IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 2659/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO THE JUDGES: YES
(3) REVISED.

15/05/2025
DATE.......... SIGNATURE [redacted] ....

In the matter between:

NKONDO PHAMELA CLINTON **Applicant**

and

LIMPOPO PROVINCIAL LEGAL COUNCIL **Respondent**

JUDGMENT

MATHABATHE AJ

Introduction

[1] In this application the applicant (Nkondo Phamela Clinton) seeks reviewing and setting aside the decision of the respondent to have him suspended from practice as a legal practitioner[1]. In paragraph 5 of the founding affidavit the applicant stated that" the purpose of this application is to have certain processes, reports, decisions and/ or resolutions of the applicant and its concomitant committees reviewed and set aside[2]".

[2] The applicant in notice of motion seeks various 18 prayers amongst others, the appointment of Mr. Ashwin Reddy ("Mr. Reddy") as investigator, that investigation conducted by Mr. Reddy and report dated 30 July 2019, be review and set aside. The applicant also seeks reviewing and setting aside the resolution of 24 February 2020 and all steps taken pursuant thereto, reviewing and setting aside the charge sheet dated 4 April 2021, investigation report dated 27 May 2021, charge sheet date 4 April 2022[3].

[3] The LPC is a body corporate with full legal capacity established in terms of s 4 of the Legal Practice Act 28 of 2014 (the LPA). It came into effect on 1 November 2018 and exercised jurisdiction over all legal practitioners.

[4] I must say that this is "broadly" a review application because, when regard is had to the papers, the issues are convoluted by extensive peripheral in-formation which makes it difficult to ascertain precisely what the applicant seeks.

[5] The issue to be determined is whether, applicant has indeed established that he is entitled to the relief that he seeks.

---

[1] Applicant's line 1.1. of Heads of argument

[2] Page 11 para 5 of the notice of motion.

[3] Page 1-3 of the notice of motion.

Factual Background

[6] The applicant was admitted as an attorney on 25 November 2013. He soon thereafter commenced practicing as a sole practitioner for his own account under the name and style of Nkondo Attorneys, in Polokwane (the firm). The Legal Practice Council received complaints against the applicant. The complaints relate inter alia to the misappropriation of monies entrusted to the applicant and failure to account to clients. Legal Practice Council instructed a Chartered Accountant, Mr. Reddy (Reddy), to conduct an inspection of the accounting records and the affairs of the firm and to investigate the complaints.

[7] On 30 July 2019, Mr. Reddy compiled a report of his investigation. In his investigation report page 2 paragraph 3 "*Mr. Nkondo was furnished with a copy of my mandate as well as a letter dated 24 June 2019 which specified the accounting record required for the inspection. I proceeded to explain the reason for the inspection. Mr. Nkondo signed a copy of my mandate as well as a later dated 25 June 2019 as a proof of having received the same*".

[8] Based on Mr. Reddy's investigation report, on 24 February 2020 the LPC took resolution for the suspension of the applicant from practice as a legal practitioner and authorised then chairperson and/or any other member of the Executive Committee to apply and signed necessary document to give effect to the resolution on behalf of the Council,

[9] On 5 May 2020, the LCP launched an urgent application for suspension of the applicant and subsequently on 26 May 2020, the matter was heard before then Judge President Makgoba, the applicant was suspended from practice as attorney pending determination of part B, which still pending before another Court. The court noted that the Court order of the applicant's suspension still stand neither challenge in the proceedings.

[10] It is unnecessary to set out in detail the transgressions which led to the suspension of the applicant as he does not deal with them individually. There were eight

complaints levelled against the applicant. Most dealt with unprofessional conduct and theft of trust money.

[11] On 4 December 2023, the applicant launched this review application before this court. I noted both the notice of motion and the founding affidavit does not address the issue of condonation for late launching review application and the applicant's suspension order dated 26 May 2020.

[12] The central issue in this matter is whether is the applicant contended that attacking the decision of the LPC and its finding in respect of the Reddy's appointed by the respondent, in that Reddy is neither a practicing attorney or advocate and therefore ineligible for appointment as investigator, for the present purpose, therefore unlawful investigation and report.

[13] The applicant's counsel during court proceedings and in their heads of argument rely on Rule 38.4 of the Legal Council Rules, which disqualify Reddy to be appointed as investigator. I disagree with the applicant's counsel; Mr. Reddy was appointed to inspect the accounting records of any trust account practice in order to satisfy itself that the provision of section 86 and 87 of the Act and the accounting rules issued by the Council are being complied with.

<u>Grounds of review considered</u>

[14] Before each ground may be considered, it suffices to reflect on some important legal principles which find application in this matter. <u>It is common cause that this Court is called upon to review a decision of a body statutorily authorised to do what it did. There can be no doubt that the Tribunal is a specialised body laden with certain expertise or specialties. Regulation 3(8)(b) specifically provides that the Tribunal consists of three independent medical practitioners with expertise in the appropriate areas of medicine, appointed by the Registrar. Clearly, a Tribunal is a specialised body, which will require to apply its expertise in the areas of medicine</u>.

[15] The proper approach to be adopted in a review of such bodies was considered in Canadian Union of Public Employees Local 963 v Brunswick Liquor Corporation (CUPE)[4], where the Supreme Court of Canada held that judges should not have the last word on all administrative interpretations of law, but should sometimes intervene only when the agency interpretation is irrational. The CUPE decision was followed by the Supreme Court of Canada in the matter of Dunsmuir v New Brunswick (Dunsmuir)[5]. The Supreme Court of Canada stated that in order to establish whether deference should be accorded and a reasonableness test to be applied, the following factors play a role; (a) putative clause – this is a statutory direction from Parliament or legislature indicating the need for deference; (b) a discrete and special administrative regime in which the decision maker has special expertise; and (c) the nature of the question of law.

[16] The learned Schutz JA in Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another (Phambili)[6] stated the following:

> "*Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical or of a kind in which a court has no particular proficiency.*"

[17] In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others (Bato Star)[7], it was emphasised that the Court should take care not to usurp the functions of administrative agencies. The task of the Court is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution. The Court, in Bato Star, emphasised that a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. At the same time, a Court must not function as a rubber stamp of administrative tribunals. When deference is accorded, it is not a sign of timidity but rather a recognition of the principle of separation of powers. In Trencon Construction (Pty) Limited v Industrial Development Corporation

[4] [1979] 2 SCR 227.
[5] [2008] 1 S.C.R 190.
[6] 2003 (6) SA 407 (SCA) at para 53.
[7] 004 (4) SA 490 (CC).

of South Africa Ltd and Another (Trencon)[8] the approach in Bato Star was endorsed. Additionally, the Court stated that indeed the idea that Courts ought to recognise their own limitations still rings true. Such a stance is informed not only by the deference Courts have to afford an administrator but also by the appreciation that Courts are ordinarily not vested with the skills and expertise required of an administrator. With specific reference to the functions of the Tribunal, medical expertise are required for the Tribunal to either confirm or reject a SIAR. Undoubtedly, a Court is bereft of medical expertise required in the assessment process.

Legal Framework

[14] Rule 50 of the Legal Practice Council rules deal with inspection of accounting records.

14.1 Rule 50.1 deals with authority to conduct inspection

"*Rule 50.1.1 provide that the Board may at any time, itself or through its nominee, or through nominee of the Council acting on behalf of the Board and at its own cost and on its own initiative, inspect the accounting records of any trust account practice in order to satisfy itself that the provision of section 86 and 87 of the Act and the accounting rules issued by the Council are being complied with*".

14.2. Trust accounts

Section 86. *(1) Every legal practitioner referred to in section 84(1) must operate a trust account.*

(2) Every trust account practice must keep a trust account at a bank with which the Fund has made an arrangement as provided for in section 63(1)(g) and must deposit therein, as

[8] 2015 (5) SA 245 (CC).

soon as possible after receipt thereof, money held by such practice on behalf of any person.

(3) A trust account practice may, of its own accord, invest in a separate trust savings account or other interest-bearing account any money which is not immediately required for any particular purpose.

(4) A trust account practice may, on the instructions of any person, open a separate trust savings account or other interest-bearing account for the purpose of investing therein any money deposited in the trust account of that practice, on behalf of such person over which the practice exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity.

(5) Interest accrued on money deposited in terms of this section must, in the case of money deposited in terms of—

(a) subsections (2) and (3), be paid over to the Fund and vests in the Fund; and

(b) subsection (4), be paid over to the person referred to in that subsection: Provided that 5% of the interest accrued on money in terms of this paragraph must be paid over to the Fund and vests in the Fund.

(6) A legal practitioner referred to in section 84(1) may not deposit money in terms of subsection (2), nor invest money in terms of subsections (3) and (4) in accounts held at a bank which is not a party to an arrangement as provided for in section 63(1)(g), unless prior written consent of the Fund has been obtained.

(7) A legal practitioner referred to in section 84(1) must comply with the terms of an arrangement concluded between a bank and the Fund as provided for in section 63(1)(g).

14.3 Accounting

Section 87 (1) <u>*A trust account practice must keep proper accounting records containing particulars and information in respect of—*</u>

(a) <u>*money received and paid on its own account;*</u>

(b) <u>*any money received, held or paid on account of any person;*</u>

(c) <u>*money invested in a trust account or other interest-bearing account referred to in section 86; and*</u>

(d) <u>*any interest on money so invested which is paid over or credited to it.*</u>

(2) (a) The Council or the Board may, itself or through its nominee, at the cost of the Council or the Board, inspect the accounting records of any trust account practice in order to satisfy itself that the provisions of section 86 and subsection (1) are being complied with.

(b) If on an inspection it is found that these provisions have not been complied with, the Council or the Board may write up the accounting records of the trust account practice and recover the costs of the inspection and the writing up of the accounting records from the trust account practice concerned.

(3) For the purposes of subsections (1) and (2), "accounting records" include any record or document kept by or in the custody or under the control of any trust account practice which relates to—

(a) money held in trust;

(b) money invested in terms of section 86(2), (3) or (4) and interest thereon.

(c) any estate of a deceased person or any insolvent estate or any estate placed under curatorship, in respect of which an attorney in the trust account practice is the executor, trustee or curator or which he or she administers on behalf of the executor, trustee or curator; or

(d) the affairs of the trust account practice.

(4) (a) Any money held in the trust account of a trust account practice in respect of which the identity of the owner is unknown or which is unclaimed after one year, must, after the second annual closing of the accounting records of the trust account practice following the date upon which those funds were deposited in the trust account of the trust account practice, be paid over to the Fund by the trust account practice.

(b) Nothing in this subsection deprives the owner of the money contemplated in paragraph (a) of the right to claim from the Fund any portion as he or she may prove an entitlement to.

(5) (a) Despite section 37(2)(a), any attorney or an advocate referred to in section 34(2)(b) or an employee of a trust account practice must, <u>at the request of the Council or the Board, or</u> ***<u>the person authorised thereto by the Council</u>*** *<u>or the Board, produce for inspection a book, document or article which is in the possession, custody or under the control of that legal practitioner or such employee, which book, document or article relates to the trust account practice or former trust account practice of such attorney or advocate: Provided that the Council or the Board or person authorised by the Council or the Board may make copies of such book, document or article and remove the copies from the premises of that attorney, advocate or trust account practice</u>.*

(b) The legal practitioner referred to in paragraph (a) or employee in question may not, subject to the provisions of any other law, refuse to

produce the book, document or article, even though he or she is of the opinion that it contains confidential information belonging to or concerning his or her client.

(6) Any person who performs any function under this section, may not disclose any information which he or she obtained in the performance of such a function except—

(a) for the purposes of an investigation or hearing by a disciplinary body;

(b) to any person authorised thereto by the Council or the Board who of necessity requires it for the performance of his or her functions under this Act;

(c) if he or she is a person who of necessity supplies it in the performance of his or her functions under this Act;

(d) when required to do so by order of a court of law;

(e) at the written request of the Ombud; or

(f) at the written request of the National Prosecuting Authority or any competent authority which requires it for the institution of an investigation with a view to the institution of any criminal prosecution.

14.4 Rule 50.2 deal with Inspections

Rule 50.2.1 <u>The Board may appoint any person in the service of the Board, or any other person qualified person, as an inspector to carry out inspection terms of these rules</u>

Rule 50.2.2 The Board may determine the remuneration to be paid to a person who is appointed in terms of the rule 50.2.1 and who is not the full-time service of the Board.

[15] The submission made by the applicant in relying on Rule 38.4 of the Legal Practice Council Rules is dealing with the investigation committee established by the council, to attack the appointment of Reddy, is misplaced. Reddy is appointed for inspection of accounting records, to do investigation in terms of rule 50 of the Legal Practice Council Rules, of any trust account practice in order to satisfy itself that the provision of section 86 and 87 of the Act and the accounting rules issued by the Council are being complied with. The applicant relied on investigation in terms of 37(2)(a) and (b), that refers to Reddy as investigator is misplaced.

[16] The decision to appoint Reddy to conduct investigation into the applicant's firm accounting records in terms of section 37(2)(a) and (b) does not constitute a reviewable action.

[17] In Carte Blanche Marketing CC and Others v Commissioner for the South African Revenue Service (26244/2015) [2020] ZAGPJHC 202; [2020] 4 All SA 434 (GJ); 2020 (6) SA 463 (GJ); 83 SATC 89 (31 August 2020) at par 66 *"By selecting a person for an audit an investigative process is set in motion, nothing more. The initiation of an investigation does not constitute a decision which is capable of review: simply put, it is not yet ripe for review as it is incomplete".*

[18] The applicant complains that the decision and/or resolution of the respondent to apply for suspension of applicant, taken on 24 February 2020. In paragraph 1.5 of the applicant took issue that the respondent approached court on extreme urgency during May 2020 to give effect to resolution.

[19] According to Reddy's report and suspension application, the applicant conceded amongst others misappropriating the monies he had received from his clients. Money in a trust account is not the attorney's property, and any deposit must be dealt with in accordance with the trust creditor's instruction. When trust monies are paid to an attorney, it is his duty to keep it in his possession and to use it for no other purpose than that authorized by his client. It is imperative that trust monies in the possession of the attorney should be available to his client the instant it becomes payable, and it must be kept in trust if it is not yet payable (**Incorporated *Law Society, Transvaal v Behrman* 1977 (1) SA 907 (T)**).

19.1 Section 43 of the LPA envisages that the Council resolution to institute the legal proceedings should have been pursuant to a disciplinary body informing the council that the disciplinary body is satisfied that the applicant has misappropriated trust monies or is guilty of other serious misconduct. It can be argued that contrary to what is contemplated in section 43 there was no disciplinary hearing against the applicant, and he has not been found guilty of any misconduct.

19.2 Section 44 of the LPA provides that the provisions of the LPA do not derogate in any way from the power of the Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner or a juristic entity

19.3 Incidents of misappropriation of trust funds are always urgent and deserve the earliest attention of the court in order to prevent further unjustified exposure of the Legal Practitioners' Fidelity Fund, which may increase by the hearing of a matter in the normal course.

19.4 In Law Society of the Cape of Good Hope v Budricks [2002] 4 ALL SA 441 (SCA), after surveying the relevant case law, the SCA quoted with approval the decision of King JP (with Foxcroft J) in Cape Law Society v Parker 2000 (1) SA 582 (C) at 587 G-H that "*the principle as it emerges from the cases, is that the utilization of funds in a trust account without the authority of the person on whose behalf the funds are held for purposes which do not benefit him and in circumstances where he has not authorized such use, amounts to misappropriation of trust monies, which in turn is a form of theft.*" The decision of the court in Parker was itself based on precedent of considerable pedigree.

19.5 As early as the 19th century, the courts recognized that the misappropriation of trust money amounts to theft. As Innes CJ concluded in ***Rex v Rorke*** 1915 AD 145 at 157, if an attorney deliberately misappropriated monies entrusted to him for his own use "*the jury was fully justified in concluding that such misappropriation was fraudulent, and that he had committed the crime of theft*" (see also the comments of Chesiwe J in ***Macheka v S* [2019] JOL 458**

22 (FB)). In ***Budricks***, the SCA, reflecting on the interplay between misappropriation and theft, confirmed the proposition that misappropriation and theft in the context of the unauthorized use of trust funds by a legal practitioner amounts to the same thing.

[20] The suspension and removal/striking off application constituted *sui generis* disciplinary proceedings which becomes the Court's proceedings[9]. These proceedings are merely referred to by the LPC to the Court. When the LPC exercises its discretion to refer the alleged offending conduct to the Court for the Court to make a decision on whether the practitioner should be suspended and or removed/strike off as not being a fit and proper person to continue to practice as an attorney, the exercising of such discretion does not constitute a decision within the ambit of administrative action as defined in section 1 of PAJA.

20.1 The Courts, including the Supreme Court of Appeal (SCA), have repeatedly pronounced that *sui generis* disciplinary proceedings are not normal civil proceedings. The LPC (applicant) merely brings the attorney before Court by virtue of a statutory right and informs the Court as to what the attorney has allegedly done and asks the Court to exercise its disciplinary power. It does not institute any action or civil suit against the attorney. It merely submits to the Court facts which it contends constitute unprofessional, dishonourable and unworthy conduct.

[21] A determination as to whether a decision constituted an administrative action is not a simple exercise. Our courts have appreciated that to determine a power or function is of a public nature is a difficult exercise. The Constitutional Court in Association of Regional Magistrates of Southern Africa[10] highlighted that in determining whether a decision is reviewable in terms of power is context specific. It is not a mechanical exercise where in a court would merely ask itself whether public powers being exercised at a public function is being performed. The courts further expressed that

[9] Legal Practice Council v Motlhabani (UM 148/2018) [2020] ZANWHC 76 (7 May 2020) par 25.

[10] Association of Regional Magistrates of Southern Africa vs President of the Republic of South Africa [2013] ZACC 13.

in determining whether particular conduct constitutes administrative action the focus must be on the nature of the power exercised rather than upon the functionary.

[22] At no stage did the LPC discipline, fine or suspend the respondent. The exercising of a discretion to refer the respondent's conduct for the Court's determination of his status as an officer of the Court, does not fall within the definition of administrative action. So too does the exercise of the applicant's discretion not adversely affect the rights of the applicant. It does not have a direct external legal effect.

[23] Another point carried out by Reddy's report was that admission by the applicant that he had not received copies of accounting records from his accountant, Reddy reported that is of the view that the applicant contravened rule 54.6 of the LPC Rules.

23.1 The failure to keep proper accounting records in relation to the trust account is a serious offence. The keeping of proper records underpins the legislature's endeavors to protect the interests of the public. As succinctly stated by Van Winsen J in Cape Law Society v Mda 1971 (2) SA 201 (C) at 204H:

> "*It is not sufficient that trust monies should be misappropriated. It is equally necessary that an attorney's dealings with such monies should be properly recorded… failing that, much of the machinery provided by the Legislature… for the protection of clients, and, indeed, of the (Legal Practitioners Fidelity Fund) is rendered nugatory.*"

<u>Conclusion</u>

[24] Having considered all the grounds pleaded, this court finds no legal basis to interfere with the impugned decision, the applicant pleaded wrong rule, the applicant is not permitted to do so. The applicant has failed to make a proper case for review and setting aside of the respondent's decision.

Order

[25] I accordingly make the following order: -

1. The application for review is dismissed.

2. No order as to costs.

[redacted]

Mathabathe AJ

Acting Judge of the High Court of South Africa

Limpopo Division

Polokwane

Appearances

For the Applicant: Adv M Malowa SC with Adv M.J Mohoto

Instructed by: LETSELA NKONDO ASSOCIATES INC

E-mail: litigation@lestselankondoinc.co.za

For the Respondent: Adv M Rakgogo

Instructed by: AM VILAKAZIN INC ATTORNEYS

E-mail: info@vilakazitauattorneys.com

Dates of Hearing: 17 February 2025

Date of Judgement: 15 May 2025

This judgment was handed down electronically with the consent of and by circulation to the above-mentioned legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 15 May 2025.