

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 40561/2018

Date:

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	<input checked="" type="checkbox"/>
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	<input checked="" type="checkbox"/>
(3) REVISED	<input type="checkbox"/>
15 MAY 2019	
DATE	SIGNATURE

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

APPLICANT

AND

MATOME ALPHEUS MAMOROBELA

1ST RESPONDENT

M A MAMOROBELA INCORPORATED

2ND RESPONDENT

(Trading as MAMOROBELA INCORPORATED
ATTORNEYS)

JUDGMENT

TOLMAY, J:

[1] INTRODUCTION

This is an application for the suspension of the First Respondent from practice as a legal practitioner, alternatively, for the removal of the First Respondent's name from the roll of legal practitioners.

THE RESPONDENTS

[2] The First Respondent was admitted and enrolled as an attorney of this Honourable Court on 10 May 2012. He was a non-practising member until 04 September 2012 and commenced practising as a sole director at the firm M A Mamorobela Incorporated (Second Respondent) with effect from 07 August 2014.

[3] The name of the First Respondent is still on the roll of legal practitioners of this Court.

SERVICE OF THE APPLICATION

[4] On 20 June 2018, the application was served on the Respondents.

- [5] On 24 July 2018, the Respondents opposed the application, but failed to file an answering affidavit. On 21 August 2018, the Respondents filed a Notice of Change of Address. It is stated that on 28 August 2018, the Applicant's attorneys attempted to effect service of the Notice of Set Down on the Respondents, at the address as per the Notice of Change of Address, served on its office on 21 August 2018, but the First Respondent informed the security guard at the gate of the complex, not to allow the office assistant of the Applicant's attorney access to the premises. Subsequently, and on the same day, the Notice of Set Down was sent to the Respondents by e-mail. On 13, 14, 18 and 19 September 2018, the Sheriff attempted to effect service of the Notice of Set Down on the Respondent without success.
- [6] On 02 October 2018, the Applicant's attorneys again attempted to effect service of the Notice of Set Down on the Respondents. The Applicant's attorneys found the First Respondent, but he refused to accept service of the Notice of Set Down.
- [7] On 11 October 2018, the Applicant's attorneys sent a letter to the Respondents raising its concerns about the First Respondent's continued refusal to accept service. On 17, 18, 23, 25 and 29 October 2018, the Sheriff again attempted to effect service of the Notice of Set Down on the Respondents, again without success. On 21 January 2019, the Sheriff attempted service of the Notice of Set Down at an alternative address, without success. On 14 March 2019, a further e-

mail was sent to the Respondents requesting an alternative address for service.

[8] On the day of the hearing we were informed by Ms Magardi that her office received an email during the morning of the hearing, that the First Respondent was allegedly involved in a car accident the previous day and could therefore not attend Court. While we were busy dealing with the matter counsel entered the Court and told us that she was briefed by the Respondents to appear in the matter and to request a postponement. During questioning of counsel it became apparent that she had no papers in the matter nor any knowledge of the facts. She did not accept the invitation by the Court to let the matter stand down for her to peruse the papers. It also quite concerningly transpired that she was told by the First Respondent that he did file opposing papers, which is untrue. Counsel then withdrew and left the Court.

[9] As a result, it is apparent that First Respondent was aware of the date of the hearing. The Court proceeded with the matter, as it was clear that the Respondents were aware of the date of hearing and chose not to oppose the application. Legal practitioners are held to a high standard and the conduct of First Respondent in dealing with this very serious matter does not bode well for his ability to act professionally and may point to him, not being a fit and proper person to be admitted as a legal practitioner.

SUBSTITUTION OF THE LAW SOCIETY WITH LEGAL PRACTICECOUNCIL (LPC)

[10] In preparation of the matter the Court became aware of an unreported judgment, **The South African Legal Practice Council v Brown**¹ where an application was brought by the LPC in terms of Rule 15 of the Uniform Rules of Court for substitution of the Law Society by the Legal Practice Council (LPC). Rule 15(3) and (4) read as follows:

"(3) Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted.

(4) The court may upon a notice of application delivered by any party within 20 days of service of notice in terms of subrule (2) and (3), set aside or vary any addition or substitution of a party this affected or may dismiss such application or confirm such addition or substitution, on such terms, if any, as to the delivery of any affidavits or pleadings, or as to postponement or adjournment, or as to costs or otherwise, as to it may seem meet."

¹ Case no 10382/2018 dated 20 March 2019

[11] The Court then requested the LPC to address the Court on the question whether such a substitution in terms of Rule 15 is not required, before it can proceed with the application. As a result, the LPC filed supplementary heads of argument, which is appreciated.

[12] Section 116(2) of the Legal Practitioners Act (LPA)² deals with pending provisions and reads as follows:

“(2) Any proceedings in respect of the suspension of any person from practice as an advocate, attorney, conveyancer or notary or in respect of the removal of the name of any person from the roll of advocates, attorneys, conveyancers or notaries which have been instituted in terms of any law repealed by this Act, and which have not been concluded at the date referred to in section 120(4), must be continued and concluded as if that law had not been repealed, and for that purpose a reference in the provisions relating to such suspension or removal, to the General Council of the Bar of South Africa, any Bar Council, any Society of Advocates, any society or the State Attorney must be construed as a reference to the Council.” [Court’s emphasis]

[13] Section 119, is also relevant and reads as follows:

“119. Repeal and amendment of laws, and savings

(2) Any—

² 28 of 2014

(a) *regulation made under any law referred to in subsection (1) and in force immediately before the date referred to in section 120(4); and*

(b) *rule, code, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document promulgated, issued, given or granted and any other steps taken in terms of any such law immediately before the date referred to in section 120(4) and having the force of law,*

remain in force, except in so far as it is inconsistent with any of the provisions of this Act, until amended or revoked by the competent authority under the provisions of this Act.

(3) *Anything done in terms of a law repealed or amended by this Act—*

(a) *remains valid if it is consistent with this Act, until repealed or overridden; and*

(b) *is deemed to have been done in terms of the corresponding provision of this Act.*

(4) *A Provincial Council contemplated in section 97(1)(a)(ii) continues to exist and is deemed to have been established by the Council in terms of this Act."*

[14] On a proper interpretation of the aforementioned sections, it would seem that anything done under the repealed legislation remains valid, as if it were done under the LPA. This must include applications for suspension/removals of a legal practitioner, as well as applications that were pending on the date of the commencement of the LPA. It would seem that there was a statutory substitution of the Law society with the LPC, which then would do away with the need for a formal substitution in terms of rule 15.

[15] As a result, a formal substitution in terms of Rule 15 is not required, in circumstances where the application was pending, when the LPA came into effect.

THE MERITS

[16] The First Respondent transgressed several provisions of the Attorneys Act and the applicable regulations. The First Respondent failed to cause his auditor to lodge unqualified audit reports for the periods ending February 2016 and February 2017. As a result the First Respondent was not issued with Fidelity Fund Certificates for the years commencing January 2017 and January 2018.

[17] The First Respondent failed to effect payment of his subscription fees for the financial years 2016, 2017 and 2018. The total amount outstanding is R9 063.00.

[18] A complaint was lodged against the Respondents by Munyai Attorneys on behalf of Mr Clarence Moshiga. Mr Moshiga previously instructed the First Respondent to finalise a matter against the RAF. An amount of R1 045 513.50, was subsequently paid into the trust account of the First Respondent on 14 March 2016, in settlement of the complainant's claim against the RAF.

[19] The First Respondent allegedly did not do much work on the matter; however, the First Respondent took an amount of R445 513.50, in respect of fees, without furnishing the complainant with a statement of account. The complainant still has to settle the account of Munyai Attorneys for services rendered with regards to the RAF matter.

[20] On 12 May 2016, the First Respondent signed an undertaking to effect payment of an amount of R218 571.00, in favour of Munyai Attorneys, which he failed to do. The First Respondent failed to answer to correspondence addressed to him by the Applicant in this regard.

REPORT BY MPETE DATED 28 FEBRUARY 2018

[21] Ms Enica Mpete (Mpete) a legal official employed in the LPC's monitoring unit, investigated the complaints against the Respondents. During her visit to the firm, Mpete requested the file of Mr Moshiga as well as the firm's accounting records in order to inspect same. The First Respondent advised that Mr Moshiga's file had been with his correspondent attorney in Polokwane. The First Respondent also

demanded a written request before he could allow Mpete to inspect his firm's accounting records, which Mpete furnished on 12 July 2017. The First Respondent has however, failed to furnish Mpete with the firm's accounting records and documents relating to the matter of Mr Moshiga.

[22] With regards to the complaint of Mr Moshiga, the First Respondent, *inter alia*, advised that he was indeed approached by Mr Moshiga, as Mr Moshiga was unhappy with the services he had received from Munyai Attorneys, who at the time had already finalised the merits of the matter and that the only outstanding issue had been quantum. The First Respondent undertook to pay Munyai Attorneys for work done, upon receipt of their statement of account.

[23] The First Respondent explained that he took R250 000.00, as fees. An amount of R150 000.00, was retained as fees for Munyai Attorneys. However, Munyai Attorneys rendered a statement of account for R218 571.00. The First Respondent informed Mpete that he no longer had the trust funds to pay Munyai Attorneys, as he had utilised it. The First Respondent also admitted not having had a contingency fee agreement in place with Mr Moshiga and not having furnished Mr Moshiga with a statement of account.

[24] Mpete also pointed out that, in addition to the funds due to Munyai Attorneys, an amount of R184 135.13, was also still due and payable to

Mr Moshiga. A certificate of balance shows that an amount of only R728.44 was available in the firm's trust bank account as at 22 February 2018.

[25] The Respondent's actions were in contravention of various sections in the LPA and the Rules of the Attorneys Profession.

APPLICABLE LEGAL PRINCIPLES

[26] It is trite that the question whether a legal practitioner is a fit and proper person is not dependent upon factual findings, but lies in the discretion of the Court, and that the enquiry which the Court must conduct is threefold³:

1. The Court must first decide as a matter of fact whether the alleged offending conduct by the legal practitioner has been established.
2. If the Court is satisfied that the offending conduct has been established, a value judgment is required to decide, whether the person concerned is a fit and proper person to practise as a legal practitioner.⁴

³ *Law Society of the Cape of Good Hope vs C*, 1986(1) SA 616(A) at 637 C – E. *A vs Law Society of the Cape of Good Hope*, 1989(1)SA 849(A) at 851 A-E. *Law Society Transvaal vs Mathews*, *supra* at 393 I-J

⁴ For an analysis of what a "fit and proper person" is in the context of an attorney, see *Kaplan vs Incorporated Law Society, Transvaal*, 1981 (2) SA page 762 at page 782 A – C; *Reyneke vs Wetsgenootskap van die Kaap die Goeie Hoop* 1994 (1) SA page 359 at page 369 – 370

3. If the Court decides that the legal practitioner concerned is not a fit and proper person to practise as a legal practitioner, it must decide in the exercise of its discretion whether in all the circumstances of the case the legal practitioner in question is to be removed from the roll or merely suspended from practice. Ultimately, this is a question of degree.⁵

[27] The Court's discretion must be based upon the facts before it and facts in question must be proven upon a balance of probabilities.⁶ The facts upon which the Court's discretion is based should be considered in their totality⁷.

[28] In the light of all the facts of this case I am of the view that the Respondents should be struck from the roll of legal practitioners. There are no circumstances that warrant a mere suspension. In the light of all the facts Frist Respondent's conduct was dishonourable, unprofessional and unworthy of a legal practitioner.

⁵ *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at 51 B-I; *Law Society of the Cape of Good Hope vs Buddricks* 2003 (2) SA 11 (SCA) at 13 I and 14 A to B; *Malan v The Law Society of the Northern Provinces* (568/2007) [2008] ZASCA 90 (12/09/2008) at [4 - 9]

⁶ *Law Society Transvaal vs Mathews*, *supra* at 393 I-J; *Olivier vs Die Kaapse Balie-Raad* 1972(3) SA 485(A) at 496 F-G; *Summerley vs Law Society Northern Provinces* 2006(5) SA 613(SCA) at 615 B-F; *Malan v The Law Society of the Northern Provinces* (568/2007) [2008] ZASCA 90 (12/09/2008) at [9]

⁷ *Law Society Transvaal vs Mathews*, *supra* at 393 I-J; *Olivier vs Die Kaapse Balie-Raad* 1972(3) SA 485(A) at 496 F-G; *Summerley vs Law Society Northern Provinces* 2006(5) SA 613(SCA) at 615 B-F; *Malan v The Law Society of the Northern Provinces* (568/2007) [2008] ZASCA 90 (12/09/2008) at [9]

[29] In the light of the aforementioned the following order is made:

1. That the name of **MATOME ALPHEUS MAMOROBELA** (hereinafter referred to as the First Respondent) be removed from the roll of legal practitioners of this Court.
2. The First Respondent is ordered to immediately surrender and deliver to the registrar of this Court his certificate of enrolment as a legal practitioner of this Court.
3. That in the event of the First Respondent failing to comply with the terms of this order 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, is authorised and directed to take possession of the certificate and to hand it to the Registrar of this Court.
4. That the Respondents be prohibited from handling or operating the trust accounts as detailed in paragraph 5 hereof.
5. That Johan van Staden, the head: Legal Practitioners' Affairs of the Applicant or any person nominated by him, be appointed as *curator bonis* (curator) to administer and control the trust accounts of the Respondents, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with the Respondents' practice, as a legal practitioner and

including, also, the separate banking accounts opened and kept by Respondents at a bank in the Republic of South Africa in terms of section 86(1) & (2) of Act No 28 of 2014 and/or any separate savings or interest-bearing accounts as contemplated by section 86(3) and/or section 86(4) of Act No. 28 of 2014, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said sub-sections or in which monies in any manner have been deposited or credited (the said accounts being hereafter referred to as the trust accounts), with the following powers and duties:

- 5.1 immediately to take possession of the Respondents accounting records, records, files and documents as referred to in paragraph 6 and subject to the approval of the Legal Practitioners' Fidelity Fund Board of Control (hereinafter referred to as the Fund) to sign all forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which the Respondents were acting at the date of this order;
- 5.2 subject to the approval and control of the Legal Practitioners' Fidelity Fund Board of Control and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against the Respondents in respect of monies held, received and/or invested by the Respondents

in terms of section 86(1) & (2) and/or section 86(3) and/or section 86(4) of Act No 28 of 2014 (hereinafter referred to as trust monies), to take any legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions, if any, in which the Respondents were and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);

5.3 to ascertain from the Respondents' accounting records the names of all persons on whose account the Respondents appears to hold or to have received trust monies (hereinafter referred to as trust creditors) and to call upon the First Respondent to furnish him, within 30 (thirty) days of the date of service of this order or such further period as he may agree to in writing, with the names, addresses and amounts due to all trust creditors;

5.4 to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of the Legal Practitioners' Fidelity Fund Board of Control, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of the Respondents and, if so, the amount of such claim;

5.5 to admit or reject, in whole or in part, subject to the approval of the Legal Practitioners' Fidelity Fund Board of Control, the claims of any

such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;

5.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the Legal Practitioners' Fidelity Fund Board of Control;

5.7 in the event of there being any surplus in the trust account(s) of the Respondents after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce (as the case may be), firstly, any claim of the fund in terms of section 86(5) of Act No 28 of 2014 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of the Respondents, the costs, fees and expenses referred to in paragraph 10 of this order, or such portion thereof as has not already been separately paid by the Respondents to the Applicant, and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the Legal Practitioners' Fidelity Fund Board of Control, to the First Respondent, if he is solvent, or, if the First Respondent is insolvent, to the trustee(s) of the First Respondent's insolvent estate;

5.8 in the event of there being insufficient trust monies in the trust banking account(s) of the Respondents, in accordance with the available documentation and information, to pay in full the claims of trust

creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which may be available in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the Legal Practitioners' Fidelity Fund;

5.9 subject to the approval of the chairman of the Legal Practitioners' Fidelity Fund Board of Control, to appoint nominees or representatives and/or consult with and/or engage the services of legal practitioners, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and

5.10 to render from time to time, as curator, returns to the Legal Practitioners' Fidelity Fund Board of Control showing how the trust account(s) of the Respondents has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.

6. That the Respondents immediately deliver the accounting records, records, files and documents containing particulars and information relating to:

6.1 any monies received, held or paid by the Respondents for or on account of any person while practising as a legal practitioner;

- 6.2 any monies invested by the Respondents in terms of section 86(3) and/or section 86(4) of Act No 28 of 2014;
- 6.3 any interest on monies so invested which was paid over or credited to the Respondents;
- 6.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by the Respondents, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;
- 6.5 any insolvent estate administered by the Respondents as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;
- 6.6 any trust administered by the Respondents as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;
- 6.7 any company liquidated in terms of the provisions of the Companies Act, No 61 of 1973 read together with the provisions of the Companies Act, No 71 of 2008, administered by the Respondents as or on behalf of the liquidator;
- 6.8 any close corporation liquidated in terms of the Close Corporations Act, 69 of 1984, administered by the Respondents as or on behalf of the liquidator; and

6.9 the First Respondent's practice as a legal practitioner of this Court, to the curator appointed in terms of paragraph 5 hereof, provided that, as far as such accounting records, records, files and documents are concerned, the Respondents shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.

7. That should the Respondents fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on the Respondents (as the case may be), the sheriff for the district in which such accounting records, records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator.

8. That the curator shall be entitled to:

8.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;

- 8.2 require from the persons referred to in paragraph 8.1 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or the Respondents and/or the Respondents' clients and/or fund in respect of money and/or other property entrusted to the Respondents provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof.
- 8.3 publish this order or an abridged version thereof in any newspaper he considers appropriate; and
- 8.4 wind-up of the Respondents' practice.
9. That the First Respondent be and is hereby removed from office as:
 - 9.1 executor of any estate of which the First Respondent has been appointed in terms of section 54(1)(a)(v) of the Administration of Estates Act, No 66 of 1965 or the estate of any other person referred to in section 72(1);
 - 9.2 curator or guardian of any minor or other person's property in terms of section 72(1) read with section 54(1)(a)(v) and section 85 of the Administration of Estates Act, No 66 of 1965;

- 9.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;
 - 9.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973 and read together with the provisions of the Companies Act, No 71 of 2008;
 - 9.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;
 - 9.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984; and
 - 9.7 administrator appointed in terms of Section 74 of the Magistrates Court Act, No 32 of 1944.
10. That the Respondents be and is hereby directed:
- 10.1 to pay, in terms of section 87(2) of Act No. 28 of 2014, the reasonable costs of the inspection of the accounting records of the Respondents;
 - 10.2 to pay the reasonable fees of the auditor engaged by applicant;
 - 10.3 to pay the reasonable fees and expenses of the curator, including travelling time;

10.4 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;

10.5 to pay the expenses relating to the publication of this order or an abbreviated version thereof; and

10.6 to pay the costs of this application on an attorney-and-client scale.

11. That if there are any trust funds available the Respondents shall within 6 (six) months after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, shall satisfy the curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to the First Respondent in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof;

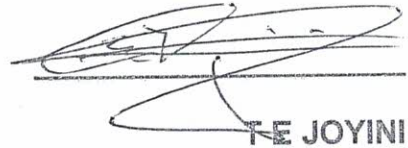
12. That a certificate issued by a director of the Legal Practitioners' Fidelity Fund shall constitute *prima facie* proof of the curator's costs and that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.



R G TOLMAY

JUDGE OF THE HIGH COURT

I AGREE



T E JOYINI

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 24 APRIL 2019

DATE OF JUDGMENT: 15 MAY 2019

ATTORNEY FOR PLAINTIFF: DAMONS MAGARDIE RICHARDSON

ADVOCATE FOR PLAINTIFF" MS S MAGARDIE

ATTORNEY FOR DEFENDANT: MAMOROBELA ATTORNEY (no
appearance)

ADVOCATE FOR DEFENDANT:NO APPEARANCE