IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 73871/18

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

....
DATE SIGNATURE

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL	APPLICANT
and	
EMMANUEL MESELE TAU	FIRST RESPONDENT
JOHANNA POPI KHUPARI (KGOBANE)	SECOND RESPONDENT
TAU KHUPARI ATTORNEYS	THIRD RESPONDENT

JUDGMENT

SKIBI, AJ

[1] The applicant launched an application seeking an order to have the names of **Emmanuel Mesele Tau** (first respondent) and (Johanna Popi Khuphari (Kgobane) (second respondent) removed from the roll of attorneys of this Court. However, on the date of the hearing we were informed by counsel for the applicant that there was an error in mentioning the name of the second

respondent as she had left the law firm in 2010 before the complaints against the law firm were reported. The applicant undertook to write a formal apology to the second respondent for unnecessarily dragging her into this application. The application is not opposed by the first respondent.

[2] The application was heard on 20 October 2020. After hearing counsel for the applicant, we granted the order appended hereto marked "XYZ" and reserved the reasons for granting the order. In terms of the said order, the first respondent was struck off the roll of attorneys. This judgment provides the reasons for the said order.

[3] The first respondent was admitted as an attorney of the High Court on 16 March 2009. He is currently practising as an attorney, a sole practitioner for his own account, under the name of Tau Khupari Attorneys, the third respondent (hereinafter to refer as the "firm"), at Office 109A, Mosque Plaza Building, 53 Berg Street, Rustenburg.

[4] The application was served on the first respondent personally on 29 January 2020. The first respondent has not filed a notice of intention to oppose and has not filed an answering affidavit. Moreover, no heads of argument were filed and there was no appearance on behalf of the first respondent at the hearing of this application on 20 October 2020.

[5] The facts which led the applicant to bring this application are set out in the founding affidavit. The applicant alleges that the first respondent contravened numerous provisions of the Legal Practice Act[1] (LPC), the Code of Conduct and the LPC rules. It is alleged that the first respondent failed to inform the applicant in writing of any changes in his business, postal and residential addresses. He abandoned his practice, or closed his practice, without previous notice to his clients and without arranging with them for the dispatch of their business or the care of their property in his possession or under his control. He further failed to reply, within a reasonable time, to all communications

[1] 28 of 2014.

addressed to him and which required an answer. He in turn failed, within a reasonable time after the performance or earlier termination of any mandate, to account to his clients in writing.

[6] It is alleged further that the first respondent, unless otherwise instructed, failed to pay any amount due to a client within a reasonable time as will be elaborated on hereunder in respect of the various complaints lodged with the applicant: He failed to ensure that payments made from the firm's trust account are made to trust creditors; he misappropriated trust funds; he failed to account to clients; and he delayed the payment of trust funds. The applicant alleges that in the firm's trust account, there is a deficit of R2 376178.05.

[7] In addition to the transgressions mentioned above, the applicant states that the first respondent is not in possession of a fidelity fund certificate, yet he continues practising as an attorney without the said certificate.

[8] After the applicant had received several complaints against the first respondent, it instructed a Chartered Accountant, Mr. D. Swart (Swart), to visit the first respondent's practice and to conduct an inspection of his accounting records, his practice affairs and to investigate the complaints. From the evidence presented by the applicant, Swart executed his mandate and compiled a report dated 13 February 2019. The report was considered by an Investigating Committee of the applicant which recommended that this application for the removal of the first respondent's name from the roll of attorneys be launched. The report compiled by Mr Swart, together with his confirmatory affidavit, have been attached to the applicant's founding affidavit.

[9] In his report, Mr Swart referred to the name of the firm of the first respondent from the date it was formed and the work which it handled, its address and the names of the partners at its formation. According to the records of the applicant, the said firm, known as Tau Khupari Attorneys, was opened in 2009 with the first applicant and Miss. J.P. Khupari (the second respondent) as the two partners of the firm. However, Miss. Khupari resigned as a partner on 9

February 2010, leaving the first respondent as the sole practitioner. She was enrolled, from the date of her resignation, as a non-practiisng attorney. This remained the position until this application was launched. The applicant alleged that from the complaints received against the firm, the practice activities were mostly the work of the Road Accident Fund claims, where individual clients give a mandate to the firm, and most of the fees of the firm are raised through the non-recurring work.

[10] The applicant sets out the terms of reference and scope of inspection as amongst others the inspection of the accounting and supporting records, systems in place, and procedures with a view of establishing the general state thereof and identification of, and commentary on any aspects considered irregular and/ or unsatisfactory. Despite several attempts, Swart was unable to inspect the accounting records of the firm, and was not able to investigate the complaints against the trust accounting records of the firm. Swart made several appointments with the first respondent and the latter had many excuses, including ill-health, which was never substantiated, being hospitalised, and was unreachable on his mobile phone. The time line of the investigation by Swart is said to have started on 18 April 2018 to February 2019 (this is a period of about nine months).

[11] The applicant received seven complaints from different individuals whose cases were handled by the firm. I will deal with these complainants in turn. The first complaint against the firm was brought by Miss. R.P. Moruni (hereinafter to refer as Miss. Moruni). Miss Moruni was left disabled after a motor vehicle accident. On 9 September 2012, she sought the services of the firm to attend to her claim for compensation against the Road Accident Fund (RAF). On 8 February 2016 the RAF paid her claim in the amounts of R300 000.00 and R656, 555.98 into the firm's trust banking account. She discovered this payment on 15 November 2016 after she had contacted the RAF. She sought the intervention of the applicant to pursue the first respondent to get her funds from the firm. Upon enquiry by the applicant, it was informed that the money

had been paid to Miss. Moruni. This was denied by Miss Moruni. The firm received an amount of R956, 555.98 in February 2016 and no money was paid to the complainant.

[12] The applicant also received another complaint against the firm from Mr. J.B. Maite (Mr. Maite). On 21 March 2013 Mr. Maite sought assistance from the firm to get his compensation from the RAF after he was involved in a motor vehicle accident. Mr Maite and the firm agreed on a contingency fee of 25%. He alleged that the firm never gave him feedback. On 1 February 2016, he was informed by RAF that an amount of R200, 000.00 for general damages; R337,786.95 for loss of earnings (which makes a total amount of R537,786.95) was paid into the firm's trust banking account. After the disbursements and the contingency fee of 25 % Mr. Maite was only paid an amount of R383,326.72 and an amount of R140 334.51 in respect of costs, which was received by the firm after taxation, and remained unaccounted for by the firm. This means that the firm claimed the first respondent's fee from the client in terms of the Contingency Fees Act[2] as well as from the RAF and received more than double payment.

[13] A further complaint against the firm was received by the applicant which was brought by Miss. B.M. Mfofi (Miss. Mfofi). At about June 2015 Miss. Mfofi appointed the firm to attend to her claim against the RAF at an agreed contingency fee of 25%. The firm did not give feedback to Miss Mfofi. On 7 November 2016 she received short messaging system (SMS) notification from RAF that her funds have been transferred to the trust banking account of the firm. On the same date, she contacted the firm informing it that RAF has paid her claim, but she was told that her claim would be settled after 105 days.

[14] Miss. Mfofi sought assistance from the applicant for the recovery of her funds from the firm. She produced documents from the RAF which show that the RAF paid to the firm's trust banking account an amount of R84, 493.95 for loss of support and R548 169.30 for future loss of support. The total amount of

[2] 66 of 1997.

R632, 663.25 was received by the firm and it was never transferred to Miss. Mfofi.

[15] The applicant received a complaint by a Miss. D.L. Dlamini (Miss. Dlamini). In October 2013 Miss Dlamini approached the firm to attend to a claim against RAF at an agreed contingency fee of 25%. On 23 February 2015 the RAF made payment for the amount of R356,06.25 for past and future loss of support settling her claim. The firm did not contact her. On 13 December 2016, Miss Dlamini discovered that payment of her claim had been made, in that funds had been transferred to the firm's trust banking account. When she contacted the firm informing it that her claim had been paid by the RAF in its trust banking account, she alleged that the firm refused to communicate with her and it ignored her phone calls. She lodged a complaint with the applicant against the firm to recover her funds. Upon receipt of Miss. Dlamini's complaint the applicant approached the firm to address the complaint by Miss. Dlamini, the firm requested for extension of time, but it was never properly addressed. The applicant's averment is that the firm received an amount of R356,067.25 on 23 February 2015 and no funds were paid to the complainant.

[16] Miss. R.B. Mpepha (Miss. Mpepha) lodged a complaint against the firm with the applicant. In October 2013 Miss. Mpepha appointed the firm to attend to her claim against RAF after the father of her child had died in a car accident. The parties agreed on a contingency fee of 25%. On 27 January 2015 the RAF made payment of the amount of R226,683.25 into the firm's trust banking account for past and future loss of support. After receipt of the said payment the first respondent never contacted her. On 13 December 2016, she was informed by the RAF that her funds had been paid into the firm's trust banking account. When Miss Mpepha confronted the first respondent as to when she would be paid her funds, the first respondent kept on promising her that he would sign a cheque for her, but that never materialised. On 17 August 2017, she submitted a written complaint to the applicant seeking its intervention in order to assist her to recover her funds. According to the applicant, the firm

received an amount of R226, 683.25 and the said money was never paid to the complainant.

[17] Miss. M.H. Mookeletsi (Miss. Mookeletsi) filed a complaint against the firm. On 2 August 2011, Miss. Mookeletsi appointed the firm to attend to her claim against the RAF. On 5 august 2011 the RAF deposited R220, 757.28 into the firm's trust banking account for past and future loss of support in respect of Miss Mookeletsi's claim. The firm did not contact her. On 21 April 2017 she acquired proof from the RAF that her claim had been paid to the firm about six years earlier, i.e. in 2011. Miss. Mookeletsi was thereafter unable to discuss the matter with the firm as the latter refused to communicate with her. On 3 June 2017, she submitted a written complaint to the applicant seeking its intervention in the matter to recover her money. The applicant's case is that an amount of R220 757.28 was received by the firm on 5 August 2011, but the funds were never paid to Miss. Mookeletsi.

[18] Another complaint against the firm received by the applicant came from Mr. B.J. Mnguni (Mr. Mnguni). Mr. Mnguni alleges that he also appointed the firm to attend to his claim against the RAF. However, he was never contacted by the firm. On 27 October 2017 the RAF paid an amount of R283,505.00 for general damages and future loss of earnings. The said amount was deposited into the firm's trust banking account. Mr Mnguni was never contacted by the firm until he discovered 8 months later that his claim has been paid by the RAF to the firm. Mr. Mnguni thereafter was unable to discuss the matter with the firm and he sought the assistance of the applicant to recover his funds from the firm on 3 June 2018. The investigation by the applicant revealed that indeed an amount of R283 505.00 was never paid to the complainant.

[19] In addition to the above-mentioned complaints, the investigation by the applicant revealed a shortage in the Attorney's Annual Statement on Trust Accounts for the year ending 28 February 2018. It was discovered that by the end of the financial year a balance of an amount of R53.96 was in the trust banking account. In an audited Statement of Account of the firm's auditors,

Madalitso Chartered Accountants, there was a qualified audit on the books of the firm.

[20] A reconciliation was done where it was discovered that there was a shortage of R2 376 178.05 from the balances of the known creditors as recorded in Swart's report. As a result of the aforesaid complaints, the amount of R2 376 232.01 is owed to trust creditors and consists of the following known creditors: Miss. R.P. Moruni R656, 555.98; Miss. B. Mfofi R632 663,25; Miss. D.L. Dlamini R356 067.25; Miss. R.P. Mpepha R226 683,25; Miss. M.H. Mookeletsi R220 757,28 and Mr. B.J. Mnguni R283 505.00. The aforesaid amount demonstrates that by 28 February 2018, the balance which ought to have been in the firm's trust banking account was an amount of R2 376 232.03, but instead the balance was a paltry amount of R53.96, which is an indication of a shortage of at least R2 376 178.05 and remains unexplained by the first respondent.

[21] As indicated above, the first respondent, despite the fact that he was served personally with the papers, chose not to file a notice of intention to oppose and he failed to file an answering affidavit. No heads of argument were filed and he failed to appear at the hearing of the application. The averments made by the applicant remain unchallenged. Mr. Jooste for the applicant submitted that the *prima facie* case has become conclusive proof as there is no answer to it.

[22] Before I deal with the legal framework and analysis, I deem it appropriate to deal with the issue of the repealed provisions as most, if not all, of the transgressions took place before the coming into operation of the provisions of the LPA. The Legal Practice Act came into effect on 1 November 2018. The transgressions which led to the complaints referred to above took place before this Act came into operation. One may ask the question if the unprofessional conduct of an attorney occurred before the Act came into operation whether he/she could be held accountable in terms of the provisions of this Act or the

Attorneys Act.[3] The LPA contains a section 119, dealing with the repeal and amendment of the laws. Section 119 (2) reads:

> "(2) Any –
>
> (a) regulation made under any law referred to in subsection (1) and in force immediately before the date referred to in subsection 120(4); and
>
> (b) rule, code, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document promulgated, issued, given or granted and other steps taken in terms of any such law immediately before the date referred to in section 120(4) and having the force before the date 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 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 provisions 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 Council in terms of this Act."

[23] In the case of the *South African Legal Practice Council v Mamorobela & Another,*[4] Tolmay, J., dealt with the interpretation of the provision of the said section. In para 14 of the judgment Tolmay, J., states:

> "On a proper interpretation of the aforesaid 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."

[3] 53 of 1979.
[4] [2019] ZAGPPHC 226.

[24] I am of the considered view that based on the interpretation provided in the case referred to above, this court is empowered by the legislation to act on the unprofessional conduct of the first respondent based on the facts of this case.

[25] The question whether an attorney is no longer a fit and proper person to practise as such lies in the LPA, the LPA Rules (formerly the Law Society's Rules and the Rules for the Attorneys' profession), the Code of Conduct, Attorneys Act, of 1979, as well as the common law, falls within the discretion of the Court.[5]

[26] The appropriate sanction, namely a suspension from practice or striking from the roll, also lies within the discretion of the Court.[6] Over and above the aforementioned legislation, this Court has inherent jurisdiction to determine the fitness of attorneys to practise and has inherent disciplinary power over all of its officers.[7]

[27] In exercising its discretion, the Court is faced with a three-stage enquiry:

(a) The first inquiry is for the Court to decide whether or not the alleged offending conduct has been established on a preponderance of probabilities. This is a factual enquiry.

(b) The second inquiry is whether the person, in the discretion of the Court, is a fit and proper person to continue to practise. This involves the weighing up of the conduct complained upon against the conduct expected of an attorney. This entails a value judgement.

(c) Thirdly, the inquiry is whether in all circumstances, the practitioner in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specific period will suffice.

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[5] See *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) and *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA).
[6] See *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 851 A – F.
[7]See *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 851 E – F and *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (C) at 638 C – 639 F.

> This will depend on such factors such as the nature of the conduct complained of, the extent to which it reflects upon the respondent's character or shows him/her to be unworthy to remain in the ranks of an honourable profession, the likelihood or otherwise of a repetition of such conduct and the need to protect the public. Ultimately, this is a question of degree.[8]

[28] The Court's discretion should not be exercised in a vacuum, but based upon the facts before it and the said facts must be proven on a balance of probability. See the recent judgment of this Court in the case of *Mamorobela*[9] and *South African Legal Practice Council v N. Gattoo and Another*.[10]

[29] The investigation of the first respondent's affairs and financial records by Swart, a chartered accountant, revealed a possible trust shortage of R2 376 178 05. Swart referring to the factual situation detailed in his report, dated 18 May 2019, concludes as follows:

> *"Based on my instructions received from the Legal Practice Council and arising out of my findings and comments set out previously, I am of the opinion that the firm Tau Khupari Attorneys has contravened the provisions of the Act and/or Rules as set out hereunder:*
>
> *12.1.1 Rule 26.2 of the Rules in that the practitioner did not inform the Law Society in writing of any changes in his business and residential addresses as set out in paragraph 3.7 above.*
>
> *12.1.2 Rule 49.4 of the Rules in that the practitioner abandoned his practice, or closed his practice, without previous notice to his clients and without arranging with them for the dispatch of their business or the care of their*

[8] See *Law Society Transvaal v Mathews* 1981 (2) SA at 782 A – C and *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at 51.
[9] *Supra* n 4 at para 27.
[10] [2019] ZAGPPHC 1052 at para 15.

property in his possession or under his control as set out in paragraph 3.7 above.

12.1.3 Rule 47.1 of the Rules in that the practitioner failed to reply, within a reasonable time, to all communications which require an answer as set out in paragraph 3.18 above.

12.1.4 Rule 35.11 of the Rules in that the firm did not, within a reasonable time after the performance or earlier termination of any mandate, account to its clients in writing as set out in paragraphs 4.3, 5.8, 6.3, 8.2, 9.2 and 10.2 above.

12.1.5 Rule 35.12 of the Rules in that the firm did not, unless otherwise instructed, pay any amount due to a client within a reasonable time as set out in paragraphs 6.4,7.4,8.3,9.3 and 10.3 above.

12.1.6 Rule 49.6 of the Rules in that the practitioner is guilty of unprofessional, and/or dishonourable and/or unworthy in that the firm should not have overreached a client, or charge a fee which is unreasonably high, having regard to the circumstances of the matter as set out in paragraph 5.7 above.

12.1.7 Section 78(1) of the Old Act read with Rule 35.13.8 of the Rules in that the firm did not ensure that the total amount of money in tis trust banking account, trust investment account and trust cash at any date shall not be less than the total amount of credit balances of the trust creditors shown in its accounting records as recorded in paragraph 11.5 above.

12.1.8 Rule 35.13.10 of the Rules that the firm did not immediately report in writing to the Law Society that the total amount in the firm's trust creditors shown in its accounting records, as well as written explanation of the reason for the trust shortage and proof of rectification as set out in paragraph 11.5 above."

[30] In addition to Swart's report, Mr Jooste, in his heads of argument, referred to various sections of the LPA and the Rules of Attorney's Profession that were contravened by the first respondent. It is patently clear that the contraventions of the Rules by the first respondent listed by counsel for the applicant as substantiated and forming part of the investigation creates an unwelcoming or bleak image of the first respondent's conduct as an attorney or legal practitioner.

[31] The misappropriation of a trust fund is extremely serious and is probably the worst professional transgression an attorney can commit. The first respondent neglected his positive duty as a legal practitioner by failing to ensure that all amounts received from, or on behalf of a trust creditor, were deposited into his trust account; that all withdrawals and transfers from his trust account to business account were not made in respect of fees and disbursements due to the firm; and that the total amount of money held in the trust account was not less than the credit balance of his trust creditors and that no account of any trust creditor was in debt.

[32] Having considered Swart's report and conclusions, as well as the facts summarised above from the complainants' written statements attached to the applicant's founding affidavits, it is clear to me that the first respondent betrayed the clients he was supposed to serve with dignity, honesty and professionally. To highlight a few of the complaints handed to the applicant for investigation the following:

(a) Miss. Dlamini stated that she went to the offices of the first respondent more than twenty (20) times in an attempt to get the money which was due to her after having been paid by RAF into the firm's trust banking account. She phoned the first respondent many times and when she phoned him, he ignored answering her calls. When she visited the first respondent's offices, he disappeared. A period of 32 months (23 February 2015 to 13 December 2016)

lapsed without the firm alerting Miss Dlamini that her compensation claim had been paid by the RAF;

(b) A period of 6 years (August 2011-April 2017) lapsed before Miss. Mpepha discovered that her claim had been paid by the RAF. This is something out of the ordinary. The firm received payment from RAF just three days after Miss. Mpetha had instructed the law firm. It is not surprising that Miss. Mpetha in her affidavit to the police said she wanted her funds with CPI interest from 2011 to date of payment;

(c) Miss. Moruni was disabled after she was involved in an accident and she had to visit the first respondent's offices to get feedback on her claim when she was a phone call away.

[33] The complainants were unemployed individuals who were mostly women who had placed their trust and faith in the first respondent to act in their best interests but he let them down. They were desperate to have their legal issues attended to by entering into the contingency fee agreements with the firm so that the firm could facilitate the payment of their claims. The first respondent put the attorney's profession into disrepute. His actions do not only deserve sanction in the form of being struck off of the roll of attorneys, I would recommend that he should in turn also be investigated for possible criminal prosecution of theft of trust funds which disappeared from the firm's trust banking account.

[34] It has been proven on a balance of probabilities that first respondent contravened numerous provisions of the Rules of the Attorney's Profession and the LPC Rules. The firm contravened Rule 35.11 of the Rules for the Attorney's Profession (Rule 54.12 of the LPC) in that the firm did not, within a reasonable time after the performance, or an earlier termination of any mandate, account to its client in writing. It also contravened Rule 35.12 of the Rules of Attorneys' Profession (Rule 54.13 of the LPC Rules) in that the firm did

not, unless otherwise instructed, pay any amount due to a client within a reasonable time.

[35] The evidence clearly shows that the first respondent has contravened section 78(1) of the Attorneys Act read with Rule 35.13.8 of the Rules of Attorney's Profession (Rule 54.14.8 of the LPC Rules) in that the firm did not ensure that the total amount of money in its trust banking account, trust investment account and trust cash at any date shall not be less than the total amount of the credit balances of the trust creditors shown in its accounting records.

[36] The Court, and the profession at large, is entitled to require of attorneys to carry out their duties with a high degree of skill, care and attention. The Court and the applicant have a duty to act where an attorney's conduct falls short of what is expected and to curb the erosion of the values of the profession. The protection of the public goes hand-in-hand with the Court's obligation to protect the integrity of the Courts and the legal profession. Public confidence in the legal profession and in the Courts is undermined when the strict requirements for membership to the profession are polluted.

[37] The first respondent failed to account for monies received on behalf of his clients for whom he was acting, without the permission or authority of any of them to do so. He abused the position of trust and fiduciary relationship which should exist between a legal practitioner and his/her client. He can no longer be considered to be a fit and proper person to be allowed to practise as a member of the profession. The first respondent's conduct is serious and, when viewed cumulatively, warrants an order removing the first respondent's name form the roll of attorneys.

ORDER

[38] Based on the above reasons we concluded that the order marked "XYZ" be made an order of Court, including the first respondent to pay the applicant's costs on an attorney and client scale.

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N. SKIBI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED

_____

C.J. VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicant:	Adv. C. Jooste
Instructed by:	Igbal Mohammed Attorneys
For the First Respondent:	No appearance

Date of hearing:	20 October 2020
Date of judgment:	Delivered through email and uploaded on Caselines