first to fourth respondents when alleging knowledge of the wrongdoing or examining their degree of culpability for it. In addition, there are several issues hotly disputed on the papers, including whether the conduct underlying these allegations took place; whether, on a proper analysis, the conduct that did take place amounted to the transgression of the Code of Conduct for Legal Practitioners; and whether each of the first to fourth respondents committed the misconduct, knew about it or were in a position to stop it.
- 5 For these reasons, the papers lack an adequate factual substrate on which we are able to undertake the three-stage inquiry that would usually fall to us: first, to determine whether the misconduct alleged actually took place; second, to determine whether the misconduct established means that each of the first to fourth respondents is no longer fit and proper to practice as an attorney; and third, to determine the appropriate sanction, if any, to be imposed following upon the conclusions reached on the first two legs of the inquiry (see, for example, *Legal Practice Council v Mkhize* 2024 (1) SA 189 (GP)).

- 6 Mr. Stocker, who appeared for the LPC, was unable to convince us that the papers are adequate to support findings on each of these issues, in relation to each form of misconduct alleged and in relation to each of the first to fourth respondents. His fall-back position was that the understatement of the firm's fee income is essentially common cause, as is Mr. Louw's culpability for it. Mr. Stocker submitted that, on those common cause facts, each of the first to fourth respondents must be struck from the roll. Mr. Louw's fate, Mr. Stocker submitted, is clear from his own admissions of dishonesty. The second, third and fourth respondents must also be struck off because they knew, ought to have known, or are deemed to have known, about Mr. Louw's misconduct, and are as responsible for it as he is.
- 7 It is true that the rule has generally been that directors of a law firm hold fiduciary duties toward the firm, an incident of which is that they may not plead ignorance of the firm's financial affairs where a misappropriation of trust funds is established. This rule appears to have been applied where trust funds have been stolen, or where a trust fund has been run unlawfully at a deficit (see *Limpopo Provincial Council of the Legal Practice Council v Chueu Incorporated* [2023] ZASCA 112 (26 July 2023), paragraphs 26 to 30 and the cases cited there).
- 8 I am not convinced, however, that this general rule necessarily implies that each of the first to fourth respondents in this case is liable to be struck off. In the first place, the nature of the scheme Mr. Louw implemented was not a misappropriation of trust funds in the true sense. It is not as if the money paid to the firm did not end up exactly where it should have been. The problem is

how the firm accounted for the movement of its money. There is no suggestion of theft. Nor has the firm's trust account ever shown a deficit. What happened instead was that fee income was paid out directly from the firm's trust account to meet the firm's expenses. The fee income ought properly to have been paid into the firm's business account, and expended from there. Had that been done, there would have been no misconduct.

9 I have no doubt that the deceptive nature of the scheme leaves Mr. Louw with a lot to answer for, but I cannot say that his striking off is inevitable without a fuller picture of the firm's affairs and his role in them. Moreover, unlike in a standard case of theft or another plainly unlawful misappropriation, it is not clear to me that the other former directors misconducted themselves, and, if they did, whether they nevertheless remain fit and proper to practice. Without establishing what they knew or ought to have known, and when they knew or ought to have known it, that evaluation cannot take place. In other words, beyond cases of theft or similarly clear instances of misappropriation of trust funds, I cannot conclude, as a matter of principle, that knowledge of the details of a firm's accounts must always and everywhere be imputed to each of the directors of that firm, with the result that any misstatement of the firm's financial position must inexorably lead to their disbarment.

10 Secondly, the first to fourth respondents' shareholdings in the firm, and the level of power they could reasonably have been expected to exercise over the firm's affairs, are issues that must be explored in much greater depth than the papers in this case presently do. The impression arising from the papers is that Mr. Louw ran the firm on his own. The second respondent, Ms. Williams,

is his wife, and no account has been taken of the extent, if any, that this might affect her culpability or the appropriate sanction if any is found. The third and fourth respondents' shareholdings in the firm were not such as to ground the inference that they could realistically have challenged Mr. Louw's grip over the firm's affairs.

The need for a full disciplinary hearing

- 11 For all these reasons, no relief can be granted on the papers before us, but the first to fourth respondents still stand in peril of disciplinary sanction, up to and perhaps including an order that they be struck off. There is a clear need to explore their conduct, to determine their level of culpability and to formulate the appropriate sanction.
- 12 Chapter 4 of the Legal Practice Act 28 of 2014 provides the LPC with a full suite of statutory powers to investigate and discipline legal practitioners, and to determine the extent of their culpability. In the event that the material facts underlying any allegation of misconduct that may lead to striking off are contested or obscure, the exercise of these powers will normally be a necessary step before approaching the court for a striking off order.
- 13 The main dispute between the parties in this case is whether the LPC ought to have engaged these statutory powers before seeking the first to fourth respondents' striking off. On the facts of this case, and for the reasons I have given, the LPC clearly should have done so.
- 14 This is, in fact, what the LPC's own investigating committee, established under section 37 of the Act, recommended should happen. On 3 April 2023, having

considered a preliminary report detailing what it called “*prima facie* evidence” of wrongdoing, the investigating committee referred the matter to the LPC in terms of section 37 (3) (a) of the Act. That provision authorises the LPC to establish a disciplinary committee to oversee “misconduct proceedings” if “*prima facie* evidence” of misconduct is found. The investigating committee also recommended that the LPC consider whether an urgent application to suspend the first to fourth respondents from practice ought to be instituted under section 43 of the Act. For reasons that are not clear from the record, the LPC rejected the recommendation that a disciplinary committee be established and resolved to proceed directly to court for a suspension order. It then sought striking off orders on substantially the same facts as it sought the suspension order.

- 15 It should not have done so. Properly construed, the investigating committee’s recommendation presupposed that there was *prima facie* evidence of misconduct that might warrant immediate suspension. That was plainly why an urgent application under section 43 was suggested. However, the committee also concluded that a disciplinary inquiry was necessary to test the *prima facie* evidence of wrongdoing it found, and to ascertain whether definitive findings of misconduct could be reached. Eschewing that approach, the LPC chose to ask the court for final relief merely on the *prima facie* evidence of misconduct placed before the investigating committee, without convening the disciplinary inquiry the committee recommended. In doing so, the LPC deprived itself, and the court, of the definitive factual findings necessary to reach fair conclusions on each of the first to fourth respondents’ culpability and the appropriate sanction if such culpability is found.

- 16 Plainly, oral evidence from each of the first to fourth respondents, subject to cross-examination, is essential to provide the answers so lacking on the papers about whether all of the misconduct alleged has been established, what each of the respondents knew about it, when they knew, and what level of culpability they each have for that misconduct. Of particular importance in this case is whether that culpability, if any, is direct, or whether culpability must be imputed by virtue of the first to fourth respondents' status as directors of the firm.
- 17 In principle, of course, it is open to us to refer the striking off application to trial, and to explore the respondents' oral evidence ourselves. However, I do not think that would be a wise use of judicial resources on a trial roll which is already notoriously overburdened. In any event, the LPC has adequate power to refer *prima facie* misconduct to a disciplinary committee, which may then recommend that the LPC seek striking off relief after a full hearing. In clothing the LPC with such power Parliament chose to place the duty to mature the facts underlying a striking off application squarely on the LPC. There is no reason why we should undertake a task that the LPC has been specifically empowered to execute.
- 18 Mr. Morison, who appeared together with Mr. Salukazana for the respondents, submitted that, properly interpreted, the Legal Practice Act lays down an absolute requirement that a disciplinary hearing must be held in every case of misconduct that might require court sanction before a court may be approached. I do not see how that submission can survive contact with the plain text of section 44 (1), which states that "[t]he provisions of this Act do not

derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner, or a juristic entity". The "power" referred to in section 44 (1) can be none other than the common law power the High Court has always possessed to discipline its officers, including attorneys. To make the exercise of that power conditional, as matter of principle, upon the LPC first holding a full disciplinary inquiry would be inconsistent with its explicit preservation in section 44 (1).

- 19 In any event, on the facts of this case, a disciplinary inquiry is necessary. The failure to hold one renders the LPC's approach to this court premature. Its application for the first to fourth respondents' striking off will be dismissed, but nothing stops the LPC from approaching the court again with a record of the disciplinary inquiry, and a reasoned motivation for the first to fourth respondents' striking off which is justified on the basis of that record.

Costs

- 20 The LPC initially applied for urgent interim relief suspending the first to fourth respondents from practice. Crutchfield J struck that application from her urgent roll for the week of 6 September 2023. Crutchfield J was in my view appropriately critical of the LPC's failure to give full effect to its investigation committee's recommendation, and its delay in seeking urgent relief. Crutchfield J reserved the question of the costs in the urgent application, which we must now determine.
- 21 A further abortive hearing took place on 20 February 2024. After that hearing, the respondents sought and were granted the recusal of one of the two Judges

allocated to hear the application for final relief. That inevitably meant that the other Judge also had to recuse herself. The costs of that hearing were not dealt with in the recusal judgment. Those costs also now fall to us to determine.

- 22 Ordinarily, professional bodies are not mulcted in costs when they seek to strike off or suspend legal practitioners, even if they are unsuccessful. They are, in fact, generally entitled to costs on the attorney and client scale, whatever the outcome of their approach to court. This general rule recognises the important role they play in enabling the court to fairly discharge its disciplinary functions (see, for example, *Law Society of the Northern Provinces v Dube* [2012] 4 All SA 251 (SCA), paragraph 33).
- 23 However, the general rule, being general, has its limits. The LPC benefits from a generous costs regime because it is expected to fairly and professionally assist the court in the discharge of its disciplinary functions. Where it fails to provide the assistance a court is entitled to expect, that regime may be put aside, because costs remain in the court's discretion.
- 24 I do not think the usual costs regime can apply in this case. The LPC has refused to convene a disciplinary inquiry against the advice of its own investigation committee without explaining its decision to do so. It has claimed urgency where manifestly no urgency exists. It seeks orders that it ought to have known could not be granted on the established facts. Moreover, the LPC has swept aside the first to fourth respondents' attempts to engage with it on their degree of culpability, and on the extent to which they may be prepared to accept some form of sanction for their involvement in, or failure to prevent,

at least some of the misconduct alleged against the firm. The LPC has not explained why these overtures were rejected. The LPC's founding papers were also over-long, repetitive and obscure.

25 Had the LPC taken its cue from the judgment of Crutchfield J, re-evaluated its approach, and reverted to the advice of its investigation committee, there would have been no basis to mulct it in costs. However, it persisted with an application for final relief that was very likely to fail. That is not the conduct of a professional public body seeking only the public good.

26 For all these reasons, the LPC will pay the respondents' costs, on the ordinary scale. The matter is of sufficient complexity to justify counsel's costs on the "B" scale.

27 The respondents also sought the costs reserved by Motha J in *Williams v South African Legal Practice Council* (case no. 2023-064163). In that matter, the second, third and fourth respondents sought to compel the LPC to issue them with certificates of good standing. They were substantially successful, but that matter was not enrolled before us, and no argument has been addressed to us on whether the circumstances of that case justify a costs award either way. Those costs remain reserved, and may be argued, if necessary, in due course in the ordinary manner.

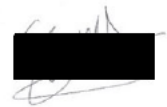
Order

28 Accordingly –

28.1 The application is dismissed.

28.2 The applicant must convene a disciplinary inquiry in terms of section 37 (4) of the Legal Practice Act 28 of 2024 before it takes any further steps to suspend the first to fourth respondents from practice or strike the first to fourth respondents from the roll of legal practitioners on the basis of the *prima facie* evidence of misconduct identified by its investigating committee on 3 April 2023.

28.3 The applicant is directed to pay the respondents' costs, including the costs of the 6 September 2023 and 20 February 2024 hearings, and including the costs of two counsel where employed. Counsel's costs may be taxed on the "B" scale.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 30 September 2024.

HEARD ON: 29 August 2024

DECIDED ON: 30 September 2024

For the Applicant: R Stocker
Instructed by RW Attorneys

For the Respondent: L Morison SC
M Salukazana
Instructed by Webber Wentzel