



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

CASE NO: 101522/2023

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

10 December 2024

Date

K. La M Manamela

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

KABELO HUMPHREY MASHIGO

Respondent

This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Senior Judge's secretary. The date of the judgment is deemed to be 10 December 2024.

JUDGMENT

Khashane Manamela, AJ (Collis, J concurring)

Introduction

[1] In this application, wherein the South African Legal Practice Council ('the LPC') seeks an order that the respondent, Mr Kabelo Humphrey Mashigo ('the respondent') be struck off the roll of attorneys. The respondent is alleged to have misappropriated trust funds and to be guilty of having practised without a fidelity fund certificate and trust account. The application is opposed by the respondent, mainly, on the ground that the subject matters of most of the complaints against him have been amicably resolved with the relevant complainants and with the remainder of the complaints he pleaded guilty and admitted the material transgressions when he appeared before the disciplinary committee of the LPC.

[2] The matter came before us on special allocation by the Deputy Judge President on 09 September 2024. Ms N Erasmus appeared for the LPC and Mr Mashigo appeared in person. This judgment was then reserved.

Issues for determination

[3] The issues to be determined in this matter in accordance with the durable judicious guide by Harms DP in *Law Society, Northern Provinces v Mogami and others*¹ are the following: (a) whether the alleged offending conduct has been established; (b) if the offending conduct has been established, whether the respondent, as a legal practitioner, is a fit and proper person to continue to practise, and (c) if the Court is of the view that the respondent is not a fit and proper person to practise as an attorney, whether in all the circumstances the respondent is to be removed from the roll of attorneys or whether an order suspending him from practising for a specified period would suffice.²

¹ *Law Society, Northern Provinces v Mogami and others* 2010 (1) SA 186 (SCA).

² *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) [4], relying on *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); *Malan and another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) [10].

Applicable legal principles

[4] This type of applications are governed by the provisions of the Legal Practice Act 28 of 2014 ('the LPA'), Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities of the LPC made in terms of section 36(1) of the LPA ('the Code of Conduct') and the South African Legal Practice Council Rules ('the LPC Rules') made under the provisions of the LPA. Due to the dates of some of the alleged transgressions in some instances the applicable rules are those under the now repealed Attorneys Act 53 of 1979.³ But the latter rules are replicated in the current LPC Rules.

[5] These instruments exist to ensure that the LPC is empowered, among others, to: (a) enhance and maintain the integrity and status of the legal profession; (b) determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners; (c) promote high standards of legal education and training and compulsory post-qualification professional development; (d) uphold and advance the rule of law, administration of justice, and the Constitution of the Republic of South Africa, 1996; (e) exercise disciplinary jurisdiction over legal practitioners whose conduct, allegedly, is unprofessional, dishonourable or unworthy; (f) in appropriate cases and in terms of sections 40(3)(a)(iv) and 44(1) of the LPA, to launch an application for the striking off the roll or suspension from practice of a legal practitioner if a court is satisfied that the legal practitioner is not a fit and proper person to continue to practise.

[6] Section 40(3)(a)(iv) of the LPA provides that '[i]f found guilty of misconduct, the disciplinary committee concerned may call witnesses to give evidence in aggravation of

³ Section 116 of the LPA deals with 'pending proceedings' and its subsection (2) reads in the material part: 'Any proceedings in respect of the suspension of any person from practice as an ... attorney ... or in respect of the removal of the name of any person from the roll of ... attorneys ... which have been instituted in terms of any law repealed by [the LPA], and which have not been concluded at [01 November 2018], must be continued and concluded as if that law had not been repealed ...'

sentence and may - (a) ... (iv) advise the Council to apply to the High Court for - (aa) an order striking his or her name from the Roll; (bb) an order suspending him or her from practice ...’

[7] Section 44 of the LPA provides for powers of the Court seized with an application relating to conduct of a practitioner. It reads as follows in the material part:

(1) The provisions of [the LPA] do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner ...

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

[8] A practitioner’s obligations regarding accounting or trust accounts include the following:

[8.1] Section 84(1) of the LPA proscribes practising by a legal practitioner (as an attorney) without a fidelity fund certificate and reads in the material part:

(1) Every attorney ... who practises or is deemed to practise –
(a) for his or her own account either alone or in partnership; or
(b) as a director of a practice which is a juristic entity,
must be in possession of a Fidelity Fund certificate. [underlining added]

[8.2] Rule 54.29 of the LPC Rules reads:

In order to qualify for the issue of a Fidelity Fund certificate, a trust account practitioner must ensure that an unqualified audit or inspector's report is issued in respect of any firm or firms of which he or she is or was a partner or director or sole practitioner during the financial period under review, and is delivered timeously to the Society.

[9] A legal practitioner ought to comply with the provisions of the LPA and all the rules in relation to the money of a client which is placed into his custody and control. Such money ought to be kept in a trust account.

Brief background

[10] Most of the issues in the background of this matter are not in dispute and therefore, common cause between the parties. Where there is a dispute this would be pointed out and the relevant issues would appear in detail under the parties respective cases, discussed below.

[11] The respondent was admitted and enrolled as an attorney of this Court on 13 October 2016. He had served articles of clerkship with the firm Tim Sukazi Inc ('Sukazi Inc'). After his admission, the respondent remained with Sukazi Inc as a professional assistant until 26 January 2018. Thereafter, the respondent moved his name to the roll of non-practising attorneys. Part of the respondent's conduct subject to determination in this matter occurred during this period. The respondent's name was restored to the roll of practising attorneys, after five years, on 13 February 2023. The respondent is now practising as a sole practitioner under the name and style of Mashigo Kabelo Attorneys in Illovo, Johannesburg. He says his return to the practising roll and opening of a law firm was only to render himself compliant in case he has to render legal services, as his main activities are in football agency.

LPC's case

General

[12] The complaints lodged with the LPC (and its constituent predecessor the Law Society of the Northern Provinces ('the LSNP')) against the respondent relate to the period when the respondent was a professional assistant at Sukazi Inc and, after his departure from the firm, when his name was on the roll of non-practising attorneys. There are, effectively, three complaints lodged against the respondent.

Complaint(s) by Mr Tim Sukazi and Advocate H Drake

[13] Mr Tim Sukazi ('Mr Sukazi') from the respondent's erstwhile employer Sukazi Inc lodged a complaint with the LSNP on 18 April 2018.⁴ The complaint was later supplemented by Advocate Hannine Drake ('Adv Drake') on 12 July 2018. Advocate Drake practised as an advocate and a member of the Johannesburg Bar. Mr Sukazi, essentially, complained that he had discovered after the respondent had left the employ of his firm in January 2018 that the respondent stole and/or fraudulently misappropriated some business and trust monies whilst he was a professional assistant at the law firm, Sukazi Inc.

[14] The respondent, in the one instance, is said to have misrepresented to Advocate Drake that he had the authority of Sukazi Inc or Mr Sukazi for monies to be refunded or deposited into a bank account different from the trust account of Sukazi Inc.⁵ Advocate Drake had discovered that the firm, Sukazi Inc, had overpaid her on a matter she handled on behalf of the firm. She took this up with the respondent, who was acting on behalf of the law firm, by way of e-mails and telephone discussion. She even suggested setting-off the amount against another invoice owing on another matter, but this was not agreed upon. Ultimately, the respondent in November 2017 directed her to repay or refund the money in the amount of R31 200 into the bank account of an entity called 'Tshau Business Solutions' to his benefit. Advocate Drake had queried the use of a personal or third party bank account, but the respondent made it sound as if the payment arrangement was sanctioned by Mr Sukazi. Besides, Advocate Drake says she did not have any reason to distrust the respondent as she had worked with him for years and had found him to be diligent. Advocate proceeded to make payment in the amount of R31 200 into the designated bank account.

⁴ Founding Affidavit ('FA') at para 6.1.

⁵ FA at paras 6.10 – 6.26.

[15] Another complaint or part of the complaint by Mr Sukazi related to the unauthorised spending on the firm's credit card by the respondent, including by way of cash withdrawals during the months of November 2017 to January 2018. The respondent, according to the LPC, signed an acknowledgement of debt regarding the unauthorised spending in the amount of R169 280, 52.⁶ The respondent was also alleged to have conducted business or done work outside that of his employer, Sukazi Inc. This included him issuing letters of demand on the firm's letterhead and reflecting that Mr Sukazi was the signatory of the letters, when Mr Sukazi had no knowledge of this.⁷ The respondent failed to provide written comments to these allegations when requested to do so by LPC.⁸ In May 2019, the investigating committee of the LPC recommended that the respondent be summoned to appear before the disciplinary committee.⁹ But it does not appear that the complaint had progressed to the disciplinary committee when this application was made.

Complaint by Nyapotse Inc attorneys

[16] The LPC also received a complaint from Nyapotse Inc attorneys ('Nyapotse') dated 25 September 2019.¹⁰ This related to events in 2018 and 2019. Nyapotse had been retained by some persons who were defendants in a matter. This firm issued two invoices for the legal services rendered to these individual clients. The invoices were not paid when Nyapotse complained to the LPC in June 2019 that, three of the four individual clients advised of their intention to terminate the firm's mandate and retain a firm called 'Kabelo Mashigo Attorneys'.¹¹ It is common cause that this was the respondent's 'firm' when he was not on the roll of practising attorneys. Also, the 'firm' was unknown to the LPC.

⁶ FA at para 6.6.

⁷ FA at para 6.7.

⁸ FA at para 6.27.

⁹ FA at para 32.

¹⁰ FA at para 7.1.

¹¹ FA at para 7.4.

[17] Nyapotse accepted the termination of its mandate, but advised that the respondent's firm would only come on board once Nyapotse's bills have been settled in full.¹² This did not happen. The three individuals appointed the respondent's 'firm' as the new attorneys. Nyapotse wrote to the respondent complaining about his conduct which the firm deemed to be unethical. When the respondent failed to respond, despite a follow up letter, Nyapotse lodged the complaint with the LPC. It sought the LPC to look into the manner in which respondent accepted instructions from the three individuals and his failure to react to correspondence sent to him by Nyapotse. In related documents to this complaint, it appeared that the respondent also used the entity called 'K4 Alchemy Consult (Pty) Ltd' for his business activities and he was reflected as a director of the entity.¹³ A subsequent internet search by the LPC from the records of the CIPC revealed the latter entity as bearing a 2015 registration number and the respondent as a director since 04 April 2018, the same date on which the only other director resigned from the entity.¹⁴

[18] The Nyapotse complaint was referred to the respondent for comments.¹⁵ He was also asked to explain whether 'K4 Alchemy Consult' was a firm of legal practitioners and the type of services the entity rendered to the public. The respondent was also requested to provide information regarding the law firm Kabelo Mashigo Attorneys, which was not registered with the LPC.¹⁶ It is common cause that the respondent by this time had been on the non-practising roll of attorneys since 26 January 2018. Therefore, as pointed out by the LPC, in terms of section 34 of the the LPA, the respondent could not render any legal services nor did he have any authority to render legal services in terms of section 33 of the LPA.¹⁷ The respondent

¹² FA at para 7.5.

¹³ FA at para 7.9.

¹⁴ *Ibid.*

¹⁵ FA at paras 7.11 – 7.12.

¹⁶ FA at para 7.11.2.

¹⁷ FA at para 7.11.3.

failed to respond, despite being granted another opportunity to do so and the matter was placed before the investigating committee without his comments. The investigating committee summoned the parties to appear before it for a discussion on 07 April 2021 when the matter was referred to a disciplinary committee for the respondent to face specified charges.¹⁸

[19] On 22 September 2021, the respondent appeared before a disciplinary committee of the LPC and pleaded guilty to charges which included: (a) failure to maintain the ethical standards of integrity and honesty prescribed in the Code of Conduct; (b) bringing the legal profession into disrepute, and (c) practising as an attorney without being in possession of a fidelity fund certificate.¹⁹ As a sanction, the committee recommended that the matter be referred to the Council or LPC to apply to this Court for an order striking the name of the respondent from the roll of legal practitioners in terms of the the LPC Rules made under the provisions of the LPA.²⁰ In the course of time the current application was launched.

Complaint by Coovadia Attorneys on behalf of Mr Vladislav Heric

[20] Coovadia Attorneys ('Coovadia') lodged a complaint with the LPC in a letter dated 10 March 2021.²¹ This was on behalf of their client Mr Vladislav Heric ('Mr Heric'). Mr Heric, prior to approaching them, had retained the respondent in respect of a dispute regarding his former football team employer. Settlement of the dispute was reached between Mr Heric and his former employer and recorded in an agreement between the parties.²² After payment was made into the respondent's bank account the respondent ignored the calls from Mr Heric and his request for payment of his funds from the settlement.²³

¹⁸ FA at para 7.18.

¹⁹ FA at para 7.20.

²⁰ FA at para 7.21.

²¹ FA at para 8.1.

²² FA at para 8.2.

²³ FA at para 8.4.

[21] The LPC referred the complaint by Coovadia to the respondent for a response by 06 May 2021, but he failed to respond on time. He had to be reminded by the LPC of the consequence of his failure to respond.²⁴ The respondent chose to provide the LPC with emails exchanged with other attorneys, including Coovadia, instead of directly responding to the Coovadia complaint.²⁵ He, ultimately, paid an amount of R194 147, 40 to Mr Heric. This was the balance of the amount of R330 000 received by the respondent as settlement of the dispute concerning Mr Heric. This means that the respondent retained the amount of R135 852, 60. He claimed this to be for his services in the matter, despite the fact that he had already been paid the agreed 10% fee (i.e. R30 000 of the settlement amount of R330 000).²⁶ The respondent explained that before he could make payment to Mr Heric, the latter instructed him to file a case with FIFA for payment of the full value of his contract. The amount of R135 852, 60 represent 10% of the amount the respondent would have obtained had Mr Heric ‘remained patient and the FIFA order ...obtained’.²⁷ The work had already been done. He has also informed Mr Heric how the bill would look like, if the FIFA case was abandoned. This was disputed by Coovadia on behalf of Mr Heric in communication with the LPC on 29 July 2021.²⁸ The respondent was considered to be unreasonably withholding the amount of R135 852, 60.

[22] The LPC highlights the following regarding the refund paid by the respondent. The payment had been made from the bank account of Kabelo Mashigo.²⁹ This is not a trust bank account in terms of the rules of the LPC. The statement of account provided by the respondent reflected the name of ‘K4 Alchemy Consult’, referred to above.³⁰ On 16 February 2022 the

²⁴ FA at paras 8.5 – 8.6.

²⁵ FA at paras 8.7 – 8.8.

²⁶ FA at para 8.13.

²⁷ FA at para 8.15.

²⁸ FA at para 8.16.

²⁹ FA at para 8.14.

³⁰ Paras [17]-[18] above and FA at para 8.10.

investigating committee recommended that the matter be enrolled for discussion.³¹ It appears this had not yet been done when this application was launched.

Conclusion on alleged contraventions by the respondent

[23] The LPC points out that the offences against the respondent are serious and clearly show an obvious failure over a number of years to uphold the highest standard of honesty, reliability and integrity as expected from a legal practitioner. Some of the complaints include alleged criminal conduct by the respondent which cast doubt on his professional integrity and fitness to continue practising as an attorney. The respondent is not a fit and proper person to continue to practise as a legal practitioner, the LPC concludes.

Mr Mashigo's case

[24] In his answering affidavit, Mr Mashigo, as the respondent described himself as a practising attorney based in or residing in Centurion, Pretoria.³² Although not really aimed as an attempt to discredit, the respondent's affidavit and his written material can be described as frugal in their contents and even coming short in terms of addressing the allegations in the complaints lodged with the LPC. This was also the case at the hearing of the matter where the respondent appeared in person. The Court, thinking this could be aided, alerted the respondent to consider acquiring legal representation, including free legal aid. The respondent was confident to elect to proceed defending the matter in person. Not that anything would turn on this for purposes of the outcome of this matter. The LPC also raised the concern about frugality of the responses in its replying affidavit. It pointed out that the respondent chose not to answer allegations against him, which would remain undisputed. This, the LPC adds, is suggestive of a respondent and legal practitioner who refuses to take the Court into his confidence and choosing to remain coy about the complaints instead of explaining his conduct.

³¹ FA at para 8.18.

³² Answering Affidavit ('AA') at para 1.

[25] The respondent argues that of the three instances or offences he is alleged to have committed two of them have not been properly ventilated through ‘the proper channels’ of the LPC.³³ He does not explain this, but it appears that he alludes to the fact that not all three complaints have progressed through the structures of the LPC towards a disciplinary hearing. I hasten to point out that this is irrelevant as discussed below.³⁴ Also, the respondent views ‘the matters [to be] issues which have only been brought to light in an attempt to discredit [him] and create an inaccurate picture of [his] conduct as an attorney’.³⁵ Further, the respondent asserts that both the complaints by Mr Sukazi and Advocate Drake, and by Coovadia on behalf of Mr Heric – in the respondent’s knowledge – have been resolved and ought not to form part of the application.³⁶ He says he is still working with Mr Sukazi, his erstwhile employer, on some football matters. They have a ‘healthy active working relationship’, he claims. The issues or ‘misunderstanding’ between the two of them have now been resolved. It should be the end of the matter as the respondent has not yet been found guilty of any misconduct in relation to this complaint. The LPC ought not to have brought this part of the matter before the Court when the issues have not been finalised in terms of the LPC’s processes. The same applies to the Coovadia complaint concerning Mr Heric.

[26] The respondent pointed out that he pleaded guilty to the charges relating to the Nyapotse complaint when he appeared before the disciplinary committee of the LPC.³⁷ He provided the following explanation on this complaint or charges. He had assisted two family friends and their respective companies in an undesirable position, as Nyapotse couldn’t attend to their matter timeously. All he did was limited to the filing of a discovery affidavit on their

³³ AA at para 6.

³⁴ Par [32] below.

³⁵ AA para 6.

³⁶ AA at paras 8 – 9.

³⁷ Par [19] above.

behalf. Besides this, he was not - during this period - involved in any court or legal work.³⁸ He simply remained on the non-practising roll due to lack of funds. But after the LPC process he paid the necessary fees and transferred his name back onto the roll of practising attorneys to avoid recurrence of similar incidents.³⁹

[27] In conclusion, the respondent stated that his conduct, despite being undesirable, does not amount to him being a person who is not fit and proper person to continue to practise as a legal practitioner. He is currently in good standing with the LPC as a practising attorney. Removal from the roll is an extreme punishment not warranted in this matter, the respondent submits. His removal from the roll would have a negative impact on him and those dependant on him or on his ability to work. For, once removed, he would not be able to obtain employment. The respondent also finds it ‘disheartening’ to imagine that after four years of LLB studies and years of articles one mistake of filing a discovery affidavit would mean the end of the road at the age of 34. His acceptance of the charges relating to the Nyapotse complaint are worthy of consideration for current purposes and ought to convince the Court that he does not shy away from his mistakes. The respondent submits that suspension from practice, also represents a sanction within the discretionary jurisdiction of this Court and the contemplation of the LPA.⁴⁰ This is so, particularly, where there are grounds for the Court to conclude that suspension, with or without conditions, would subsequently render a practitioner fit to resume practising.⁴¹ The respondent, also, mentions the possibility of other types of sanctions, such as a fine and reprimand, but concedes those are for misconduct of a less serious nature.

³⁸ AA at para 11.

³⁹ AA at para 10.

⁴⁰ *Jasat v Natal Law Society* 2000 (2) ALL SA 310 (SCA).

⁴¹ *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 638I-639E; *Law Society, Cape of Good Hope v Berrangé* 2005 (5) SA 160 (C) at 173G-I.

The test or inquiry for a determination in this of application

[28] As stated above, this type of applications ought to be determined in terms of a three-stage inquiry set in *Law Society, Northern Provinces v Mogami*. First, whether the alleged offending conduct has been established on a preponderance of probabilities. This is a factual inquiry. Secondly, once the Court is satisfied that the offending conduct has been established, whether the practitioner concerned is a fit and proper person to continue to practise. This part of the inquiry entails a value judgment, involving weighing up of the conduct complained of against the conduct expected of a practitioner or an attorney. Thirdly, if the Court is of the view that the practitioner is not a fit and proper person to practise as an attorney, whether in all the circumstances the practitioner in question is to be removed from the roll of attorneys or whether an order suspending him from practising for a specified period would suffice.⁴²

[29] In my view, the three-stage inquiry or assessment is dispositive of the major issues requiring determination by the Court. Below, follows a discussion of the issues to be determined under self-explanatory subheadings.

Is the alleged offending conduct on the part of the respondent established?

[30] The first of the three-stage inquiry suggested in *Mogami* is whether the alleged offending conduct has been established on a balance or preponderance of probabilities. This is said to be a factual inquiry.⁴³

[31] The LPC relied on three complaints lodged against the respondent to predicate the relief sought against the respondent, fully discussed above. The one complaint is by the respondent's erstwhile employer Mr Sukazi of Sukazi Inc.⁴⁴ In the main it concerns allegations that the

⁴² *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) [4], relying on *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); *Malan and another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) [10].

⁴³ *Ibid.*

⁴⁴ Paras [13]-[15] above.

respondent in November 2017 misled Adv Drake - retained in a matter - to refund trust funds in the amount of R31 200 into a bank account (instead of trust account) for the personal benefit of the respondent. The other legs of this complaint concern the respondent's alleged misappropriation of monies of the law firm through the unauthorised use of the law firm's credit card in the amount of R169 280, 52. Also, the respondent is alleged to have conducted his own private business work whilst employed by Sukazi Inc as a professional assistant. The second complaint as mentioned lodged with the LPC against the respondent was from Nyapotse Inc in September 2019.⁴⁵ The respondent was charged, pleaded guilty to most of the charges and was found guilty by a disciplinary committee of the LPC.⁴⁶ These related to the respondent's rendering of legal services whilst he was on the non-practising roll of attorneys and, therefore, practising without a fidelity fund certificate and a trust account. In September 2021 the disciplinary committee of the LPC recommended that the matter be referred to the Council to launch the current application.⁴⁷ The third complaint was by Coovadia Attorneys in March 2021 involving Mr Heric, their client.⁴⁸ The respondent is alleged to have unreasonably withheld an amount of R135 852, 60 from his client; refunded the money from a bank account of Kabelo Mashigo and not a law firm's trust bank account, and to have conducted legal services through an entity called 'K4 Alchemy Consult', which is a law firm. Other than saying the matter or complaint has been resolved, the respondent also contends the matter is premature before this Court as it has not fully progressed within the structures of the LPC.

[32] I hasten to point out that the LPC is not precluded from approaching this Court without its disciplinary process being fully consummated where it is of the view that the complaints whether viewed jointly or severally render(s) a practitioner to be a person not fit and proper to

⁴⁵ Pars [16]-[19] above.

⁴⁶ Par [19] above.

⁴⁷ *Ibid.*

⁴⁸ Pars [20]-[22] above.

continue practising as an attorney.⁴⁹ Therefore, there is no merit in the respondent's assertion that he expected the LPC to follow through with its disciplinary process with regard to the Sukazi and Coovadia complaints. Besides, a decision to launch this application was properly made by the LPC in respect of the charges relating to the Nyapotse complaint. It would be unreasonable to expect the LPC to wait for each and every complaints to be finalised through its disciplinary structures when the LPC is on the view that the determination by the court is warranted as to whether a practitioner is fit and proper to continue to practise.

[33] As this part or stage of the inquiry constitutes a factual inquiry,⁵⁰ I find that there is no factual dispute in respect of the misappropriation or theft of the amount of R31 200 by the respondent when he misled Adv Drake to pay same into a bank account for his personal benefit. I agree with the LPC that it does not matter that the respondent has made amends with Mr Sukazi or the latter's firm. The dishonesty survives any amicable resolution of the matter. This offence has been established on a balance of probabilities. The law firm also complained about the misuse of the law firm's credit card. The respondent acknowledged in writing that he is indebted to the law firm in the amount of R169 280.52.⁵¹ Therefore, there is no doubt that an offence has been established in this regard. But I am not satisfied that an offence has been established regarding the alleged running of own business or law firm by the respondent whilst he was a professional assistant at Sukazi Inc.

[34] The Coovadia complaint appears to be exclusively pertaining to the respondent as a football agent and non-practising attorney. The essence of the complaint alludes to a contractual dispute which on balanced probabilities does not suggest transgression of the rules

⁴⁹ *South African Legal Practice Council v Langa and Others* [2023] ZAGPPHC 1728; 79330/2018 (31 March 2023) [8] *coram* Du Plessis AJ and Makhoba J, relying on *The Law Society of the Northern Provinces v Morobadi* (1151/2017) [2018] ZASCA 185 (11 December 2018) [25], [31].

⁵⁰ *Law Society of the Northern Provinces v Morobadi* [2018] ZASCA 185 [4].

⁵¹ FA at para 6.6.

of the LPC and provisions of the LPA. There may be a dispute about what is payable, but this would not be legal fees but non-practitioner charges not capable of easy assessment by the LPC and, by extension, this Court for their reasonableness. Should I be wrong in this regard, the latter remains an option for the LPC or Mr Heric to pursue.

[35] The Nyapotse complaint has been established. The respondent admitted his conduct in this regard and only sought to explain his motivations for doing what he did, which aspect is not relevant at this stage of the enquiry. Therefore, the alleged offending conduct has been established in respect of this complaint.

Is the respondent a fit and proper person?

[36] This is the second and value judgment part of the three-stage inquiry. It involves the weighing up of the conduct of the respondent against the conduct expected of an attorney.⁵² The respondent has admitted practising without a fidelity fund certificate and a trust account albeit established in respect of only one incident or matter. His conduct has also been found to constitute theft or misappropriation of trust funds in the amount of R31 200 in respect of the redirected payment from Advocate Drake and the misuse of the funds of Sukazi Inc in the amount of R169 280, 52. It is material that the impugned conduct took place within the first two to three years of the respondent's career as an attorney (i.e. between October 2016 and 13 October 2019. Ms Erasmus for the LPC actually made this observation.

[37] The offences the respondent has been found to be guilty of are serious, as urged by the LPC, particularly when they are considered cumulatively. I have considered submissions made by or on behalf of the parties above, including that the respondent's motives were altruistic in respect of the Nyapotse complaint and, reportedly, that he derived no financial benefit for rendering the material services when he was on the non-practising roll. I disagree with the

⁵² *Ibid.*

respondent that despite all these he remains a fit and proper person to remain practising as an attorney. At least, not without the remedial measures proposed below.

Should the respondent be removed from the roll of attorneys or suspended from practising as an attorney

[38] Once the Court concludes that a practitioner is not a fit and proper person to practise as an attorney, the third stage of the inquiry is triggered. During this stage the Court ought to determine whether in all circumstances the practitioner in question ought to be removed from the roll of attorneys or whether suspension of such practitioner from practising as an attorney for a definite period would suffice.

[39] The seriousness of the offences the respondent is guilty of is not ameliorated or extinguished by the fact that the respondent already may have amicably resolved most of the complaints or offences with the affected complainants or have pleaded guilty thereto before the disciplinary committee of the LPC. The respondent not only misappropriated trust funds of the client of Sukazi Inc, but also misused a credit card allocated to him by the aforesaid law firm and practised without a trust account and fidelity fund certificate. A trust account and fidelity fund certificate are instruments to protect members of the public who are trust creditors from the mishandling of their trust funds by the practitioners. Trust funds should never be utilised for personal objectives, no matter the amount involved.

[40] The respondent seem to be of the view that he could do as he pleases with trust funds and, subsequently, escape scrutiny and accountability by resolving the matter privately with those affected. The resolution may be under the circumstances commendable but the dishonesty remains.

[41] A determination of whether a practitioner should be struck off the roll or suspended is never a comparative exercise. In *Law Society of the Northern Provinces v Sonntag*⁵³ the observation was made that the lower court materially misdirected itself in ordering the suspension of the respondent and not her striking off the roll of attorneys through an exercise of a full-length comparison of the facts in the matter and those of the SCA decision in *Malan v Law Society, Northern Provinces*, referred to above. It was held that because the scale of wrongdoing in the latter case was so much greater, it means a lesser penalty was appropriate in the case the court was seized with. Comparative reviews of sanctions may be vital aids and, at times, convenient tools at arriving at an outcome befitting particular conduct of a practitioner but they cannot usurp the jurisdiction of the court seized with the matter.⁵⁴ In *Malan v Law Society, Northern Provinces* Harms ADP authoritatively pointed out that facts matter when, respectfully, he observed: '[f]acts are never identical, and the exercise of a discretion need not be the same in similar cases. If a court were bound to follow a precedent in the exercise of its discretion it would mean that the court has no real discretion.'⁵⁵

[42] The facts in the matter now before this Court clearly show that the respondent offended from the onset upon acquiring his licence to practice. His conduct – even whilst he was a professional assistant at Sukazi Inc and, thus, also bound by an employment contract - deviated from what is acceptable and expected for an attorneys' profession. It appears that the respondent despite satisfactorily completing his training and examinations to qualify as an attorney has not learned to distinguish what is right from what is wrong in the conduct of a legal practitioner or attorney. I respectfully agree with the submission by counsel for the LPC – obviously made whilst taking a leaf out of the Court's book during the hearing – that the respondent needs guidance. He is dishonest, but this doesn't appear to be so embedded that he

⁵³ *Law Society of the Northern Provinces v Sonntag* 2012 (1) SA 372 (SCA) [16].

⁵⁴ *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA) [28].

⁵⁵ *Malan v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) [9].

should be indefinitely excluded from the attorneys' profession. Perhaps unethical and dishonest behaviour can be cured or remedied to an acceptable level.

[43] Therefore, a proper sanction will be for the respondent to be suspended from practising of own account, as a partner or as a director of a juristic entity on specified conditions aimed at assisting him to critically remedy his defective conduct and steer himself back on his conduct onto course in order to conform to the very high standard, reputation or honour of the attorneys' profession. As this is primarily aimed at remedying the respondent's conduct the suspension will be subject to conditions or remedial course, dealt with below.

Conclusion and costs

[44] In this type of applications, the role of the Court is twofold: (1) the discipline and punishment of errand attorneys, and (2) the protection of the public.⁵⁶ Of the two what is paramount is the protection of the public.⁵⁷

[45] Recently, in this Division in *Legal Practice Council of South Africa v Baloyi*⁵⁸ Janse Van Nieuwenhuizen, J and Kekana, AJ observed:

[99] In the result, I am of the view that the respondent should be suspended from practicing for his own account and that he may only bring an application for the upliftment of his suspension if he can satisfy the Legal Practice Council and the Court that he possesses the necessary knowledge and skill to manage trust funds.

[100] This sanction entails that the respondent may still be employed by a firm of attorneys and, furthermore, affords the respondent an opportunity to enhance his bookkeeping skills.

[46] There is a semblance of commonality between this matter and the *Baloyi* matter in this regard. Whilst the respondent in *Baloyi* needed to enhance his bookkeeping skills, in this matter

⁵⁶ *Summerly v Law Society, Northern Provinces* 2006 (5) SA 613 SCA [19].

⁵⁷ *Malan v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) [7].

⁵⁸ *Legal Practice Council of South Africa v Baloyi* (32033/2020) [2024] ZAGPPHC 827 (17 July 2024) [99]-[100].

the respondent requires re-education or enhancement of the standard of his conduct with regard to an attorney's practice, especially ethical conduct.

[47] The respondent has to attend a course or training on practice management with emphasis on ethics. The LPC may be of assistance in this regard as it was tasked in *Baloyi* in identifying - jointly with the respondent - a proper course or programme for the respondent to undertake.⁵⁹ After all, the LPC is not an ordinary adversarial litigant in these application, but a custodian of the interests of the profession and the public at large.⁶⁰

[48] I propose that the respondent be suspended from practising for own account, as a partner in a partnership or director of a juristic entity for a period of two years. The aforesaid restriction may be removed after a period of two years on condition that the respondent has attended or undertaken a programme or course on practice management, including ethics, to the satisfaction of the LPC. Such course or programme may be undertaken during the two years of suspension.

[49] The effect of this would be that the respondent surrenders his fidelity fund certificate and adhere to the other consequential aspects of the order to be made with regard to all files and/or matter currently handled by his law firm, subject to the rights of the affected clients.

[50] With regard to the issue of costs the LPC emphasised that it ought to be enabled to continue its role of bringing evidence of a practitioners' misconduct to the attention of the Court, in the interests of the Court, the profession and the public at large, to enable the Court to exercise its disciplinary powers over practitioners.⁶¹ The LPC seeks costs of the application on the scale as between attorney and client, lest it is burdened with legal costs and left out of

⁵⁹ *Legal Practice Council v Baloyi* [2024] ZAGPPHC 827 [99].

⁶⁰ *Van der Berg v General Council of the Bar of South Africa* [2007] ZASCA 16, [2007] 2 All SA 499 (SCA) [2].

⁶¹ *Ibid.*

pocket if not fully indemnified for its costs.⁶² The respondent submitted that an attorney and client order ‘is steep’ or ‘extremely punitive’, especially given that he is not practising or in a cash business. He is just helping young football players in early development who do not have money. Whilst the respondent’s activities may be commendable they do not detract from the fact that these proceedings became necessary due to the conduct of the respondent and the LPC ought to be placed in a position it would have been without the costs of these proceedings. The costs are not part of the sanction or punishment of the respondent, but merely an incident of these proceedings. Therefore, an award of costs at attorney and client scale will be made.

Order

[51] In the result, I propose that the following order be made, that:

1. **KABELO HUMPHREY MASHIGO** be suspended from practicing for own account, as a partner in a partnership or director of a juristic entity for a period of two (2) years from date of this order, subject to the condition in 2 hereof;
2. **KABELO HUMPHREY MASHIGO** (hereinafter referred to as ‘the respondent’) should furnish to the Legal Practice Council proof of satisfactorily attending or undertaking a programme or course on practice management, including ethics, before the respondent is permitted from practising for his own account, which course or programme may be undertaken during the period of suspension.
3. the respondent be prohibited from handling or operating on his trust accounts as detailed in paragraph 4 hereunder;
4. the Director/Acting Director and or Nominee, of the Gauteng Provincial Office of the applicant, be appointed as curator *bonis* (herein after referred to as ‘curator’) to administer and control the trust accounts, or any purported trust accounts, of the respondent, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with the respondent’s practice as attorney and including also, the separate banking account opened and kept by the respondent at a bank in the Republic of South Africa in terms of section 86(1) of the Legal Practice Act (‘the LPA’) - bearing

⁶² *Botha v Law Society of the Northern Provinces* 2009 (1) SA 227 (SCA) 236F.

accounts as contemplated by sections 86(3) and 86 (4) of the LPA, in which monies from such trust bank accounts having been invested by virtue of the provisions of the said subsections 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:

- 4.1 immediately to take possession of the respondent’s accounting records, records, filed and documents as referred to in paragraph 5 and subject to the approval of the Board of Control of the Legal Practitioner’s Fidelity Fund (herein after 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 deem necessary to bring to completion current transactions in which the respondent was acting at the date of this order;
- 4.2 subject to the approval and control of the Board of Control of the Fund 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 respondent in respect of monies held, received and/or invested by the respondent in terms of sections 86(3) and 86(4) of the PA (hereinafter referred to as ‘the 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 respondent was and may still have been concerned and to receive such monies and to pay same to the credit of the trust account(s);
- 4.3 to ascertain from the respondent’s accounting records the names of all persons on whose account the respondent appears to hold or to have received trust monies (hereinafter referred to as ‘trust creditors’) and to call upon the respondent to furnish him, within 30 (thirty) days of the date of service of this order such further period as he may agree to in writing, with the names, addresses and amounts due to all trust creditors;
- 4.4 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 Board of Control of the Fund, to determine whether any such

trust creditor has a claim in respect of monies in the trust account(s) of the respondent and, if so, the amount of such claim;

- 4.5 to admit or reject, in whole or in part, subject to the approval of the Board of Control of the Fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' rights of access to the civil courts;
- 4.6 having determined the amounts which he considered are lawfully due to trust creditors, to pay such claims in full subject always to the approval of the Board of Control of the Fund;
- 4.7 in the event of there being surplus in the trust account(s) of the respondent 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 63(3) of the LPA in respect of any interest therein referred to and, secondly, without prejudice to the rights of the trust creditors of the respondent, the costs, fees and expenses referred to in paragraph 13 of this application, or such portion thereof as has not already been separately paid by the respondent to applicant, and, if there is any balance left, subject to the approval of the Board of Control of the Fund, to the respondent, if he is solvent, or, if the respondent is insolvent, to the trustee(s) of the respondent's insolvent estate;
- 4.8 in the event of there being insufficient trust monies in the trust banking account(s) of the respondent, 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 bank account(s) amongst the trust creditors alternatively to pay the balance to the Legal Practitioner's Fidelity Fund;
- 4.9 subject to the approval of the chairman of the Board of Control of the Fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and
- 4.10 to render from time to time, as curator, returns to the Board of Control of the Fund showing how the trust account(s) of the respondent has/have been dealt with, until

such time as the Board notifies him that he may regard his duties as curator terminated.

5. that the respondent immediately delivers his accounting records, records, filed and documentation containing particulars and information relating to:
 - 5.1 any monies received, held or paid by the respondent for or on account of any person while practising as an attorney;
 - 5.2 any monies invested by the respondent in terms of sections 86(3) and 86(4) of the LPA;
 - 5.3 any interest on monies so invested which was paid over or credited to the respondent;
 - 5.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by the respondent, whether as an executor or trustee or curator or on behalf of the executor, trustee or curator;
 - 5.5 any insolvent estate administered by the respondent as trustee or on behalf of the trustees in terms of the Insolvency Act, No 24 of 1936;
 - 5.6 any trust administered by the respondent as trustee or on behalf of the trustee in terms of the Trust Property Control Act, No 57 of 1988;
 - 5.7 any company liquidated in terms of the Companies Act, No 61 of 1973, administered by the respondent as or on behalf of the liquidator;
 - 5.8 any close corporation liquidated in terms of the Close Corporation Act, 69 of 1984, administered by the respondent as or on behalf of the liquidator; and
 - 5.9 the respondent's practice as an attorney of this Honourable Court, to the curator appointed in terms of paragraph 4 hereof, provided that, as far as such account records, files and documents are concerned, the respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.
6. should the respondent 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 respondent (as the case may be), the sheriff of the district in which such accounting records, records, files and documents are, be empowered and directed to search for and take possession thereof wherever they may be and to deliver them to such curator, alternatively for the curator to make arrangements for the collection of the said documents from the office of the sheriff.

7. the respondent be and is hereby removed from office as –

- 7.1 executor of any estate of which the 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);
- 7.2 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;
- 7.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;
- 7.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973;
- 7.5 trustee of any trust in terms of Section 20(1) of the Trust Property Control Act, No 57 of 1988;
- 7.6 liquidator of any close corporation appointed in terms of Section 74 of the Close Corporation Act, No 69 of 1984;

8. 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 respondent and/or

respondent's clients and/or the Fund in respect of money and/or other property entrusted to the respondent 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;
- 8.4 wind-up the respondent's practice;
- 9. if there are any trust funds available, the respondent 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, 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 him (respondent) in respect of this former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements against the trust creditor(s) concerned for payment or recovery thereof;
- 10. a certificate issued by the director of the Legal Practitioner's 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;
- 11. the respondent be and is hereby directed: -
 - 11.1 to pay, in terms of section 87(2) of the LPA, the reasonable costs of the inspection of the accounting records of the respondent;
 - 11.2 to pay the reasonable fees and expenses of the curator;
 - 11.3 to pay the reasonable fees and expenses of any person(s) consulted and / or engaged by the curator as aforesaid;
 - 11.4 to pay the expenses relating to the publication of this order or any abbreviated version thereof; and
 - 11.5 to pay the costs of this application on an attorney and client scale.



Khashane La M. Manamela
Acting Judge of the High Court

C Collis
Judge of the High Court

I agree and it is so ordered

Date of Hearing : **09 September 2024**

Date of Judgment : **10 December 2024**

Appearances:

For the Applicant : Ms N Erasmus
Instructed by : Mphokane Attorneys, Pretoria

For the Respondent : Mr KH Mashigo (in person)