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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 2023/023597

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

DATE 05 NOVEMBER 2024

SIGNATURE

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

And

MPHAFOLANE JERRY KOMA

Respondent

CORAM : MABESELE AND BAM JJ

JUDGMENT

BAM J:

1. 'A person who is admitted to practise as an advocate, and who chooses to exercise that right to practise, must adhere to the recognised standards of the profession. An advocate who fails to adhere to those standards to a degree that satisfies a court that he is unfit to continue to practise is liable to be

suspended from practise or to have his name struck from the roll of advocates.¹ The present application argues exactly that, that the respondent by his conduct which led to his suspension in the first place, has strayed from the standards of legal practitioners² to a degree that he is unfit to continue to practice as an advocate; his name is liable to be struck from the roll of advocates.

2. The evidence placed before this court by the applicant suggests, in summary, that the respondent — whilst not being a trust account advocate and without being in possession of a Fidelity Fund Certificate (FFC) — had consistently sought and received trust monies into his personal bank account and taken instructions directly from members of the public without the involvement of an attorney. Having received monies from his clients, the respondent failed to carry out his clients' instructions and neglected calls to account for the funds. The respondent further abjured his responsibility to reply to the applicant's letters when his clients' complaints were brought to his attention.
3. Even though he had filed his papers in opposition, the respondent failed to attend court when the application was argued in respect of Part B³.

Background

4. On 25 March 2023, following investigations by the applicant's Investigating Committee, the applicant launched proceedings in the urgent court seeking an interim order for suspension of the respondent from practising as an advocate, pending finalisation of Part B of the Notice of Motion. Such order was granted, per Basson J, on 25 May 2023 and it remains in place. The genesis of the application may be traced to the three complaints lodged with and investigated by the applicant. The three complaints were soon followed

¹ Van der Berg v General Council of the Bar of South Africa (270/06) [2007] ZASCA 16; [2007] SCA 16 (RSA); [2007] 2 All SA 499 (SCA) (22 March 2007), paragraph 1

² As set out in the Legal Practice Act and the Code of all Legal Practitioners

³ See Caselines A2, pages 68-89. Here the respondent acknowledges receipt of the applicant's Practice Note for Part B, Heads of Argument, Part B, Chronology Part B, and Authorities, on 16 July 2024; also Caselines 36-6

by ten further complaints. Below, I set out, to the extent necessary, the details of the three complaints. It will be noted that, when I deal with the respondent's defence, the respondent admits that he accepted funds from members of the public even though he did not have a trust account and without having received a brief from an attorney.

(i) Ms Mankgaba

5. On 26 January 2022, Ms Mankgaba, labouring under the belief that she was dealing with an attorney, instructed the respondent to attend to the transfer of a property she had purchased. The purchase price of R140 000 was transferred into the respondent's personal bank account on his direction. Ms Mankgaba did not hear from the respondent after making the payment. Her calls were ignored by the respondent. On 29 June 2022, Ms Mankgaba lodged a complaint with the applicant. The two letters written by the applicant to the respondent, (on 19 July and 16 August 2022) in connection with Ms Mankgaba's complaint went unanswered.

(ii) Mr D J Makanatleng

6. Mr Makanatleng and his mother had instructed the respondent to attend to matters concerned with his father's (her husband's) deceased estate during February 2021. The respondent sought and was paid an amount of R35 000 for his services which he never rendered. On 24 April, Mr Makanatleng terminated his mandate and called upon the respondent to repay the amount of R35 000 but the respondent ignored his calls and further refused to account for Mr Makanatleng's funds. Their complaint to the applicant was submitted on 29 May 2022. The applicant's letters (of 4 July and 3 August 2022) were ignored by the respondent.

(iii) Mr Samuel Somsuthu Masilela

7. Mr SS Masilela instructed the respondent on 3 April 2022 to represent him in an unfair dismissal case he had against his then employer. On respondent's direction, he paid R5000 for consultation. The respondent later demanded more money to 'speed up the case'. Mr Masilela paid R40 000 as per the

respondent's direction. Mr Masilela lodged a complaint with the applicant on account of the respondent's failure to render the services he had undertaken to render. The respondent shunned the applicant's letters of 24 October and 21 November 2022.

8. All three complaints were referred to an Investigating Committee, (I/Com). In all three cases, the I/Com found that there was a prima facie case of misconduct as the respondent had taken instructions directly from members of the public without a brief from an attorney and received trust monies into his personal bank account even though he is not a trust account advocate and was not in possession of a Fidelity Fund certificate, FFC. The I/Com referred all three matters to council with a recommendation that urgent proceedings be instituted to suspend the respondent from practice.

9. As earlier indicated, the three complaints were followed by ten further complaints. The ten complaints were not investigated at the time of instituting Part A of these proceedings. These complaints further confirmed the respondent's tendency of taking instructions from members of the public without a brief from an attorney, including calling for and accepting of trust monies into his personal bank account while neglecting to account to his clients. We list the further complainants and the amounts they had paid the respondent. The complaints are not in dispute, save for the respondent's assertion that about seven of the total number of complaints against him had been withdrawn: They are:

(i) Ms Nonkosi Carol Mofokeng: Paid R 25000 for a civil matter;

(ii) Mr MJ Kekana & O: They each paid R 500 totalling R 33 000 into the respondent's personal bank account, for a labour matter.

(iii) Mr ME Ngoatje: Paid R 55 000, into the respondent's personal bank account, for a labour matter

- (iv) M A Sekole: Paid R 115 000 as fees
- (v) Mr KS Ramorena: Paid R 35 000 for a labour matter
- (vi) Mr D M[...]: Paid R 35 000 in respect of a divorce
- (vii) Makua: Paid R 35 000 for the respondent to act against ABSA Bank
- (viii) Ms Chabalala - paid R 14 900
- (ix) Mr Masemola - paid R 32 500
- (x) Mr Nonyana - paid R 46 000

Issues

10. The issues to be determined are:

10.1 whether the misconduct complained of has been established;

10.2 whether the respondent is a fit and proper person to continue to practise as an advocate;

10.3 whether the misconduct warrants the ultimate sanction of being struck from the roll or whether an order of suspension will suffice.

10.4 Whether a curator must be appointed to control and manage the respondent's accounts including his personal bank account/s.

Nature of proceedings

11. Although these proceedings have been brought on motion, the ordinary approach outlined in *Plascon Evans*⁴ is not appropriate for this kind of proceedings⁵. This is so because the applicant's role in bringing proceedings

⁴ Given that it is undesirable to determine factual disputes, where such disputes arise, a referral to oral evidence would be necessary to resolve such disputes, unless the evidence relied on to raise a dispute is unmeritorious and uncreditworthy that it can be dismissed off-hand.

⁵ Van den Berg, note 1, paragraph 2

is not that of an adversarial litigant but to bring evidence of a practitioner's misconduct to the attention of the court, in the interests of the court, the profession, and the public at large, for the court to exercise its disciplinary powers over its officer⁶.

Procedure to determine the issues

12. In terms of the procedure to determine the issues, it is trite that the enquiry envisages three stages:

'In the first stage the Court must determine, on a balance of probabilities, whether the Legal Practice Council [LPC] has established the misconduct upon which it seeks to rely. Thereafter, it must determine whether the legal practitioner is a 'fit and proper' person to continue to practise. This requires the Court to weigh up the conduct complained of against the conduct expected and, to this extent, it involves a value judgment. Finally, the Court must decide whether the misconduct warrants the ultimate sanction of being struck from the roll or whether an order of suspension from practice will suffice. The exercise of discretion is thus concerned with the second and third parts of the enquiry, not the first.'⁷

13. The court is enjoined to evaluate the material circumstances, including the respondent's personal circumstances, the nature of the conduct complained of, the extent to which it reflects on the respondent's personal character, or shows him to be unworthy of remaining in the ranks of an honourable profession, the likelihood or otherwise of repetition of such conduct and the need to protect the public⁸. The purpose of the proceedings is not to punish the wrongdoer but to uphold the rules of the profession⁹ and

⁶ ditto

⁷ Cape Law Society v Gihwala (14154/17) [2019] ZAWCHC 1; [2019] 2 All SA 84 (WCC) (29 January 2019), paragraph 79; Jiba and Another v General Council of the Bar of South Africa and Another; Mrwebi v General Council of the Bar of South Africa (141/17; 180/17) [2018] ZASCA 103; paragraph 6

⁸ Gihwala supra, paragraph 68

⁹ Jiba supra, paragraph 21

the law. Thus, were this court to conclude that the circumstances of this case render the respondent unfit to continue to practice and make an order to strike his name from the roll of advocates, such an order is not punishment but a means of protecting the public¹⁰.

Advocates who may/may not take instructions from the public

14. Finally, in terms of Sec 34 (2):

- (a) An advocate may render legal services in expectation of a fee, commission, gain or reward as contemplated in this Act or any other applicable law—
 - (i) upon receipt of a brief from an attorney; or
 - (ii) upon receipt of a request directly from a member of the public or from a justice centre for that service, subject to paragraph (b).
- (b) An advocate contemplated in paragraph (a) (ii) may only render those legal services rendered by advocates before the commencement of this Act as determined by the Council in the rules, if he or she—
 - (i) is in possession of a Fidelity Fund certificate and conducts his or her practice in accordance with the relevant provisions of Chapter 7, with particular reference to sections 84, 85, 86 and 87;
 - (ii) has notified the Council thereof in terms of section 30 (1) (b) (ii).

Whether the conduct complained of has been established

- (i) Accepting instructions directly from the public;
- (ii) Calling for and accepting trust monies into personal bank account

15. In his supplementary affidavit¹¹, the respondent admits taking instructions without a brief from an attorney in respect of the matters of Mekanatleng, Mankgaba, Ramona and Makua. He further admits having collected monies from these clients, even though he is not a trust account advocate and does not hold an FFC. In defending his conduct, the respondent suggests that he received oral instructions from one Post Moloto, an attorney. He does not

¹⁰ Ndleve v Pretoria Society of Advocates (CCT74/16) [2016] ZACC 29; 2016 (12) BCLR 1523 (CC) (1 September 2016), paragraph 10

¹¹ Caselines 08-10

explain his conduct in receiving trust monies from members of the public without being in possession of a FFC.

16. The defence of receiving instructions via a call does not assist the respondent. Firstly, in terms of Rule 28.1 of the Code of Conduct for All Legal Practitioners, an advocate shall receive a written brief or by way of email. In cases of urgency an advocate may receive instructions telephonically but must as soon as it is practically possible, insist on a written or emailed brief, failing, the advocate shall confirm the instructions in writing. It is common cause that the respondent had no written brief, whether in the form of an e-mail or physically delivered written brief. Secondly, the respondent could not even produce his written confirmation of the instructions from Mr Moloto. More tellingly, the respondent could not even provide an affidavit from Mr Moloto.

17. In any event, this version is gainsaid by the complainant in Mofokeng who says that they tried to secure another attorney as it was clear that Mr Koma was failing them. As a result of interacting with the new attorney, whom they say opened their eyes, the complainant says they were informed that they were not supposed to pay money into an advocate's personal account. The new attorney further advised them that an attorney appoints an advocate to work on a case.

18. It is not in dispute that the respondent is a referral advocate as envisaged in Sec 34 (2) (a) (i) of the LPA. The respondent is further not a trust account advocate; he does not hold a FFC, does not conduct his practice in line with the provisions 84, 85, 86, and 87 of the LPA, and he has never informed the applicant that he conducts his practice in line with the aforementioned provisions. Thus, the respondent was not entitled to take instructions directly from members of the public, without a brief from an attorney.

19. There is no dispute that in seeking and receiving trust¹² money from members of the public, the respondent contravened the provisions of Act¹³ and the Code of Conduct for All Legal Practitioners¹⁴. The respondent further failed to render services to his clients and failed to account to them.
20. With regard to the conduct of the respondent in relation to the applicant, this court, in the course of its determination of Part A, made certain comments about the conduct of the respondent which we find highly relevant. In this regard, the court noted that the respondent refused to acknowledge or take ownership of his conduct; that he had shown contempt for the applicant by launching several baseless attacks against the applicant and accusing it of dishonesty and improper conduct, even though the applicant is not a litigant in the proceedings¹⁵. The accusation made by the respondent that the applicant had hastily brought this application without properly investigating the matters appears to refer to the withdrawal of some of the complaints, a matter to which we turn in the paragraphs immediately here below, along with the remainder of the respondent's defences.

The respondent's defences

(a) Whether the withdrawal of the complaints by some complainants detracts from the respondent's misconduct

21. In his attempt to answer to the breaches of his professional and statutory duties, the respondent pointed that seven of the thirteen complaints had been withdrawn. But the withdrawal of complaints by its clients does not mean that the misconduct complained of did not occur and cannot be a bar to this court's enquiry into the respondent's fitness to be an advocate. See in this

¹² The money had to remain in trust as the respondent had not yet executed his clients' instructions.

¹³ See paragraph 14 of this judgment.

¹⁴ Clause 27.2 and 27.4 read with 22.1

¹⁵ Caselines 29-5, paragraph 14

regard *Law Society of the Northern Provinces v Mabunda and Another*¹⁶ and *Law Society of the Northern Provinces v Zwiegers*¹⁷.

(b) *Whether the respondent had to be subjected to a disciplinary hearing prior to launching the application*

22. Part of the respondent's complaint that the applicant had hastily launched these proceedings pivots on the claim that the respondent had to first be subjected to a disciplinary enquiry. This complaint is nothing more than a misunderstanding of the applicant's role. It is not a requirement that the applicant subjects any legal practitioner to a disciplinary enquiry prior to launching these proceedings. This is so because in bringing these proceedings, the applicant is merely bringing to the attention of the court the respondent's offending conduct, in the interests of the public and that of the profession.

23. In *Law Society of the Northern Provinces v Le Roux*, the court affirmed this position:

'As *custos morum* of the profession it brings offending behaviour to the court's notice, but the resultant hearing is an inquiry conducted by the court into the behaviour of its officer's fitness to remain on the roll of practitioners. The applicant fulfils the role of an *amicus curiae*. In principle, nothing prevents the court from initiating the inquiry into an errant attorney's conduct itself if it comes to the court's notice in whatever fashion.'¹⁸

(c) *Mr Chabalala does not exist*

24. The respondent contends that he had no such client as Mr Chabalala. The real issue here is that the client is a Ms Chabalala as opposed to Mr Chabalala. Nothing further need be said about this defence.

¹⁶ (LEGODI JP) [2019] ZAMPMBHC 8; 2734/2018 (18 October 2019), paragraph 23;

¹⁷ (12993/2017) [2020] ZAGPPHC 785 (22 December 2020), paragraph 17

¹⁸ 49385/2010) [2012] ZAGPPHC 22; 2012 (4) SA 500 (GNP) (14 February 2012), paragraph 12

(d) Whether the pending proceedings¹⁹ and the subsequent application to rescind the interim order are a bar to this court entertaining the present Part B proceedings.

25. Shortly after the application had been launched, the respondent, on 9 April 2013, launched an application to interdict the applicant from proceeding with the application to suspend him. In terms of Part B of the respondent's notice of Motion, he intends to review and set aside the applicant's decision of 9 February to instruct lawyers to move the application for suspension. On 15 June 2013 the respondent instituted proceedings for a rescission of the interim order of 25 May 2023²⁰. The applicant duly filed its answering affidavits in both applications. The respondent has yet to file his reply in the rescission application.

26. As to whether the review application bars this court from entertaining the present proceedings, this question has already been answered by this court when it heard Part A. It is not open to this court to revisit that ruling. The short answer is that the pending review does not prevent this court from entertaining Part B. In so far as the application for rescission, we correctly in our view, submits that the rescission application cannot prevent this court from enquiring into the question of fit and properness of the respondent to hold office as an advocate.

27. We hold that the offending conduct complained of has, on a balance of probabilities, been established.

Whether the respondent is a fit and proper person

28. In answering this question, this court is guided by the oft made statements regarding the qualities required of an advocate. Writing for the minority in *Jiba*, Van der Merwe JA noted:

¹⁹ Caselines 06-5 launched on 9 April 2023

²⁰ This is the order that saw the respondent suspended.

‘An advocate is required to be of ‘complete honesty, reliability and integrity’....It goes without saying that these qualities are particularly required of an advocate who holds high public office in the administration of justice.’²¹

And

‘The profession has strict ethical rules to prevent malfeasance. ...Because ‘[t]he preservation of a high standard of professional ethics [has] been left almost entirely in the hands of individual practitioners, it stands to reason, firstly, that absolute personal integrity and scrupulous honesty are demanded of each of them and, secondly, that a practitioner who lacks these qualities cannot be expected to play his part.’²²

29. The complaints against the respondent have at their heart an undoubted refusal on the part of the respondent to hold himself bound by the strictures of the law, (the provisions of the Act, the Code and Rules) amongst which is the absolute bar to taking instructions from members of the public directly without a brief from an attorney and seeking and receiving trust monies from the public, where the advocate is not a trust account advocate²³.

30. The repetitive nature of the conduct of calling for and receiving funds from the public into his personal bank account, in circumstances where, to the knowledge of the respondent, the public had no protection as he is not a trust account advocate, and the refusal to do the work and account to his clients, all of these issues evidence lack of integrity. As for the respondent’s insouciant attitude of refusing to cooperate with the applicant, when looked in

²¹ Jiba note 5 supra, paragraph 33

²² Johannesburg Society of Advocates and Another v Nthai and Others (879/2019; 880/2019) [2020] ZASCA 171; 2021 (2) SA 343 (SCA) ; [2021] 2 All SA 37 (SCA) (15 December 2020), paragraph 1

²³ There is the exception provided for in Sec 34 (1) (c) but that is not implicated in this case

the context of his conduct as set out in this judgment, the conduct is incompatible with the requirement of a fit and proper person.

31. We conclude that the respondent's conduct renders him and unfit and proper person to remain on the roll of advocates.

Whether the conduct warrants the sanction of striking the respondent's name from the roll of advocates

32. The respondent was admitted in 2006. Unlike a new comer, he has had almost two decades to learn about the requirements of his profession as an advocate, specifically in relation to the requirements of being fit and proper. There can thus be no excuse in that regard. We have already referred to the repetitive nature of the respondent's offending conduct and his conduct in relation to the applicant. What remains to be mentioned is the respondent's conduct before this court. The respondent showed no regard for the court and its time. He made every attempt to stymie this court and exploit every possible avenue through the courts' system to continue to delay finalising the application. In this regard, we mention there was first an application for postponement on the day of hearing the urgent motion on 11 April 2023. When the application for postponement failed, the respondent turned to the application for an urgent interim interdict and review. There were no less than 3 applications for leave to appeal the rulings made by the court on 11 April. In the end the respondent failed.

33. In all of this, the respondent has never cared to explain what happened to the monies he collected from his clients. We must conclude that the monies must in all probability have been misappropriated.

34. We have already found that the respondent is not a *fit and proper person to continue to practice as an advocate*. In *Mfundisi v EC Provincial Council of SA Legal Practice Council*, it was said:

'Logic dictates that once a court finds that a person is not a fit and proper person to practice as attorney, it must follow that his or her name be struck from the roll of attorneys. An order suspending the respondent from practice, wholly suspended, is wholly incompatible with the above finding.'²⁴

35. We agree with the reasoning of the full bench in *Mfundisi*. The respondent has shown himself to be unfit to the degree that his name must be removed from the roll of advocates.

Whether a curator must be appointed to control and manage the respondent's accounts including his personal bank account/s

36. The applicant submits that the circumstances of this case warrant that a curator be appointed to control and manage not only the respondent's business related accounts but his personal bank account/s. In our reasoning, there are a myriad of issues that militate against issuing such an order. We mention some of those.

37. This prayer was initially included in the relief sought in Part A. The respondent vehemently resisted the suggestion that a curator be appointed over his personal bank account/s. Given the urgency of the matter and the obvious difficulties in scrutinising the merits of the individual party's cases under the conditions of the urgent court, this aspect of the case was deferred.

38. The order of suspension was obtained in May 2023. That is sufficient time to have enabled the applicant to make enquiries from the four major banks and requested bank statements in respect of all accounts held under the respondent's name. We have not been favoured with any information suggesting that the respondent ran an exceptionally lucrative and busy practice to the extent that a limited investigation with the sole purpose of

²⁴ (3630/2021) [2022] ZAECHC 72 (20 October 2022)..., paragraph 82

identifying the direct deposits or transfers made by the complainants could not be carried out. Instead, we have only been supplied with two account numbers relating to two banks, namely, Capitec and First National Bank Ltd, without any clear indication of what the accounts are for and represent in relation to the respondent's practice.

39. In our view this is simply not sufficient detail to warrant the kind of invasive order sought by the applicant which may in all likelihood affect the lives of people who are not before court, such as the respondent's spouse if any, his children and any other member of his family who depends on him. Without having carried out that investigation, it would be unwise of this court to issue such an order. We may add that if the applicant was of the view that it required the authority of the court to empower it to conduct such an investigation, there was nothing stopping the applicant from asking the court to authorise such investigation even at the time of hearing Part A. Therefore, we must thus decline the invitation to appoint a curator over the respondent's personal bank account/s. Thus, the order appointing the curator shall be issued only in respect of the respondent's business account/s.

Order

- (i) The application succeeds.
- (ii) Save for highlighting that the curator is appointed to control and manage only the respondents business related bank account/s, along with the necessary adjustments in this regard, the order attached hereto and marked X is granted.

N.BAM

(Judge of the High Court Gauteng Division, Pretoria)

I agree

M.M MABESELE

(Judge of the High Court Gauteng Division, Pretoria)

DATE OF HEARING:

6 August 2024

Date of Judgement

5 November 2024

APPEARANCES

APPLICANT:

COUNSEL FOR THE APPLICANT:

Mr R Stocker

Instructed by:

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