IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NO: 864/2024
Not reportable

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL	Applicant
And	
MMATHARI MARY PHOGOJANE	Respondent

Coram: Reddy J et Masike AJ
Heard: 19 September 2025

Delivered: Judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date and time for handing down of the judgment are deemed to be the 2 March 2026 at 14:00.

Summary: Legal Practice Council – Disciplinary process – LPC approaching court before disciplinary hearing concluded – LPC had ample grounds to conclude within its common law authority that respondent's case should be referred to court before disciplinary hearing held – No oversight of trust

account- Not fit and proper to practise – Struck from roll of attorneys – s44 Legal Practice Act 28 of 2014.

ORDER

1. The name of Mmathari Mary Phogojane is struck off the roll of legal practitioners (attorney) of this Court.
2. The Respondent is to surrender and deliver her certificate of enrolment as a legal practitioner to the Registrar of this Court.
3. In the event of the Respondent failing to comply with the terms of this order, as detailed in the previous paragraph, within two (2) weeks from the date of this order, the sheriff of the district in which the certificate is, be and is hereby authorised and directed to take possession of the certificate and to hand it to the Registrar of this Honourable Court.
4. The Respondent is prohibited from handling or operating on her trust accounts.
5. The Director of the Applicant (or their nominee) is appointed as Curator Bonis to administer and control the trust accounts of the Respondent, with the powers usually conferred in such orders, including the power to collect monies due to the trust account and pay claims from trust creditors.
6. The counterapplication is dismissed.
7. The Respondent is ordered to pay the costs of this application on the scale as between attorney and client.

JUDGMENT

Reddy J

Introduction

[1] What engages this Court's attention is an opposed application brought by the South African Legal Practice Council[1] (the LPC) for an order suspending the respondent, Mmathari Mary Phogojane (Phogojane) from practice as a legal practitioner, alternatively, for the removal of her name from the roll of legal practitioners.

Factual background

[2] The salient facts are simply these. Phogojane was admitted as an attorney on 13 August 2013 and commenced practice as a sole practitioner under the name and style of Phogojane Attorneys in Klerksdorp from 15 October 2014.

[3] The LPC avers various acts of misconduct, professional negligence, and statutory non-compliance against Phogojane. These allegations are set out in fine detail in the founding papers and summarised in the heads of argument filed by both parties. It is well established that heads of argument are for the benefit of the court, and we express our gratitude to the parties for same.

[1] The South African Legal Practice Council is a national statutory body , established in terms of s4 of the Legal Practice Act 28 of 2014.

The three-stage process

[4] Applications for the suspension or removal from the roll require a three-stage enquiry. First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual enquiry. Second, it must consider whether the person concerned is 'in the discretion of the Court', not a fit and proper person to continue to practise. This involves weighing the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. And third, the court must enquire whether, in all the circumstances, the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice.[2]

The role of the LPC

[5] The LPC approaches this Court in its capacity as the *custos morum* of the legal profession. Its function is to place facts concerning legal practitioners falling foul of the required conduct for consideration by the LPC, which may culminate in the hearing being an enquiry into the legal practitioner's fitness to remain on the roll of practitioners.[3] In short, the LPC acts as an *amicus curiae*.[4] Given the special supervisory and protective role that the LPC is entrusted with, it acts not as an ordinary litigant but as a guardian of the profession, placing facts before the court so that it may exercise its disciplinary powers.

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[2] . *Jasat v Natal Law Society* 2000 (3) SA 44, [2000] 2 All SA 310 (SCA); *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216; [2009] 1 All SA 133 (SCA) at para 10)

[3] *Law Society of the Northern Provinces v Le Roux* 2012 (4) SA 500 (GNP) at 502 at E-F

[4] Ibid

[6] In view of the role of the LPC, it is well to remember the words of Ponnan JA in *General Council of the Bar of South Africa v Geach and Others (Geach)*[5] when underscoring the responsibilities of a practitioner:

> 'After all they are the beneficiaries of a rich heritage and the mantle of responsibility that they bear as the protectors of our hard-won freedoms is without parallel. As officers of our courts lawyers play a vital role in upholding the Constitution and ensuring that our system of justice is both efficient and effective. It therefore stands to reason that absolute personal integrity and scrupulous honesty are demanded of each of them. It follows that generally a practitioner who is found to be dishonest should in the absence of exceptional circumstances expect to have his name struck from the roll.'

<u>Phogojane's points in limine</u>

[7] Phogojane raised several points *in limine* and defences central to these; she honed in on procedural fairness and her financial circumstances. I turn to consider these.

<u>Procedural Fairness</u>

[8] Phogojane claims that this application is premature. Phogojane maintains that she was entitled to a formal disciplinary enquiry by the LPC preceding this application being launched. This was predicated primarily on the absence of her being afforded proper access to a trite principle of natural justice in the form of the *audi alteram partem***.** This Phogojane advances would have provided a platform for her version to be ventilated.

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[5] [2013] 1 All SA 393 (SCA) para 87.

[9] This contention is devoid of any merit. Our jurisprudence is replete with precedents that underscore this conclusion. To this end, our courts have consistently asserted that the absence of a concluded disciplinary enquiry does not bar the court from hearing a striking off application.

[10] The LPC is not legally obliged to hold a formal disciplinary enquiry before approaching the court, particularly where the misconduct is serious and the facts are clear. The Court's statutory and inherent powers to discipline practitioners cannot be ousted merely because a prior administrative tribunal hearing has not been held.

[11] In *South African Legal Practice Council v Berkowitz and Another*[6] the following was posited as regards the need for the LPC to hold a disciplinary enquiry:

> '[6] In this light, in the ordinary course of events, a disciplinary matter concerning a member of the LPC will reach this court only once a full disciplinary hearing before the LPC has been concluded. The LPA allows two deviations from this usual sequence:
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> [6.1] Section 43 authorises any 'disciplinary body' of the LPC, if 'satisfied that a legal practitioner has misappropriate trust monies or is guilty of other serious misconduct' to refer the matter to the LPC to approach this court urgently for the practitioner to be temporarily suspended or for other interim relief. It is settled that an approach to court in terms of section 43 may occur before a disciplinary hearing has been held by the LPC. In such cases, the practice is for the ensuing process before this court then to replace the LPC's disciplinary process and for any application for striking the practitioner from the roll to be

[6] (35116/2022) [2024] ZAGPPHC 836 (15 August 2024).

decided by this court without a prior disciplinary hearing or decision of a disciplinary committee of the LPC.

[6.2] Section 44 of the LPA determines that:

(1) The provisions of this Act [the LPA] 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.

(2) Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or juristic entity or in connection with any decision of a disciplinary body, the Ombud or the Council in connection with such complaint or charge.

Section 44(1) makes it clear that the inherent power of this court to decide disciplinary matters concerning a legal practitioner, which derives from its position as ultimate *custos morum* of the legal profession persists in full, despite enactment of the disciplinary powers of the LPC in the LPA. It also confirms that the concomitant common law right of anyone involved with a disciplinary matter concerning a legal practitioner to approach this court for relief, likewise, remains in place. Although probably less often, section 44 has also, like section 43, been relied on by the LPC to approach this court with applications for suspension and striking from the roll, where no disciplinary hearing of the LPC has as yet taken place. In those cases, this court has accepted the LPC's approach and decided the applications.

[7] In this matter the LPC, although it had conducted a disciplinary investigation into Berkowitz' affairs, had not yet proceeded with a disciplinary hearing before a disciplinary committee. Instead, it relied on its

residual common law authority to approach this court directly concerning misconduct of a legal practitioner, recognised in section 44 of the LPA, before any such disciplinary hearing had been conducted."

[12] Section 44 of the Legal Practice Act, 28 of 2014 (the Act), properly analysed, appears to vitiate any claim of procedural unfairness. It reads that the provisions of the Act do not derogate 'in any way' from this court's inherent power; and that 'nothing' in the Act precludes any natural or juristic person with an interest in a disciplinary matter concerning a legal practitioner from approaching this court for relief.

[13] In *Wild v Legal Practice Council and Others*[7] the following was held:

[79] ... There is ... no indication that the common law powers of the Courts to regulate their own process and to recognise who may bring disciplinary proceedings before them, have been altered. One does not find a single provision in the LPA that clearly and unequivocally indicates an intention to alter the common law or to affect the existing status of any of the voluntary associations in the legal profession.

[80] On the contrary, there is a clear and explicit indication in the LPA that it assumes the continuance or retention of the common law in this regard. Section 44(1) provides that *"the 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. Subsection (2) makes it clear that *"nothing contained in this Act"* precludes a juristic entity ... from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner [S]ection 44 properly analysed, appear[s] to be a ranking clause, and not merely a linking clause. It

[7] (31130/2019) [2023] ZAGPPHC 1762; 2023 (5) SA 612 (GP) (24 April 2023) at para [79] to [80].

ranks above all the other provisions in the Act. I find it impossible to reconcile section 44(1) and (2) with an intention to interfere with the common law powers of the High Court The common law in this regard seems to be acknowledged by statute, rather [than] to alter it.'

[14] The LPC has the authority to proceed against a legal practitioner in this Court in a misconduct matter where it has neither commenced nor concluded a formal disciplinary hearing of its own.[8]

[15] It would be judicious for the purposes of completeness to identify instances where the LPC may, in prescribed circumstances, bypass an enquiry. This is by no means a numerus clausus. For present purposes, three broad categories can be identified. First, in urgent matters. This category would be defined by urgency. Included herein would be matters where trust funds are at risk or the practitioner's conduct poses an immediate threat to the public. Second, would be the instances where the evidence is clear and unequivocal. The qualifying criteria would be where the facts are largely undisputed or have been established in other proceedings (e.g., a criminal conviction for fraud). Third, would be matters where the LPC would have to exercise its inherent power, where the conduct of a practitioner is so egregious that the LPC believes the internal sanctions (which are limited) are insufficient and only a court ordered striking off is appropriate.

[16] To conclude, there is no merit in the points *in limine* raised and the counterapplication, which serves to embellish and regurgitate same. Resultantly, these should be collectively dismissed.

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[8] *South African Legal Practice Council v Mokhele (2024), Solomon v Law Society of the Cape of Good Hope (1934).*

[17] I now shift focus to the substantive application.

The Offending Conduct

[18] Extrapolating from the papers the material facts that underscore the LPC's relief is as follows:

Failure to submit Audit Reports and Practising without a Fidelity Fund Certificate (FFC)

[19] It is unassailable that Phogojane failed to lodge her audit reports for the relevant periods as required by Rule 54.24 of the Legal Practice Council Rules, (the Rules). The failure to submit the audit reports for the period ending February 2021 and February 2022 caused the LPC not to issue Phogojane with an FFC for the years commencing January 2022 and January 2023. Belatedly, Phogojane submitted the exemption applications to the LPC in respect of the financial years ending February 2021, February 2022 and February 2023. On 18 July 2023, the exemption applications were approved.

[20] What then stands over is whether Phogojane practised without an FFC in contravention of sections 84(1), 84(2), and 98(3)(c) of the Act. Phogojane vehemently denies that she is a practising attorney; her *ipse dixit* contradicts this denial, leading to the implosion of her contention. To this end, Phogojane, in her answering affidavit, deposed to on 25 June 2024, posits that she is a registered legal practitioner practising under the name and style of MM Phogojane Attorneys. Our courts have repeatedly underscored the precision and care that is obligatory in the drafting of

affidavits for the dual purpose that affidavits serve. Any attempt to circumvent this admission is simply disingenuous. Nothing further needs to be said on this score. There is no merit in this contention. It follows that an FFC was peremptory, and Phogojane was not in possession of same.

Non-payment of Annual Fees

[21] It is indisputable that Phogojane is in arrears regarding her annual membership fees for the years 2018 to 2023, totalling R23,476.00.

Complaints regarding Trust Funds

[22] Two severe complaints regarding the mishandling of trust funds were placed before this Court. I shift focus to deal with each disjunctively.

The Ramasike-Mahuma Complaint

[23] Phogojane admits to receiving R327,469.00 from a client, Ms. Reginah Ramasike-Mahuma (Mahuma), regarding the administration of a deceased estate. It is not in dispute that this amount was paid over to Phogojane.

[24] Phogojane, posits the following as regards this complaint. In March 2018, Mahuma contacted Phogojane regarding a deceased estate matter. A meeting took place on April 22, 2018, at Clearwater Mall in Roodepoort. On April 23, 2018, Mahuma paid R10,000.00 for consultation fees, file opening, and legal advice. Due to a heavy workload and the urgency of the case, specifically that a family member was allegedly selling deceased

assets, Phogojane asked a colleague, Yandisi Jamjam Mahlangatha (Mahlangatha) to assist with the matter.

[25] Throughout April and May 2018, Phogojane noticed multiple payment notifications from Mahuma. Mahlangatha claimed these funds were for "urgent applications," drafting heads of argument, and appointing correspondents. Mahlangatha insisted on using the firm's bank card to withdraw cash directly rather than receiving transfers, claiming she had too many debit orders on her own account.

[26] On 10 December 2018, while attending to a separate bail matter at the Witbank Police Station, Phogojane was arrested for fraud. Police informed her that she was being charged with taking client money without providing services and that she was allegedly working with Mahlangatha.

[27] Following her release on bail, Phogojane investigated Mahlangatha and discovered she was not a qualified lawyer. Phogojane learned that Mahlangatha was allegedly on the run for defrauding another individual of R1,000,000 in Mamelodi. Phogojane states she was not shocked by Mahuma’s complaint once she realized Mahlangatha had defrauded several people using the firm's name.

[28] Phogojane expressed regret for the situation and committed to refunding Mahuma. As of the date of the affidavit, negotiations were underway to apologize to and pay Mahuma. Phogojane has stated that she "accepts, regrets, apologizes, and takes full responsibility and accountability to refund the complainant".

[29] Phogojane's self-standing response brings into sharp focus a multiplicity of contraventions of the Act and the Rules. The management of trust accounts is governed by strict fiduciary duties under the Act and the Rules. Section 84(1) of the Act provides that every attorney who practises for their own account must be in possession of an FFC. What is evident from this complaint is that Phogojane has made an informed decision not to be candid in her opposition, this is best illustrated by the following extract from the founding affidavit, which reads:

> '18.3 Attached to the complaint is proof of payments made to the Respondent's First National Bank, account number 6[...] between the period 23 April 2018 and June 2018, totalling an amount of R 327 469.00. This account number does not correspond with the firm's trust account number as reflected on the Applicant's records.'

[30] Phogojane's retort reads:

> '27.4. Save as to admit the fact that the Respondent received the sum of R327 469.00 (Three Hundred and twenty-seven thousand four hundred and sixty-nine rand) from the client, the balance of the averments contained in this paragraph are denied, where the Respondent puts the Applicant to the proof thereof.'

[31] In reply the LPC posits:

> '24.1 The Applicant notes that the Respondent is denying that the account number in which the money was received does not correspond with the firm's trust account number as reflected on the Applicant's records, however, the Respondent fails to furnish proof to the contrary.'

[32] On a benevolent reading of Phogojane's responses, the sum of R327, 469.00 was deposited into the firm's trust account. That being said, Phogojane provides no primary evidence regarding this purported

arrangement with Mahlangatha in respect of the drawing of cash from her trust account. Moreover, it is inexplicable how such a large sum was withdrawn from an account of which Mahlangatha was not an account holder. Critically, Phogojane's affidavit makes no mention of the total amount withdrawn, how and when it occurred. Strategically, no proof was attached to her affidavit as regards the sequence of withdrawals, and she would confirm the account details. Significantly, Phogojane admits to the following:

> "I then believed her and she requested her share and I gave her the business card to withdraw her share as agreed. And she further said that the client promised to make further payments because she needs to prepare heads of argument and other applications."

[33] What is conspicuous from this portion of Phogojane's affidavit of 18 June 2021, is that there is no full disclosure as to how the R327 469.00 was to be shared. It is inconceivable that Phogojane expected the LPC to provide a historical statement for this amount. To my mind, the conclusion is inescapable that Phogojane has demonstrated a pervasive lack of candour toward the Court and intentionally sought sanctuary under the legal phrase of 'where the Respondent puts the Applicant to the proof thereof.' It was simply dishonest. This litigation strategy goes against the grain of rehabilitation and remorse.

[34] Section 86 of the Act specifically mandates the maintenance of trust accounts for client funds. It follows that Phogojane permitting Mahlangatha to use the practice's bank card or accounts is legally impermissible and constitutes a serious professional breach. It bears accentuating that legal practitioners have a personal, non-delegable duty

to account for all funds received from clients. They remain legally responsible for financial oversight. It is indisputable that legal oversight is obligatory in respect of trust accounts. The setting up of a trust account has a particular objective. These accounts are intended for secure transfers that leave a clear audit trail. It is trite that the failure to keep proper accounting records is a serious form of misconduct. Using a card for cash withdrawals bypasses internal controls designed to prevent the misappropriation of funds. It is unassailable that the duty of a practitioner is to act with the utmost good faith regarding trust money.

[35] Even if the practitioner did not personally steal the money, "culpable ignorance" or gross negligence in supervising accounts is grounds for the LPC to seek suspension or a "striking off" from the roll. [9]

<u>The Mabyane Complaint</u>

[36] On 27 November 2017, Miss Naome Ester Mabyane (Mabyane) consulted with Phogojane and instructed her to assist in divorce proceedings. It is common cause that a sum of R47,698.20 was deposited into the trust account of Phogojane for this purpose. Mabyane asserts that Phogojane failed to execute her mandate and became evasive. Several communiqués were transmitted to Phogojane, which did not trigger a response.

[37] In correspondence dated 15 October 2019 and 8 November 2019, the LPC informed Phogojane that disciplinary steps were to be instituted on the recommendation of the Investigating Committee. Given this conduct, the LPC claims that Phogojane inter alia failed to (i) maintain the highest

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[9] *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA).

standard of honesty and integrity, (ii) account faithfully, accurately and timeously, for Mabyane's funds and to retain same independently for as long as is strictly required, (iii) execute Mabyane's instruction in a competent and timely manner and not to accept further instructions well knowing that same will not be executed in a standard that is acceptable, (iv) provide Mabyane with a written account setting out details of all amounts received in connection with the matter, appropriately explained, particulars of disbursements and related payments, fees and other charges debited or raised, where any fee represents an agreed fee, a statement that such fee was agreed upon and the amount so agreed and the amount due or owed by the client.

[38] Phogojane retorts that her electronic mail was down and she had to personally visit the Offices of the LPC to collect the letters of complaints. Phogojane denies that she failed to maintain the highest standard of honesty and integrity. Phogojane, admits having not accounted faithfully, accurately, and timeously for the funds deposited by Mabyane. She disputes that she neglected to execute Mabyane's instructions in a competent and timely manner. Phogojane posits that the Mabyane matter was also handed over to Mahlangatha as she had an urgent matter to deal with. Phogojane places store on her affidavit dated 18 June 2021, which is of no relevance and significance as I will demonstrate.

[39] Insofar as the availability of written accounts, Phogojane claims that a statement of account is available on request, and there is no indication that such a request was made by Mabyane.

[40] Phogojane is nothing other than a recalcitrant litigant. A common thread that runs through her counter application is the failure of the LPC to have

afforded her a basic tenet of natural justice, to be afforded the right to *audi alteram partem*. Surprisingly, when presented with the platform before this Court to exercise this right, Phogojane recalibrates her approach and contends that the statement of account was not requested. This is simply disingenuous. It serves no purpose in this live controversy not to disclose all relevant historical accounting information to ventilate that a proper audit trail is available. It was expected of Phogojane to have made a frank and full disclosure. In the final analysis, these records fall within Phogojane's implicit possession and knowledge. The failure to disclose same speaks volumes.

[41] In respect of the substance of Mabyane’s complaint, Phogojane proffered no explanation. Her reliance on the affidavit of 18 June 2021 is misplaced. The body of this affidavit refers with specificity to the complaint lodged by Mahuma. It has no bearing on the Mabyane complaint. What Phogojane engaged in was that, instead of confronting the allegation, she opted to accuse the accuser.

[42] Cutting aside the verbiage, Phogojane intentionally elected not to offer an explanation as regards Mabyane’s complaint. Her collective conduct falls well short of the threshold of what is required of a legal practitioner in our legal ecosystem. To conclude on the first part of the enquiry, the offending conduct of Phogojane has been established on a preponderance of probabilities.

The undefined standard of a fit and proper person

[43] I then move to consider if Phogojane is in the discretion of this Court is not a fit and proper person to continue to practise. Our jurisprudence

commands that for admission into the legal profession requires an applicant to be a fit and proper person. The phraseology fit and proper is not statutorily defined. It follows that judicial precedent through case law and the courts' value judgments form the fulcrum of this term. The Act expressly requires of applicants for admission to prove they are fit and proper.

[44] In *Jasat v Natal Law Society*[10] the court held:

> '[12] This Court has in the past stressed that the profession of an attorney is an honourable one and as such demands "complete honesty, reliability and integrity from its members". (*Vassen v Law Society of the Cape of Good Hope, supra*, at 538 G). Similar statements have been made with regard to advocates. (See for eg *Kekana v Society of Advocates of South Africa, supra*, at 655 G - H.) But this does not mean that any untruthfulness however trifling will render an attorney unfit to practise and liable to be struck off the roll. As important as the requirements of honesty, reliability and integrity are, each case must undoubtedly be examined in the light of its own facts and circumstances.'

[45] In *General Council of the Bar of South Africa v Jiba and Others*[11] *it was* said that:

> '[1] The proper administration of justice may not be achieved and justice itself may not be served unless truthful facts are placed before the courts. Legal practitioners are a vital part of our system of justice. Their important role includes preventing false evidence from being presented at court hearings, and by so doing they protect judicial adjudication of disputes from contamination by fabricated facts. As a result, the law demands from every practitioner absolute personal integrity and scrupulous honesty.

[10] 2000 (3) SA 44 (SCA) at paragraph 12.
[11] [2019] ZACC 23.

[2] One of the reasons for holding legal practitioners to this high ethical and moral standard was furnished on these terms in *Swain*:

"[I]t is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court." (Footnotes omitted)'

[46] The sentiments articulated in judicial authority serves a dual purpose. First it serves as a yardstick for the admission of practitioners and second it is benchmark for the continuous assessment of professional suitability of practitioners.

Assessment of Fit and Proper Standard

[47] Phogojane's conduct is simply egregious. It falls gravely shy of the lofty standards advanced in *Jiba* and similar precedents. Practising without an FFC poses a severe risk to the public. In *S v Serache and Others*[12] the importance of FFC was expressed as follows:

'[24] There is no *lis,* that Koloane met the threshold of the proscribed definition of a legal practitioner. There is no underscoring the legal synergy that co-exists between s24 (1) and s84 of the LPA. Section 84(1) provides that "(e)very attorney…must be in possession of a Fidelity Fund certificate." Section 93(8)(c) of the LPA speaks to the criminal liability for the contravention of section 84(1) of the LPA. It is common cause that: (i) Kolaone had last been issued with a FFC on 3 April 2014 and; (ii) he represented the accused for the duration of the trial.

[12] (Review) (HC12/2025) [2025] ZANWHC 75; 2025 (2) SACR 61 (NWM) (6 May 2025.

[25] The purpose of a FFC is to afford the public protection against pecuniary loss due to possible misappropriation of trust funds. It bears re-iterating that Koloane was last issued with a FFC on 3 April 2014. The criminal trial that is subject to scrutiny within the purview of section 22(1)(c) of the SCA commenced on 31 January 2025…...

[45] The Fidelity Fund for legal representatives in South Africa, the Legal Practitioners Fidelity Fund (LPFF), plays a crucial role in safeguarding the public from financial losses caused by the misconduct of legal practitioners.

[46] Established under the Legal Practice Act 28 of 2014 (the Legal Practice Act), this fund acts as a financial safety net, reimbursing clients who suffer pecuniary loss due to the theft of money or property entrusted to a legal practitioner.

[47] This protection applies in specific scenarios: when the theft occurs in the course of the practitioner's legal practice; when the practitioner acts as an executor or administrator in a deceased estate; or when serving as a trustee in an insolvent estate. By compensating clients for losses resulting from dishonest actions—such as the misappropriation of trust funds—the LPFF fosters public confidence in the legal profession. It ensures that individuals can engage legal services, whether from attorneys or advocates holding a FFC, with the assurance that they are protected against financial wrongdoing.' (Footnotes omitted)'

[48] The failure to exercise proper oversight over a trust account constitutes a material breach of a legal practitioner's highest duty. In *Jäck v Du Plessis*[13] the following salutary peremptory guidelines were provided as regards a practitioner's trust account:

[13] [2009] JOL 24391 (WCC).

‘[9] It was common cause that the monies in question were deposited in the defendant's Trust Account by the plaintiff. Section 78(4) of the Attorneys Act expressly provides that attorneys shall keep proper records containing the particulars and information of any money received, held or paid into an attorney's Trust Account. The defendant does not state in her answering affidavit whose name the deposit was reflected in her Trust Account. The inference is irresistible that it must have been reflected in the plaintiff's name, as he deposited the money into her Trust Account.

[10] In *Barlett & another v Hirschowitz Flionis* [2005] 2 All SA 567 (W) [also reported at [2005] JOL 14311 (W) - Ed] Schwartzman J, referred to the expert evidence led in that case in regard to the duties of an attorney in so far as they relate to trust accounts at 579g:

"[36] Faris has practised as an accountant for 42 years. Since 1972 he has conducted forensic audits on behalf of the Transvaal Law Society. For the past 16 years he has acted as a consultant to examiners of the Law Society and has assisted in setting the bookkeeping admission examination for candidate attorneys. His expertise was not in issue. In his expert summary, and in evidence, he dealt in detail with an attorney's duties in relation to his or her trust account. He confirmed the following extracts from his summary:

36.1 'The conduct and duties of an attorney in relation to his trust account is governed and regulated by Statute, the rules of the Law Society, the purpose of the account and the generally accepted principles of general practice management.'

36.2 'Subject to a limitation that does not apply in this action, money in a trust account is not, by Statute, the property of the attorney. For this reason, an especially high standard of care is expected of practising attorneys in regard to the opening, keeping and management of a trust account.'

36.3 'Money in a trust account may be that of a client or third party. It is common practice that, without notice, a person other than a client may pay money into an attorney's trust account. It also happens that funds may be deposited into an attorney's trust account where the actual depositor's name is not disclosed. This can happen when the deposit is made electronically or when payment is made by a bank cheque or, as in this case, by way of an interbank clearance voucher, and the deposit slip does not identify the person paying in the money.'

36.4 '*When money is deposited into a trust account it should be credited to the client*'*s account and dealt with strictly in accordance with the client*'*s instructions*. When the identity of the client is not known or the purpose of the deposit is not known, the deposit should be credited to a Trust Suspense account until the identity of the trust creditor is established, whereafter the money should be dealt with in accordance with the trust creditor's instructions.'

36.5 'In terms of the Law Society Rule 69.5, it is an attorney's duty to ensure that all withdrawals from the trust are only made for or on behalf of the trust creditor.'

36.6 'Attorneys should be alert to the possibility that their trust account is being used for money laundering purposes. This is governed by Statute, but was not so governed in 1999.'"

[11] At 585 (she) the learned Judge stated the following:

"[52] Money deposited into an attorney's trust account is not his or her property - see section 78(7) of the Attorneys Act 53 of 1979. Faris gave an uncontradicted account of the duties and responsibilities of an attorney in relation to money in a trust account (see paragraph [36] hereof). *In relation to such money, an attorney must deal with it strictly in accordance with the client*'*s instructions*" (my emphasis).

[12] In *Hirschowitz Flionis v Bartless & another* 2006 (3) SA 575 (SCA) Howie P stated the following at 589C-F:

"[30] On the contrary, there are a number of considerations which, in my opinion, compel the conclusion that Flionis was indeed subject to the legal duty under discussion. First and foremost, the appellant, as recipient, was a firm of practising attorneys. As such, it proclaimed to the public that it possessed the expertise and trustworthiness to deal with trust money reasonably and responsibly. Second, Bartlett relied on that and particularly on the fact that the money would be in the appellant's trust account until he instructed otherwise. Faris' exposition of an attorney's obligations improperly managing a trust account demonstrates that Bartlett's reliance on the money being safe in a trust account was reasonable, even if, as I shall point out, his failure to communicate with Flionis was not. Third, even where an attorney discovers an anonymous and unexplained deposit, it requires minimal management to transfer the money to a trust suspense account. It is then a task of no difficulty to trace the depositor with the aid of the firm's own bank. After that, one need merely leave the money where it is until receipt of instructions by or on behalf of the depositor or the person for whose benefit the deposit was made. Fourth, unreasonable conduct that might put the money at risk would, as a reasonable foreseeability, cause loss to the depositor or beneficiary. The legal convictions of the community would undoubtedly clamour for liability to exist in these circumstances."

[13] In *Du Preez & others v Zwiegers* 2008 (4) SA 627 (SCA) [also reported at [2008] JOL 21577 (SCA) - Ed], the Supreme Court of Appeal again dealt with the question of attorney's trust accounts and the duty of attorneys in this regard. At 632A-F the learned President stated the following:

"[19] I find it difficult to see what possible scope there is for the contention that there was no legal duty in this situation. An attorney is under a legal duty to deal with trust account money in such a way that loss is not negligently caused, *inter alia*, to the depositor. That was decided in *Hirschowitz Flionis v Bartlett and Another*. No acceptable reasons have been advanced which take this case outside the scope of what was there found in regard to unlawfulness.

[20] The Court below did not make any express finding that the respondent had been negligent but there are indications in the judgment that the court considered his failure to make certain enquiries to have been remiss. What the court went on to say, however, would mean the same even if the respondent had been found negligent. *What the court in effect held was that as long as a depositor is silent as to what is to be done with the money deposited in an attorney*'*s trust account the latter can*, *as long as there are specific instructions from the attorney*'*s client as to that money*, *negligently*, *but still lawfully, ignore what the depositor might want done with the money*. *The proposition*'*s mere articulation warrants its rejection*.

[21] It was also wrong, in my view, to hold, as a corollary, that it was up to the depositor to look after its own interests. *Vis-à-vis* the depositor the attorney is not just another member of the public who is entitled to expect fellow citizens to take reasonable care to protect their own interests. *An attorney into whose trust account money is paid owes a duty to the depositor even if the depositor is not existing client of the practice*. *That duty*, *at the risk of repetition*, *is to deal with the money in such a way that harm is not negligently caused to the depositor among others*" (my emphasis).

[49] In the present matter, Phogojane's failure to account accurately and timeously to trust creditors despite receiving the funds points inevitably to misappropriation, which is a dishonest act and a far cry from negligence. Moreover, Phogojane has intentionally failed to take this Court completely into her confidence in respect of trust account activity. Moreover, Phogojane practised without a FFC.

[50] In *General Council of the Bar of South Africa v Jiba and Others*[14], the apex court and Supreme Court of Appeal (SCA) accentuated that legal

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14 Ibid.

practitioners must be individuals of absolute personal integrity and scrupulous honesty. An assessment of Phogojane's leads to the direct conclusion that she has dismissably failed to meet this standard.

[51] In view of the totality of the infractions, I find that Phogojane is no longer a fit and proper person to practise as a legal practitioner. Her collective conduct is nothing other than unprofessional, dishonest, and unworthy.

Sanction

[52] These leads neatly into the final jurisdictional requirement as set out in *Jasat*. The LPC seeks the removal of Phogojane's name from the roll. Phogojane counters by contending that suspension would be a more appropriate sanction.

[53] Phogojane claims that she should be allowed to lead evidence of rehabilitation and notes that criminal proceedings for fraud were finalized without a guilty finding. The standard of proof in disciplinary proceedings is a balance of probabilities, distinct from the criminal standard. Phogojane's own admission regarding the outstanding refund of R327,469.00 serves as sufficient proof of misconduct regarding trust funds. The shrouded secrecy surrounding the Mabyane complaint bolsters the latter finding. Moreover, no proper accounting records as regards trust creditors have been ventilated.

[54] Phogojane pleads exceptional financial and personal circumstances. While personal circumstances are relevant, they cannot override the need to protect the public. Financial hardship cannot serve as a valid defence

for the misappropriation of trust funds or non-compliance with statutory auditing requirements.

[55] In *Summerley v Law Society of the Northern Provinces*[15], the SCA held that where dishonesty is involved, removal from the roll is generally the appropriate sanction. Suspension is typically reserved for cases of negligence or where there is a reasonable prospect of rehabilitation that does not endanger the public. The misappropriation of trust funds is, barring exceptional circumstances, a defect of character that is incompatible with the privilege of remaining on the roll. There are no exceptional circumstances present here.

[56] Consequently, the only appropriate sanction is the removal of Phogojane's name from the roll of legal practitioners. It follows that the LPC had adequate grounds upon which to conclude, within its residual common law authority to do so, that Phogojane's case should be referred to court before a disciplinary hearing had been held.

Costs

[57] The general rule in matters of this kind is that the LPC is entitled to its costs. Having found that Phogojane conduct has been egregious, a punitive order of costs is appropriate.[16] Furthermore, it should be emphasized that the LPC should not be out of pocket for simply fulfilling a duty as *custos morum*.

Order

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[15] [2006] ZASCA 59

[16] *Law Society of Northern Provinces v Dube* (874/2011) 2012 ZASCA paragraph 33.

[58] Resultantly, I make following order is made:

1. The name of Mmathari Mary Phogojane is struck off the roll of legal practitioners (attorneys) of this Court.

2. The Respondent is to surrender and deliver her certificate of enrolment as a legal practitioner to the Registrar of this Court.

3. In the event of the Respondent failing to comply with the terms of this order, as detailed in the previous paragraph, within two (2) weeks from the date of this order, the sheriff of the district in which the certificate is, be and is hereby authorised and directed to take possession of the certificate and to hand it to the Registrar of this Honourable Court.

4. The Respondent is prohibited from handling or operating on her trust accounts.

5. The Director of the Applicant (or their nominee) is appointed as Curator Bonis to administer and control the trust accounts of the Respondent, with the powers usually conferred in such orders, including the power to collect monies due to the trust account and pay claims from trust creditors.

6. The counterapplication is dismissed.

7. The Respondent is ordered to pay the costs of this application on the scale as between attorney and client.

A REDDY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

I agree

T MASIKE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Appearances:

For the applicant :	Advocate G Seleka
Instructed by:	Damons Margadie Richardson Attorneys C/o Maponya Attorneys Mahikeng
For the respondent:	Ms Y Omar
Instructed by:	M H P Malesa Attorneys C/o R S Tau Attorneys Mahikeng