



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

**CASE NO.: 13023/2020**

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

20 January 2023

SIGNATURE

DATE

In the matter between:

**SOUTH AFRICAN LEGAL PRACTICE COUNCIL**

**APPLICANT**

and

**ISAAC MOKGOBI**

**RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 20 January 2023.

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**JUDGEMENT**

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**N V KHUMALO J (with PHOOKO AJ concurring)**

**INTRODUCTION**

[1] This is an application for the removal of the Respondent's name from the roll of legal practitioners.

## **THE RESPONDENT**

[2] The Respondent was admitted and enrolled as an attorney of this Honourable Court on 03 November 2008. He soon thereafter commenced practising as a sole practitioner for his own account under the name and style of Mokgobi Attorneys.

[3] On 25 March 2020, the Respondent was suspended from practice as a legal practitioner, his name however remains on the roll of the Honourable Court's legal practitioners. On the Respondent's suspension, a rule nisi was issued calling upon the Respondent to show cause on 29 October 2020, why his name should not be removed from the roll of legal practitioners. A curator bonis was also appointed to conduct the affairs of his law firm during the period of suspension.

## **NOTICE AND SERVICE**

[4] On 18 June 2020, the Respondent filed his answering affidavit and Applicant's Replying Affidavit was filed on 7 July 2020. On 29 October 2020, the court extended the rule nisi to 13 May 2021. In the meanwhile, the Notice of Set Down was served on the Respondent's offices by the Sheriff on 18 November 2020. On 11 May 2021, on the eve of the hearing, the Respondent filed an Application for condonation for the late filing of his Practice Note and Heads of Argument. The court on 13 May 2021 granted a further extension of the rule nisi to 15 February 2022, ordering the Applicant to file its Curator's Report by 10

June 2021 and the Respondent to file his answering affidavit, if any, in response to the Applicant's Curator's Report by 9 July 2021 whereupon the Applicant was to file its replying affidavit by 06 August 2021.

[5] On 09 June 2021, the Applicant filed its Curator's Report. On the same date the Applicant served the court order and Notice of Set Down on the Respondent's attorneys of record by e-mail which was also served on the receptionist at the Respondent's place of business on 17 June 2021. The Respondent failed to file an Answering Affidavit in response to the Curator's report by 9 July 2021, as ordered by the court. The Respondent's attorneys subsequently withdrew as attorneys of record on 23 July 2021, citing lack of instructions. The Applicant proceeded to file a Supplementary Affidavit on the Curator's report. The Respondent remained unrepresented until the date of hearing of the matter on 15 February 2022.

### **ISSUES TO BE DETERMINED**

[6] The issues to be determined are the following:

- (i) Whether the Applicant has established on a balance of probabilities, the offending conduct?;
- (ii) Is the Respondent a fit and proper person to continue to practice as an Attorney?;
- (iii) If not, what sanctions must be imposed to the Respondent?

### **BACKGROUND FACTS**

[7] The Applicant accused the Respondent of contravening several provisions of the LPA and rules of the Law Society, attorneys profession, legal practice rules and code of conduct, due to the following complaints that were brought against him:

[7.1] **Complaint by Mr Orah Mpumelelo Buthelezi** : The Complainant's late father instructed the Respondent to institute legal proceedings against the Minister of Cooperative Governance and Traditional Affairs. In terms of a court order dated 03 December 2018, an application for default judgment was referred to open court as the action was a damages claim. The Respondent failed to report on the progress of the matter and attempts to get hold of him proved unsuccessful. Upon enquiry by the Applicant, the Respondent failed to respond to this complaint.

[7.2] **Complaint by Mr Phillip Mobe Mkhwanazi**: The Respondent confirmed having instituted legal proceedings against the RAF and that a settlement was reached on the issues pertaining to merits and general damages and that the issue of loss of income and earning capacity still had to be settled. **The Respondent was silent on the R180 000.00 that was paid by the RAF into his firm's trust account on 17 September 2018.**

[7.3] **Complaint by Mr Johannes Kebone Moseki**: The Respondent was instructed to institute legal proceedings against the complainant's former employer, Ampath Laboratory, on the basis that the company defamed the complainant. The Respondent failed to execute the mandate given to

him and to report to the complainant. **The Respondent also failed to repay the deposit when requested to do so.**

[7.4] **Complaint by Ms Sinah Mfikwa:** The firm was instructed to institute legal proceedings against the RAF following the death of the complainant's husband. The Complainant was advised by Mr Nkuna that the RAF settlement would be paid by December 2018; however, **the firm failed to report to the complainant regarding the progress in the matter.**

[7.5] **Complaint by Mr Thabang Edwin Sono.** The complainant's matter against the RAF became settled and the latter paid an initial amount of R648 874.2, into the Respondent's firm's trust account. The Respondent only paid the Complainant an amount of R370 000.00, instead of R487 655.65. The RAF paid a further amount of R550 000.00 into the Respondent's firm's trust account. The Respondent never informed the complainant about the payment. Notwithstanding various undertakings, the Respondent failed to effect payment in favour of the complainant. It was only during June 2016 that the Respondent paid an amount of R170 000.00 to the Complainant followed by sporadic payments totalling R320 000.00. An amount of R230 000.00 remains due and payable to the Complainant. The Respondent confirmed that indeed the matter was settled for R1 198 874.20 and that there was no contingency fee agreement that was entered into between the firm and the complainant. The Respondent alleged to have been instructed by the complainant to pay the money in instalments as he feared misusing it owing to his drinking habits.

[7.6] **Complaint by Mr Poloko Dzikiti:** The Complainant was assisted by a certain Mr Nkuna at the Respondent's firm with his RAF matter. The matter had been dragging for 6 years, when the Complainant decided to enquire about the status of his claim from the RAF. He discovered that his matter had already been finalised in October 2018, and an amount of R440 000.00 paid to the Respondent's firm's trust account on 26 November 2018. The Complainant confronted Mr Nkuna who informed him that a monthly payment of R3 500.00 would be made to him.

[7.7] **Complaint by Mr Hlayiseka Godfrey Baloi.** The Complainant was advised that his RAF matter was enrolled for hearing in February 2019, but that the Respondent was in the process of negotiating a possible settlement with the RAF. During May 2019, the Complainant approached the RAF and established that his claim had already been settled and that a payment of R160 944.17 was already paid to the Respondent's firm's trust account on 24 July 2017 and a further amount of R450 000.00 on 31 January 2019. The Respondent failed to advise him that he had already received money on his behalf. There was no response to the correspondence that was addressed to Respondent by the Applicant in that regard.

[7.8] **Complaint by Mothusi Marumo Attorneys** on behalf of Estate Late Thandi Busang: The RAF paid an amount of R317 709.90, to the Respondent's firm's trust account on 18 October 2017; however, notwithstanding demand, the Respondent failed to effect payment in favour of the deceased estate. The Respondent also failed to answer to correspondence addressed to him by the Applicant in this regard.

[7.9] **Complaint by Dr Marlene De Graad:** Dr De Graad was instructed by the Respondent to conduct various medico-legal assessments on behalf of the firm's clients. The Respondent failed to pay Dr De Graad notwithstanding the fact that the costs had already been paid by the RAF into the Respondent's firm's trust account. Dr De Graad proceeded with legal action against the Respondent and obtained default judgments against the Respondent in four matters. According to Dr De Graad, he abandoned legal action on various other matters as the Respondent could not satisfy the judgment debts initially obtained against him.

[7.10] **Complaint by Mr Solang Maepe.** The Complainant was unhappy about the settlement amount and of the view that the Respondent under-settled his claim with the RAF. The Respondent in response to the complaint advised the Complainant that the matter was before court on 27 January 2014 and the RAF was found to be only 70% liable for the Complainant's proven damages on the basis that the Complainant was also responsible for contributory negligence and the sum of R1 200 000.00 apportioned by 30% in favour of the RAF. The Complainant's response was that he attended at court on 27 January 2014 and was advised that the matter was postponed. Further, he was not aware of the 70%/30% apportionment and never received any settlement offer. An amount of R586 865.00 was paid to him without proper accounting in respect of how the rest of the funds were expended.

[7.11] **Complaint by Mr Nicholas Sindisile Mbewu:** The Complainant was informed by the Respondent on 05 May 2014 that his RAF matter was per

order of court dated 30 April 2014 finalised. However, the Respondent has failed to effect payment of the full settlement amount paid in favour of the Complainant. The Complainant claims that the Respondent only paid him an amount R300 000.00, and that a further amount of R550 000.00, is still due and payable to him. A schedule attached to the complaint shows that, on 14 May 2014, the RAF paid to the Respondent an amount of R1 200 000.00. When confronted by the Complainant, the Respondent alleged that his firm's bank accounts had been frozen. Although the amount of R1 200 000.00 was paid by the RAF into the Respondent's firm's trust account on 15 April 2014, the Respondent paid the complainant only an amount of R300 000.00 on 21 January 2015 and a further amount of R85 000.00, on 24 January 2015.

[7.12] **Sowetan Newspaper article of 27 February 2017:** The article referred to the Respondent's failure to effect payment in favour of a certain Mr Moeti, after the Respondent received an amount of R700 000.00 from the RAF and a further R660 000.00, in settlement of Mr Moeti's claim. The Applicant requested the Respondent to furnish it with proof of payment in favour of Mr Moeti but the Respondent has failed to furnish same.

[7.13] **Outstanding Membership Fees:** The Respondent alleged to have failed to effect payment of his membership fees in the amount of R5 275.00.

## **SWART REPORT**

[8] Mr Swart an auditor commissioned to investigate the veracity of the complaints and assess the books of the Respondent's firm to establish the general state of the Respondent's accounting and supporting records systems and procedures, having assessed the state of the firms accounting records supplied to him at different intervals without performing a substantive audit procedure but accepting the correctness thereof, reported the firm's trust position to have shown:

[8.1] the following trust shortages:

[8.1.1] Trust position as at 31 August 2016: R1 029 197, 08

[8.1.2] Trust position as at 28 February 2017: R818 531.05

[8.1.3] Trust position as at 28 February 2018: R1 272 241.83

[8.1.4] Trust position as at 31 October 2018: R2 020 987.24

[8.1.5] Trust position as at 31 December 2018: R2 145 003.42

[8.1.6] Trust position as at 28 February 2019: R2 144 437.76

[8.2] Whilst the certificates of balance of the Respondent's firm's trust account reflected the firm's trust account balances as follows:

[8.2.1] R126 219.12 as at 31 October 2018

[8.2.2] R202.94 as at 31 December 2018

[8.2.3] R768.60 as at 28 February 2019

[8.3] The Respondent failed to file his firm's Report on the Attorneys Trust Accounts in compliance with the Act and the Rules" for the year ending 28 February 2019, which had to be filed by 31 August 2019.

[8.4] There was prima facie proof of misappropriation of trust funds of R2 144 437.76. 23 thus confirming that the Legal Practitioners' Fidelity Fund and the public are accordingly at risk.

[8.5] Mr Mokgobi ignored the telephone calls from Mr Swart (contravening Rule 47.1 of the New Act), cancelled arranged meetings on several times and despite undertakings he had made to do so, he did not allow Swart to conduct an inspection of the firms trust accounting records, by failing to produce the books, documents or records in his possession, custody or control in contravention of s 37 (2) (a) and (b) read with s 87 (2) (a) of the New Act.

[9] The Respondent subsequently on 25 June 2020 met with Ms Lekgetho employed in the Risk and Department of the Applicant on behalf of the appointed curator where the contents of the court order were explained to the Respondent. The Respondent undertook to furnish Ms Lekgetho with all the necessary documents, files and accounting records as stipulated in the court order, by 31 July 2020. The Respondent furnished the Applicant with some of the firm's client files and undertook to deliver his firm's accounting records and certificate of enrolment as a legal practitioner to the Applicant by 08 July 2020. However, the Respondent cancelled the scheduled appointment with the

Applicant and advised that he had been sick. The Respondent failed to furnish the Applicant with the firm's accounting records as well as his certificate of enrolment as a legal practitioner.

[10] On 09 December 2020, the Applicant sent an e-mail to the Respondent requesting all outstanding documents, files and accounting records as stipulated in the court order. The Respondent failed to respond to the request and to comply with the court order.

### **RESPONDENT'S RESPONSE**

[11] The Respondent's overall response to the complaints was a denial that his conduct constitutes a deviation from the standard of professional conduct or that he is guilty of unprofessional conduct or dishonourable and unworthy conduct such that he is not a fit and proper person to continue to practice as a legal practitioner or that he contravened the rules of the profession to such an extent that would warrant the removal of his name from the roll of legal practitioners and or to deliver his certificate of enrolment to the Registrar of this honourable court.

[12] According to the Respondent every year he has practised he has complied with the duty to cause his auditor to file his firm's report on the annual closing of his accounting records including the year ending in February 2020. All those years he had received unqualified reports and has had a valid Fidelity Fund Certificates for that period issued by the Applicant on 22 January 2020 for the period ending 31 December 2020. The Certificate would not have been issued if he had not complied.

[13] On the complaints the Respondent denied causing any risk to trust creditors or the Legal Practitioners' Fidelity Fund as he had paid his membership fees in March 2020 for the period ending in February 2020 in the amount of R5 275.00.

[14] He proffered the following explanations to the individual complaints received by the Applicant.

[14.1] **On the Complaint by Buthelezi:** He denied delaying the matter as the court on 3 December 2018, issued an order referring the matter to the open court. The Plaintiff had, in the interim, in 2019, passed away. He alleged to have since been awaiting the appointment of the curator which is done by the office of the Master.

[14.2] **On the complaint by Mkhwanazi:** He alleged that Mr Nkuna, a professional assistant from his firm handled the RAF claims. Nkuna advised him that the amount of R180 000 paid for general damages was not paid to the Complainant as he had moved to Limpopo and could not be traced. The amount was retained for expert costs. Other issues that were still outstanding could still be proceeded with. The Respondent undertook to cause his bill of costs to be taxed to ascertain their fees and tendered to pay the balance to the Complainant.

[14.3] **On the complaint by J K Moseke:** The Respondent indicated that the matter was settled at the CCMA in full and final settlement of all matters between the parties. The Complainant was on 27 May 2019

refunded the money she had paid for consultation and her instruction to further institute legal proceedings against the employer contrary to the settlement was refused.

[14.4]       **Complaint by Mrs Mfikwa:** The Respondent alleged to have been advised by Mr Nkuna that the complainant is claiming compensation for the death of her husband whom the RAF is alleging was the sole cause of the accident. The matter was to go to case management, then trial. The police docket could not be traced.

[14.5]       **Complaint by Mr T E Sono :** The Respondent confirmed that the Fund paid various amounts to the firm on behalf of the Complainant in 2014 and not all the monies have been paid to the Complainant. Fees may still be owed to experts. He mistakenly thought that he is entitled to 25% fees from the proceeds received from the RAF. He also alleged that the Complainant instructed Mr Nkuna to pay the money in instalments fearing that he may misuse the money due to his drinking habit. He also undertook to tax his bill of costs and expenditures and tendered to pay the difference to the Complainant.

[14.6]       **Complaint by P Dzikiti:** Respondent alleged that he was advised by Nkuna that the RAF made an advance payment of an amount of R440 000.00 on 26 November 2018 which by 2020 had still not been paid to the Complainant who could not be reached. The payment of R3 500 00 that the Complainant requested for assistance with accommodation, was not paid.

[14.7]           **Complaint by L G Baloyi:** The Respondent confirmed that the Complainant's matter became settled and that two amounts were paid by the RAF, that is R450 000.00 on February 2019 and R160 000.00 on 24 July 2017. Respondent alleges the money to be in an investment account and could not be paid to the Complainant as he could not be traced. The Respondent undertook to attend to taxation of his bill of costs and tendered to pay the difference to the Complainant. However, only R768.60 was available in the trust account as at end February 2019.

[14.8]           **Complaint by Mothusi & Marumo Attorneys** on behalf of estate T Busang: The Respondent admitted that he received an amount of R317 709.90 on 18 October 2017 from RAF on behalf of the Complainant of which R280 000.00 was paid to the Complainant only at the end of 30 August 2019 and the balance allegedly paid in front of Mr Swart, the Applicant's auditor. Mr Swart disputed the allegation.

[14.9]           **Complaint by Dr Graad:** In relation to Judgments and Warrants issued, according to Respondent all monies due to Dr Graad have been paid. The Respondent points out that there is no proof attached of the date and amounts of the payments made in his account by the RAF that he allegedly withheld. The undertaking to pay attached by Dr Graad does not refer to a patient's name.

[14.10]          **Complaint by S Maepe:** Respondent alleged Mr Nkuna to have advised him that the matter was settled on an amount of R1 120 000.00 in 2014 on an apportionment of 30%/70%. The Complainant was

only paid an amount of R586 865.00. The Respondent undertook to tax the bill of costs and tendered to pay the balance to the Complainant.

[14.11] **Complaint by C Mbewu;** On complaint of having received a settlement amount of R1 200 000.00 in 2014 and still only R300 000 paid to Complainant by 2019, the Respondent admitted guilt and was issued with a warning. The matter was thereafter settled between him and the Complainant. He had paid a further amount of R300 000 to the Complainant. He still has to tax a bill of costs and tenders to pay any balance to the Respondent.

[14.12] **Complaint on the newspaper article:** He argued that there was no complaint lodged by Mr Moeti and denied that a dispute exists between him and Mr Moeti. He alleged to have made a payment to Mr Moeti albeit late since Moeti had gone to SAPS training and was therefore not reachable. According to him absent a complaint, the Applicant was acting on hearsay evidence.

[14.13] **Regarding Mr Swart report:** He confirmed to have had challenges initially with meeting Mr Swart and that his bookkeeper failed to attend the meeting with Mr Swart. He however subsequently met with Mr Swart. He also argued that a trust position is different from a trust shortage.

[15] The Respondent however agreed that in so far as the RAF matters are concerned he did not timeously attend to the bill of costs or account to clients. He contrariwise alleged that this was due to the fact that such matters are foreign to him and were handled or attended to by Mr Nkuna, a professional

assistant in his firm. He also mistakenly thought he was entitled to 25% of the amounts he had recovered from the RAF even though there were no contingency agreements.

[16] He consequently disputed that his conduct of failure to account timeously or to timeously attend to the taxation of his bills of costs warrants a conclusion that he is not a fit and proper person to continue to practice as a legal practitioner of this honourable court and denied that any other circumstances would warrant such a conclusion to remove his name from the roll of attorneys. He denied any misappropriation of funds or there being any serious misconduct as alleged by the Applicant, or that there is a trust deficit of R2 144 437.76.

#### **THE CURATOR'S SUBSEQUENT REPORT**

[17] Subsequent to the court postponing the matter on 23 May 2021, the Applicant filed the curator's report compiled by Ms Mamiki Lekgetho, a legal official employed in the Applicant's Risk and Compliance Department in which in brief the following offending conduct was reported:

[17.1] Lekgetho met with the Respondent on June 2020 and explained the contents of the court order. The Respondent undertook to co-operate with the Applicant and to furnish the Applicant with all the necessary documents, files and accounting records as stipulated in the court order by 31 July 2020. As indicated he failed to furnish Lekgetho with all his files, books of accounting as stipulated in the court order and to tender his Fidelity Certificate.

[17.2] **Legal Practitioners Fidelity Fund Claim by Dr De Graad** : On 02 April 2020 the Applicant received a complaint from Dr De Graad that the Respondent failed to pay Dr De Graad's accounts for services rendered notwithstanding the fact that the RAF had already paid the costs to the Respondent. On 04 May 2020 Dr De Graad instituted a claim against the Legal Practitioners Fidelity Fund for payment of an amount of R243 763.02 in respect of services rendered to the Respondent's firm. The Respondent was informed of the said claim by Ms Lekgetho on 25 June 2020, and undertook to furnish the Applicant with his comments thereto; the Respondent has however, failed to do so.

[17.3] **The sequestration of the Respondent:** On 15 September 2020, the Applicant received a letter from Sechaba Trust, advising of the provisional sequestration of the estate of the Respondent. The Respondent failed to advise the Applicant of his status in this regard.

[17.4] **Legal Practitioners Fidelity Fund Claim by Mr Thabile Michael Mxabo:** The Applicant received a copy of a claim lodged against the Legal Practitioners Fidelity Fund in the amount of R692 345.60, in respect of payment which the RAF made on or about 25 January 2018 to the Respondent on behalf of Mr Mxabo. The Respondent failed to effect payment in favour of Mr Mxabo.

[17.5] **Legal Practitioners Fidelity Fund Claim by Mr H G Baloi:** The Applicant received a copy of a claim lodged by Mr Baloi against the Legal Practitioners Fidelity Fund in the amount of R458 208.00.

[17.6] Ms Lekgetho confirmed that the total amount of the trust funds received in respect of the claims lodged by Mr Mxabo and Mr Baloi, was not available in the Respondent's firm's trust account as the balance, as at 31 May 2020, was R33 362.49.

**[17.7] The total of claims lodged with Legal Practitioners Fidelity Fund:**  
On 06 April 2021, the Legal Practitioners Fidelity Fund confirmed by way of a claims browser that the total claims registered against the Respondent amounts to R4 671 790.64, in respect of six complainants. The claims of Mr Mxabo and Mr Baloi are included in this amount.

[17.8] Ms Lekgetho compared the list of clients as reflected on the claims browser received from the Legal Practitioners Fidelity Fund to the client files which she had received from the Respondent. Ms Lekgetho was of the view that not all client files were furnished to the Applicant and as such, the Respondent therefore, contravened the court order.

## **STATUTORY MISDEMEONOUR**

[18] Based on the conduct as indicated by Mr Swart and Lekgetho the Applicant alleged that the Respondent has clearly contravened various provisions of the Legal Practice Act, the Rules of the LPC and the Code of Conduct, inter alia, the following :

[18.1] Clause 3.11 of the Code of Conduct in that he failed to use his best efforts to carry out work in a competent and timely manner and not take

on work which he does not reasonably believe he will be able to carry out in that manner;

[18.2] Clause 18.14 of the Code of Conduct in that he failed to perform professional work or work of a kind commonly performed by a practitioner with such a degree of skill, care or attention, or of such a quality or standard, as in the opinion of the Council may reasonably be expected;

[18.3] Rule 47.1 of the LPC Regulations and Clause 16.1 of the Code of Conduct in that he failed, within a reasonable time, to reply to all communications which require an answer unless good cause for refusing an answer exists;

[18.4] Clause 16.2 of the Code of Conduct in that he failed to respond timeously and fully to requests from the Applicant for information and/or documentation which he was able to provide;

[18.5] Clause 16.3 of the Code of Conduct in that he failed to comply timeously with directions from the Applicant;

[18.6] Clause 3.8 of the Code of Conduct in that he failed to account faithfully, accurately and timeously for his client's money which came into his possession, keep such money separate from his own money, and retain such money for so long only as is strictly necessary;

[18.7] Rule 54.12 of the LPC Rules in that he failed, within a reasonable time, after the performance or earlier termination of the mandate received from the complainant, to furnish the complainant with a written statement of account setting out with reasonable clarity:

- (i) details of all amounts received by him in connection with the matter, appropriately explained;
- (ii) particulars of all disbursements and other payments made by him in connection with the matter;
- (iii) fees and other charges charged to or raised against the client and, where any fee represents an agreed fee, a statement that such fee was agreed upon and the amount so agreed;
- (iv) the amount due to or owed by the client.

[18.8] Rule 54.13 of the LPC Rules in that he failed to pay the amount due to the complainant within a reasonable time;

[18.9] Clause 3.1 of the Code of Conduct in that he failed to maintain the highest standard of honesty and integrity;

[18.10] Section 37(2)(a) and (b) read with section 87(2)(a) in that the Respondent did not produce any book, document or record in its possession, custody or control for inspection to a person nominated by the Council;

[18.11] Section 86(2) of the LPA read together with Rule 35.13.8 in that he did not ensure that the total amount of money in his 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; and

[18.12] Section 87(1) in that he failed to keep proper accounting records;

[18.13] Rule 35.13.10 (54.14.10) of the LPC Rules in that he failed to immediately report in writing to the Applicant that the total amount of money in the firm's trust account was less than the total amount of the credit balances of the trust creditors shown in its accounting records, as well as a written explanation of the trust shortage and proof of rectification.

## **LEGAL FRAMEWORK**

[19] It is trite that the question whether a legal practitioner is a fit and proper person to remain on the roll of attorneys is not dependent upon factual findings, but lies in the discretion of the Court. The courts engage in this *sui generis* disciplinary procedure to probe into the conduct of a legal practitioner. The probe that the Court has to conduct is threefold<sup>1</sup>:

[19.1] The Court must first decide as a matter of fact whether the alleged offending conduct by the legal practitioner has been established.

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<sup>1</sup> *Law Society Transvaal vs Mathews*, 1989(4) SA 389(T) at 393 1- J

[19.2] 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<sup>2</sup>.

[19.3] 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<sup>3</sup>.

[20] The Court's discretion must be based upon the facts before it, considered in their totality and the court must not consider each issue in isolation.<sup>4</sup>

[21] The law expects from a legal practitioner *uberrima fides*, the highest possible degree of good faith in his dealings with his client, which implies that at all times his submissions and representations to client must be accurate, honest and frank.

## **ANALYSIS**

### **ESTABLISHED OFFENDING CONDUCT**

[22] The Respondent has admitted to failure to account in several of his clients' matters and to pay some of the monies it received on behalf of these clients

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<sup>2</sup> *Kaplan vs Incorporated Law Society, Transvaal*, 1981 (2) SA page 762 at page 782 A - C

<sup>3</sup> *Jasat v Natal Law Society* [2000 \(3\) SA 44](#) (SCA) at 51 8-1; *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].

<sup>4</sup> *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 8-F; *Malan v The Law Society of the Northern Provinces* (568/2007) [2008] ZASCA 90 (12/09/2008) at [9].

until there was a complaint. In some of those matters the Respondent's books of accounting show a huge trust deficit when there are still amounts owing to clients. The Respondent has in those instances failed to give reasons for the deficit nor to indicate where the clients' money is, except to tender payment of whatever might be owed to the Complainant after taxation of his bill. The tender is in most of the matters made several years after the Respondent had received the payment, arguing that such deficit cannot constitute a serious transgression that warrants his removal.

[23] The tender however does not mean much when it is apparent that the monies are not in the attorney's trust account. The Respondent could not explain the huge deficit indicated in the Curators report when he had initially denied that there was a trust shortage. He could not provide proof of the monies he alleged to have put in an investment account.

[24] The fundamental, positive and unqualified duty of an attorney is the preservation of trust money. Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is imperative that trust money in the possession of an attorney should be available to his client the instant it becomes payable and to be kept in trust if not yet payable, therefore inherent in that, is that in such a trust account the attorney should at all times have available liquid funds in an equivalent amount. Trust money is generally payable before and not after demand.<sup>5</sup> Neither negligence nor wilfulness is an element of a breach of such duty.<sup>6</sup>

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<sup>5</sup> *Incorporated Law Society, Transvaal v Matthews (supra)* at 394. *Incorporated Law Society, Transvaal v Visse and Others: Incorporated Law Society Transvaal v Viljoen* **1958 (4) SA 115** (T) at 118 F - H.

<sup>6</sup> *Incorporated Law Society, Transvaal v Behrman* 1977(1) SA 904(T) at 905 H.

[25] Where the client's money is no longer available in the trust account that is proof of misappropriation of clients' monies, which is sheer theft as correctly pointed out by the Applicant. The unjustifiable handling of trust money in that way is totally untenable and not only frustrates the legal requirements relating to trust money but also undermines the principle that a trust account is completely safe in respect of money held therein by a legal practitioner on behalf of another person. The very essence of a trust fund being the absence of risk and the confidence created thereby.

[26] The Respondent's failure to respond to some of the clients' complaints and to indicate where the money was, even when required to do so by the Applicant, indicates a lack of accountability and disregard for the authority of the controlling body. Accountability to clients and the profession's overseeing structures is the backbone against which a legal practice is conducted. It can, therefore, be appreciated that the duty of an attorney to account is not just important. It is more than that. In essence it is fundamental to the honour of being a lawyer<sup>7</sup>. Consequently the lack of accountability together with misappropriation of trust monies are the worst indiscretions that render the legal practitioner unfit to conduct a legal practice. It is unprofessional, dishonourable and contemptible of a legal practitioner.

[27] The Respondent went further and tried to downplay the seriousness of his actions and liability by blaming Mr Nkuna, the professional assistant at his firm, notwithstanding the fact that he has not made any allegations alluding to Mr Nkuna, with or without his knowledge operating or having access to the trust

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<sup>7</sup> *Cirota and Another v Law Society of Transvaal* 1979 (1) SA 172 (A) at 193f-g; *Law Society of the Northern Provinces v Moima* 2013 ZAGPPHC 213.

account or the firm's banking facilities. He also failed to attach Mr Nkuna's confirmatory affidavit. However, even if Mr Nkuna was involved, the Respondent would have remained accountable for any misappropriation of trust funds or trust deficit as the owner of the firm. The Respondent did on an occasion acknowledge his accountability by admitting guilt for the disappearance of a client's money in the trust account. The ignorance he is now pleading regarding the mishandling of monies in the firm's banking account, specifically the RAF matters is therefore a hoax.

[28] Furthermore, the Respondent's questionable conduct during the investigation failing to give Ms Lekgetho access to all the files leaves a lot to be desired. Ms Lekgetho compared the list of clients as reflected on the claims browser received from the Legal Practitioners Fidelity Fund to the clients' files which she had received from the Respondent and concluded that not all clients' files were furnished to the Applicant. The Respondent's deliberate failure to provide the rest of his clients' files is very telling of their state. The conduct is contemptible of the court order and undermines the authority of the controlling body, which is unworthy of a legal practitioner.

#### **FIDELITY FUND CERTIFICATE**

[29] Furthermore, the Respondent has raised the Applicant's issuing of a Fidelity Fund Certificate to him for the period ending February 2020 to be an indication of everything being in order in the firm's books of accounting including the trust account. The issuing of the certificate to a legal practitioner against whom there are outstanding complaints of misappropriation of funds of which no cogent explanation had been proffered on enquiry by the Applicant,

should be reconsidered. Since such perpetuates a further conduct of impropriety with impunity, as evident from the Respondent's conceited statement that having been issued with a Fidelity Fund Certificate notwithstanding the complaints and admitted transgressions, indicates the non-severity of the transgressions. The Respondent's assertion lacks integrity and is far from the truth. A proper investigation of the situation and vigorous assessment of information submitted to the Applicant to obtain such a certificate should be done prior to the issuing of the certificate to avoid such an anomaly.

[30] As a result of considering his misconduct less severe, the Respondent suggests that he be permitted to remain practising but under supervision, subject to necessary safeguards being put in place to protect members of the public and trust creditors and that any losses are made good upon. Not having the funds available in the trust account and being unable to proffer a cogent explanation cannot be less of a transgression justifying remaining in the profession. The suggestion of an admitted legal practitioner, who is an officer of the court, working under supervision contradicts the assertion of honesty and integrity that is made when a legal practitioner is admitted to practice whereupon an exercise of the highest degree of good faith in dealings with clients, society and the courts is demanded. An officer of the court who may be treated with any mistrust, or against whom any suggestion can be created that he or she may not be worthy of any trust, thus with a compromised integrity,

has no place in the legal profession. Otherwise that would be an indictment to the rule of law to which the legal practitioner stands accountable.<sup>8</sup>

[31] From the totality of the facts including the admissions made by the Respondent, evidence of repetition of transgressions and total lack of appreciation of the seriousness thereof and its effect on his clients, it is apparent that the Respondent is not a fit and proper person to continue practising as a legal practitioner. His overall demeanour constitutes a material deviation from the standards of professional conduct which is expected of a legal practitioner.

[32] Nevertheless a huge trust deficit has now been established and misappropriation of at least an amount of R 2 144 437.76. The Fidelity Fund has undoubtedly been put at risk with claims amounting to more than R 4 671 790 000.64 already lodged with the Fund. There is also confirmation that the Respondent is insolvent and in the process of being sequestrated. The

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<sup>8</sup> A broad outline of some excerpts from the preamble of the Legal Practice Act 28 of 2014 state the aim and purpose of the Act as follows:

**“WHEREAS** section 22 of the Bill of Rights of the Constitution establishes the right to freedom of trade, occupation and profession, and provides that the practice of a trade, occupation or profession may be regulated by law:

**“AND BEARING IN MIND THAT-**

\*access to legal services is not a reality for most South Africans;

**AND IN ORDER TO-**

\*ensure that the values underpinning the Constitution are embraced and that the rule of law is upheld;

\*ensure that legal services are accessible;

\*regulate the legal professions in the public interest, by means of a single statute

\*ensure accountability of the legal profession to the public.” (my emphasis)

Respondent is not a fit and proper person to remain an attorney and the only appropriate sanction to be imposed under the circumstances is the removal of the Respondent's name as a legal practitioner and from the roll of attorneys.

[33] The nature and seriousness of the Respondent's conduct warrants a cost order on an attorney and client scale. It is also customary in matters of this nature, to order costs on a punitive scale the purpose being that the LPC, which acts in the public interest in matters of this sort, is not out of pocket.

[34] Accordingly, the following order is made:

1. The name of **Isaac Mokgobi** is struck off the roll of legal practitioners;
2. Paragraphs 2 to 12 as per Draft Order on caseline 033-13-033-24 are incorporated herein. The Draft order hereby made an order of court.

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**N V KHUMALO**  
JUDGE OF THE HIGH COURT  
HIGH COURT, PRETORIA

I agree.



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**M R PHOOKO AJ**  
ACTING JUDGE OF THE HIGH COURT  
HIGH COURT, PRETORIA

**For the Applicant:** S L Margadie  
Damons, Margadie Richardson Attorneys  
[service@dmrlaw.co.za](mailto:service@dmrlaw.co.za)

**For the Respondent:** In person  
[monaona@vodamail.co.za](mailto:monaona@vodamail.co.za)  
[mokgobi.attorneys@gmail.com](mailto:mokgobi.attorneys@gmail.com)

