



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 1949/2024

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

HEINRICH FRANCISCO GONZALES

Respondent

Coram: Justice C Fortuin *et* Justice J Cloete

Heard: 4 December 2024

Delivered electronically: 6 December 2024

JUDGMENT

CLOETE J:

Introduction

- [1] This is an application for the striking of the respondent's name from the roll of attorneys. In its founding affidavit the applicant's deponent, Ms M Govender,

who is its Chairperson of the Western Cape Provincial Council, advanced two grounds, namely that prima facie the respondent (a) misappropriated R73 320.24 held in trust on behalf of a client, Mr Andre Myburg, during the period 2022 and 2023; and (b) failed to comply with the applicant's request for information in terms of rule 40.2.4 of its rules.¹

[2] The applicant launched this application on 29 January 2024 in two parts. Part A, enrolled for hearing on 20 February 2024, was for an order suspending the respondent from practice (with the customary attendant relief) pending the determination of Part B for his removal. On 20 February 2024, Gamble J granted the Part A relief (which had not been opposed).

[3] Thereafter Ms Z Surve who is the applicant's Legal Officer: Curatorship Department: Risk and Compliance, filed a curatorship report as envisaged in paragraph 2.4 of the Gamble J order. The report is undated but appears to have been compiled on or about 15 April 2024. Although no mention had been made in the applicant's founding affidavit of a separate complaint against the respondent by a Ms Goosen, this was touched on briefly by Ms Surve in her report as follows:

‘• The first complaint was lodged by Ms Goosen, who was appointed as the firm's external Accountant, and the second complaint was lodged by a client of the firm, Mr Myburg;

Both complaints related to the administration of trust funds...’

[4] In her supplementary founding affidavit deposed to on 16 May 2024, Ms Govender, in dealing with this report, confirmed that no details were provided by the curator regarding the substance of the Goosen complaint; attempts by the curator to contact the respondent both directly and via his attorney to obtain his trust accounting records and client files had been unsuccessful; the respondent had advised the curator in April 2024 that his

¹ Promulgated in terms of the Legal Practice Act 28 of 2014.

firm had been placed in provisional liquidation at the instance of a creditor; and that by 14 April 2024 the Legal Practitioners Fidelity Fund had not yet received any claims from the respondent's clients.

[5] Ms Govender stated that the applicant's investigating committee had received two further complaints against the respondent and she would '*deal briefly with the more serious complaint*' received from Mr Henry Prins (no details were provided in relation to the other complaint). The Prins complaint was a failure by the respondent to account to him as a client for how a sum of R70 000 held in trust had been expended.

[6] In a further affidavit by a candidate legal practitioner of the applicant's attorneys, Mr A Ngoma, deposed to on 10 July 2024, the latter annexed a document from the respondent dated 3 June 2024 in which he gave his version of the Myburg and Goosen complaints; did not deal with the Prins complaint other than that he could '*account*' for it once he received a copy thereof; but then also referred to the complaints of a certain Mr Marais, a Mr Scott Carpenter and a Mr Kroutz. Given that the applicant did not place any reliance on these other three complaints, they were presumably not considered by it to be sufficiently serious to warrant an approach to this court, and I thus do not deal with them.

[7] In the same document the respondent stated the following in relation to the pending striking-off application:

'18. *I believe further litigation and filing of court papers are unnecessary legal costs and will protract the finalisation of this matter.*

19. *I will agree to a final order to be struck from the roll of practicing attorneys and co-operate with the LPC and Liquidator in respect of any further investigation relating to client complaints.*

20. *I will however reserve the right to respond to the allegations made on oath by the applicant should it be necessary in the future.*

21. *We can reach a settlement on the application, prepare a draft order, and approach the court.'*

[8] In an email from the applicant's attorney to the respondent dated 7 June 2024 the latter was advised that the applicant could not consent to a striking-off order since this was a discretion to be exercised by the court based on the information before it. If the respondent wished to place facts or information before the court he should prepare and deliver formal answering papers; and that the Prins complaint had been set out in detail in the supplementary founding affidavit, which the respondent could deal with when filing his answering affidavit.

[9] Part B was enrolled for hearing on 8 November 2024 when it came before Goliath AJP. It would appear that the respondent had filed an eleventh-hour explanatory affidavit (which was deposed to on 6 November 2024). It would also seem that the applicant's attorney and the respondent (in person) addressed Goliath AJP who then declined to hear the matter and postponed it to 4 December 2024 with a timetable for delivery of heads of argument, when it was allocated to us.

The Myburg complaint

[10] On 26 September 2023 the applicant received Mr Myburg's complaint which is annexed to its founding affidavit. He stated that on about 11 January 2022 he appointed the respondent to assist him in a maintenance dispute with his former spouse. The respondent told him to pay the full amount of the maintenance arrears of R63 320.24 into his trust account pending a round table meeting which the respondent would arrange with his former spouse. This was duly paid by Mr Myburg on the same day together with R8 000 required by the respondent for a '*consultation fee*'. On 9 June 2022,

Mr Myburg paid a further R10 000 to the respondent at his request as a deposit for the proposed round table meeting. The meeting was never arranged by the respondent and eventually Mr Myburg settled the dispute directly with his former spouse.

[11] On about 30 May 2023, Mr Myburg instructed the respondent to refund him. The respondent offered to repay this in four weekly instalments commencing on 5 June 2023. Mr Myburg accepted this arrangement since the respondent told him that he did not have the funds in his trust account. However the respondent failed to make payment as agreed and did not respond to Mr Myburg's messages thereafter. In the 3 June 2024 document sent by the respondent to the applicant's attorneys, he claimed that during *'the middle part of 2023'* his firm started to experience financial constraints. On his own version this was more than a year after the bulk of the monies were paid to him by Mr Myburg. The respondent confirmed he had received those payments. He alleged however that R63 320.24 was paid by Mr Myburg into his trust account *'as a form of security in respect of his pending litigation. With Mr Myburg's written confirmation and agreement the amount was transferred from trust to business, with repayment terms. According to my understanding, this was a temporary loan agreement between myself and the client. Unfortunately, due to unforeseen circumstances, repayment of the amount took longer than anticipated'* but Mr Myburg was refunded *'in full'* on 30 November 2023. Although the respondent made reference to annexures in his document these are not before us, but I will deal with those annexed to his later explanatory affidavit.

[12] The respondent's statement of account to Mr Myburg annexed as "K" to the explanatory affidavit reflects that only R61 595.24 was purportedly refunded to Mr Myburg, not on 30 November 2023 but on 31 May 2023, i.e. about 4 months before Mr Myburg lodged his complaint with the applicant, and about 6 months prior to the alleged repayment. The actual proof of refund, not of the full amount, but of R63 320.24 dated 30 November 2023, is annexure "M" to the affidavit.

- [13] The respondent could not, as he later claimed, have concluded a *‘temporary loan agreement’* with Mr Myburg prior to 30 May 2023 when the latter first demanded repayment. By that date Mr Myburg’s monies had already been transferred by the respondent without Mr Myburg’s permission from his trust account to his business account and utilised by the respondent. This is theft of trust monies which is one of the most serious offences a legal practitioner can commit. It is made worse by the respondent’s patently false attempt to justify his conduct *ex post facto*.
- [14] It therefore does not assist him to rely on the statement in his document that *‘in hindsight, I should’ve refrained from concluding a loan agreement with the client and [this] was a bad judgment mistake’*; nor does it assist him (in fact it makes it worse) to claim, as he did in his explanatory affidavit, that *‘at the time I was unaware it is not permissible to enter into a loan agreement with a client. It was only after proceedings were initiated by the applicant’s office that I consulted with an advocate and learned that my actions were not in line with the rules of the Legal Practice Council’*. His other allegation in his explanatory affidavit that *‘I am very bad with office administration and should rather focus on practising law instead of running my own practice’* only serves to highlight the respondent’s shortcomings.
- [15] The respondent also claimed in both his document and explanatory affidavit that the payments by Mr Myburg of R8 000 and R10 000 respectively were appropriated to fees for work done *‘as per attached statements’*. These statements were not however attached and we are left in the dark as to how the respondent racked up attendances for a bill of R18 000 when, apart from an initial consultation for which he seemingly charged R8 000 in a simple matter, on Mr Myburg’s uncontested version the respondent did no other work at all. Against this background it is also startling that the respondent initially wished to deduct a *‘yearly admin fee for managing client security deposit’* of R1 725 before refunding Mr Myburg (which is also evident from annexure “K”) although the later proof of payment (annexure “M”) excluded this.

[16] In short therefore the respondent not only stole trust monies but attempted to mislead both the applicant and the court to evade responsibility. That at the time of the so-called loan agreement he was practising for his own account while seemingly oblivious to the prohibition on loaning money from a client is also serious. As custodian of the profession we are obliged to take these factors into account in determining an appropriate sanction.

The failure to comply with the applicant's request for information in terms of rule 40.2.4 of the Legal Practice Rules

[17] Rule 40 reads in relevant part as follows:

'40. Investigation of alleged misconduct

40.1 When a complaint or allegation of misconduct against the respondent is referred to the investigating committee, that committee must investigate the complaint or allegation or cause the complaint or allegation to be investigated by the legal officer or by a legal practitioner appointed by the Council for that purpose.

40.2 For purposes of carrying out its responsibilities in terms of rule 40.1 the investigating committee may:...

40.2.4 by notice in writing require the respondent, or any employee of the respondent, to produce to the investigating committee at a time and place stipulated in the notice, any information relating to the complaint including, but not limited to, files, statements, correspondence, accounting records or other documents which are in the possession of or under the control of the respondent or that other person and which relate to the subject matter of the complaint;...'

- [18] On 17 October 2023 the applicant addressed a letter to the respondent informing him of the Myburg complaint. Included in that letter was a request for a detailed response *'supported, where appropriate, by copies of documents and relevant accounting records'*. The respondent was given a deadline of 24 October 2023, failing which the matter would be referred to an investigating committee for consideration. In a follow-up email of 24 October 2023, Ms Surve confirmed her telephone conversation with the respondent wherein he had agreed to avail himself for the inspection with the investigative committee of the applicant. Ms Surve's email recorded that: *'I confirm that writer requested your urgent availability and you advised that you were in the process of moving premises and would contact the writer with confirmation to arrange a date within the next week'*. On the same date the respondent sent an email to Ms Surve confirming that he was in the process of relocating his office to Dwarskersbos on the West Coast; that all his records, documentation and files were already packed up and in transit; but that he would gladly co-operate with an inspection and investigation and suggested that it be held on 10 November 2023. This was followed by a formal notice dated 7 November 2023 from the applicant to the respondent in terms of rule 40.2.4 in relation to the information and documentation required.
- [19] A mere two days later, on 9 November 2023, the respondent informed the applicant by email that he had decided to close his firm and would respond to various complaints lodged against him. What he also stated in that email is that he had accepted alternative employment; would be returning to the *'corporate sphere'*; and that in order to *'wind up any last strings, I will respond to all the baseless complaints hereunder by end of November 2023 in writing'*. One of those *'baseless complaints'* was that of Mr Myburg as is evident from the applicant's email to the respondent of 7 November 2023 thereunder.
- [20] On 14 November 2023 the applicant informed the respondent by email that notwithstanding his decision to close his firm, he was still required to produce the following information: (a) trust reconciliations together with trust bank statements as at 28 February 2022, 28 February 2023 and 31 October 2023; and (b) the trust creditors' ledgers and all information in respect of the

complaints lodged by Ms Goosen, Mr Myburg, Mr Carpenter and Mr Marais. The respondent simply failed to reply, despite several follow-ups by the applicant. Accordingly during December 2023 the matter was referred to an investigating committee for urgent consideration.

- [21] On 1 and 4 December 2023 the investigating committee recommended that the matter be referred: (a) for adjudication by a disciplinary committee; and (b) to the Western Cape Provincial Council for authorisation of an urgent application to suspend the respondent from practising as an attorney, inclusive of a curatorship order, pending the finalisation of a disciplinary hearing into the matter. Although on the papers before us there is no evidence that a disciplinary hearing ever took place, the Gamble J order was not made conditional upon the respondent being suspended from practice pending the outcome of such a hearing, and in relation to Part B, that order called upon the respondent to show cause why his name should not be struck from the roll of legal practitioners.
- [22] I have already referred to the report of the curator which confirmed that her attempts subsequent to her appointment to contact the respondent both directly and via his attorney to obtain his trust accounting records and client files had been unsuccessful; and that the respondent advised her in April 2024 that his firm had been placed in provisional liquidation.
- [23] The first formal response seemingly received by the applicant from the respondent was his document dated 3 June 2024. The reasons he gave therein for failing to comply with the applicant's rule 40.2.4 requirements were the financial constraints experienced from mid-2023 and the subsequent eviction of him and his family from their home. He stated *'the above mentioned are the reasons for me not attending to enquiries by your office during the last part of 2023 or availing myself to onsite inspections'*. These reasons only need be stated to be rejected, given that they had nothing to do with the respondent's failure to comply with rule 40.2.4.

[24] In addition, contrary to the respondent's earlier communication that he had ceased practising and would be returning to the '*corporate sphere*', he disclosed that he had in fact joined a firm of attorneys in Malmesbury as a '*consulting attorney*' and transferred most of his client files to that firm. It was only as result of the urgent application which served before Gamble J that the firm terminated his employment. He also then attempted to lay blame on another set of attorneys who he allegedly appointed during February 2024 to assist him with the applicant's investigation and – importantly – claimed to have provided that firm with '*records, information and contents of client files to address some of your office's queries. Unfortunately I have learned that [they] failed, alternatively neglected to forward these documents to yourself. Therefor I have decided to correspond with your office directly to expedite the process*'. He made allegations in similar vein in his subsequent explanatory affidavit.

[25] On his own version the respondent misled the applicant when he informed it he was returning to the '*corporate sphere*' in the full knowledge of a pending investigation against him relating to mismanagement of trust funds. He had no intention of doing so at the time. Instead he obtained employment at another firm of attorneys and transferred most of his client files there. There was nothing to prevent him from making his records and files available to the applicant once these reached their destination (from Paarl to Malmesbury) given his representation to the applicant that they were all '*in transit*'. That many of these records were indeed available is borne out by the respondent's subsequent allegations in both his document and explanatory affidavit that they were handed over to another firm of attorneys to make them available to the applicant's attorneys. Also disturbing is the respondent's stance in October/November 2023 that Mr Myburg's complaint (amongst others) was baseless. This all demonstrates that the respondent lacks the required degree of professionalism and integrity to practice as an attorney.

The Prins complaint

[26] Mr Prins lodged a complaint with the applicant in which he stated that on 23 November 2021 and 14 December 2021, he made two deposits into the respondent's trust account of R38 030.50 and R100 000 respectively. The purpose was for the respondent to represent Mr Prins in the High Court in a dispute pertaining to his late father's estate. The first payment was made in settlement of the respondent's invoice of 8 November 2021; the second payment of R100 000 was ostensibly made as a further deposit to the respondent for anticipated future legal services.

[27] On 1 February 2022, 29 March 2022 and 25 July 2022, Mr Prins repeatedly requested the respondent to account to him for work done. On 7 February 2023 the respondent finally reverted to Mr Prins, annexing the statement of account of his local Cape Town correspondent with a balance due of R68 864.94. The respondent advised Mr Prins that he had previously (on 16 January 2022) paid R30 000 to the correspondent from funds which he held in trust (i.e. the R100 000 deposit of 14 December 2021), but that Mr Prins had to make arrangements for payment of the balance of R68 864.94. According to the applicant, that explained what became of the sum of R30 000 but as far as the balance of the deposit is concerned, amounting to R70 000, the respondent had simply failed to account to Mr Prins despite a further email from Mr Prins to him dated 1 June 2023.

[28] In terms of clause 3.8 of the code of conduct for legal practitioners² a legal practitioner shall:

'account faithfully, accurately and timeously for any of their clients' money which comes into their possession, keep such money separate from their own money, and retain such money for so long only as is strictly necessary.'

[29] In terms of clause 13.1 of the code any breach thereof constitutes misconduct. The applicant alleged that despite what happened to the balance

² Published in GN 168, GG 42337 of 29 March 2019.

of the deposit being peculiarly within the respondent's knowledge, he had failed, despite several requests, to account for these funds.

- [30] In his explanatory affidavit the respondent acknowledged that he had failed to account properly to Mr Prins. For the first time he annexed what appears to be a printout of his business account ledger spanning the period 2 November 2021 to 31 May 2022, and a 5 page invoice only dated 9 October 2023 but covering the period 28 October 2021 to 30 May 2022. The respondent also alleged that *'at present, I am unable to fully investigate the matter due to restricted access to Lexpro, which I am currently working to restore with the assistance of the liquidator. Once my access is fully reinstated, I will conduct a thorough review of the matter. If it is found that an accounting error was made, I will take immediate steps to rectify the issue and, if necessary, arrange for any refund owed to Mr Prins. Based on my initial investigation, it appears that the issue was likely a clerical error related to the posting of accounts, and not a case of misappropriation of trust funds.'* The point is that despite the elapse of more than a year, the respondent has only been able to conduct what he refers to as an *'initial investigation'*; and on his version he is currently destitute. Accordingly, this is cold comfort for Mr Prins.

Discussion

- [31] The applicant is the successor-in-title to the erstwhile Cape Law Society, a juristic entity established in terms of s 56(a)(i) of the now repealed Attorneys Act³ ("the Attorneys Act") and which served as the regulatory body for legal practitioners in the Western Cape. In terms of s 114 of the Legal Practice Act⁴ ("the LPA") every attorney and conveyancer admitted by the High Court and authorised to be enrolled as such in terms of the Attorneys Act prior to 1 November 2018 is regarded as having been admitted to practice in terms of the LPA. The applicant is statutorily enjoined, in terms of s 5 of the LPA, to regulate all legal practitioners and to enhance and maintain the integrity and status of the legal profession.

³ No. 56 of 1979.

⁴ fn 1 above.

[32] The respondent was admitted as an attorney of the Northern Cape Division of the High Court on 16 April 2014; was enrolled as an attorney of this court on 8 December 2017 and such with the applicant; and at the time of the complaints giving rise to this application had been practising as sole director of HFG Attorneys Inc since 1 March 2018.

[33] Section 22(1)(d) of the Attorneys Act provided as follows:

‘22. Removal of attorneys from roll. – (1) Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he or she practises—

...

(d) if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney.’

[34] The LPA does not contain a provision similar to s 22(1)(d) of the Attorneys Act. However s 44(1) of the LPA provides that the LPA does not in any way derogate 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 juristic entity.

[35] Accordingly, the underlying principle espoused by s 22(1)(d) of the Attorneys Act, i.e. that a practitioner may be struck from the roll if he or she is no longer “fit and proper” remains applicable. In any event, notwithstanding the repeal of the Attorneys Act, both the common law and s 44 of the LPA vest the Court with the necessary jurisdiction to hear striking applications and to determine if the respondent is a fit and proper person to remain on the roll of attorneys.

[36] The approach to the exercise of the court's discretion in a matter such as this is settled law: see, *inter alia*, *Jasat v Natal Law Society*⁵; and *Malan & Another v Law Society Northern Provinces*.⁶ It is a three-stage enquiry. The first is whether the conduct complained of has been established on a balance of probabilities. This is a factual enquiry. It is clearly established in the present case. The second stage, which is a discretionary evaluation, necessarily calls for the conduct complained of to be weighed against the standard of the profession, which is partly value judgment and partly objective fact. The respondent is guilty of theft of trust funds, misleading his client Mr Myburg as well as the applicant and this court; and is oblivious to his professional duties in administering trust monies as the evidence before us has shown.

[37] The third and final stage of the enquiry is whether the delinquent practitioner should be struck from the roll or suspended. Again, this involves the exercise of a discretion. As was stated by Rogers J in *The Cape Law Society v Du Toit*:⁷

'Prima facie striking off is the appropriate sanction for the protracted dishonesty of which the respondent had been guilty. Suspension reflects a view that the person is likely to be rehabilitated after a period but suspension on its own will seldom bring this about – there will usually be a need for ancillary conditions directed at aiding the process of rehabilitation. It is for the delinquent attorney who seeks the lesser sanction of suspension to place the Court in a position to formulate appropriate conditions (see Malan supra paras [7]-[10]). The respondent has placed nothing before us to suggest that suspension would be appropriate...'

[38] The respondent is indeed still relatively young (he is 36 years old). I will accept in his favour that he suffered from severe depression which he has now taken steps to address. He pleads for a second chance in the form of a

⁵ 2000 (3) SA 44 (SCA).

⁶ 2009 (1) SA 216 (SCA).

⁷ Unreported decision in this Division under case no. 553/16 of 10 February 2017.

suspension and has annexed two references from individuals as to his alleged good character. He also has a family to support. All these are mitigating factors.

[39] However on careful consideration of the evidence I am unpersuaded that the respondent has a true appreciation of his character defects. That being the case, one cannot be reassured that he will in future act in accordance with such an appreciation. He has also not placed anything before the court to enable it to formulate appropriate conditions even if minded to impose a suspension. There is simply not enough to show that a suspension with attendant conditions will have the desired result. At present the respondent is regrettably a threat to any potential client, given his track record of maladministration; but he has also brought the profession into disrepute. It is of the utmost importance that the public is able to rely on the trustworthiness and absolute integrity of members of the legal profession.

[40] **I thus propose the following order:**

- 1. The respondent's name is struck from the rolls of attorneys;**
 - 2. The respondent shall surrender and deliver to the Registrar of this Court his certificate of enrolment as an attorney;**
 - 3. In the event of the respondent failing to comply with the provisions of paragraph 2 above within one (1) week from date of service of this order by email from the applicant's attorney, the Sheriff is authorised and directed to take possession thereof and deliver same to the Registrar; and**
 - 4. The respondent shall pay the costs of this application on the scale as between attorney and client.**
-

J I CLOETE

FORTUIN J

I agree and it is so ordered.

C M FORTUIN

For the applicant: Mr H Von Lieres,

Instructed by: Von Lieres Cooper Barlow (Awiwe Ngoma)

For the respondent: In person