

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE 45589/2023

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

20 June 2024

DATE

SIGNATURE

IN THE MATTER BETWEEN:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

APPLICANT

and

VELAPHI SOLOMON MKHABELA

RESPONDENT

Heard 16 April 2024

Delivered 20 June 2024

JUDGMENT

MATTHYS AJ (MOOKI J concurring)

INTRODUCTION

[1] The South African Legal Practice Council (LPC) seeks an order striking the respondent's name from the roll of legal practitioners. The respondent is enrolled as an attorney. He was suspended from practice on 13 June 2023. He opposes the relief that his name be struck from the roll.

BACKGROUND

[2] The respondent practised as an attorney for 20 years. He practised for his own account under the name and style Mkhabela Attorneys until his suspension. The LPC raises several complaints against the respondent, which the LPC contends constitute misconduct. The complaints include:

- i. He practised without a Fidelity Fund Certificate since 1 January 2023;
- ii. He failed to submit his annual auditor's report for the financial period ending 28 February 2022;
- iii. He misappropriated trust funds;
- iv. He manipulated accounting records to conceal trust deficits; and
- v. He failed and/or refused to cooperate with the LPC in the inspection of his accounting records and practice affairs.

[3] The respondent has sought to explain some of the complaints against him. He says his bookkeeper has the accounting records and that the bookkeeper was both unresponsive and untraceable. He contends that he delivered all his active client files (twelve in number) to the LPC.

[4] The respondent avers that he has redeemed himself, including by refunding clients the amount of R1 150 000 from property-related transactions. He also says a client (Mr Manyana) deposed to an affidavit confirming that the immovable property bought through the respondent had been transferred into the client's name. He further says he has not practised as an attorney since his suspension. He agrees that he prejudiced his clients and brought the image of the profession into disrepute.

[5] The respondent avers that he has not been successful in his practice as an attorney, which made him fall into difficulty, resulting in his "mismanagement" of the practice trust account. He asks that his name not be struck from the roll but that he instead be suspended on condition that he was not to practice for his own account. He contends that this would safeguard the public because he would not be handling trust funds.

[6] The respondent obtained the BProc degree in 1997 and obtained an LLM in 2005. The respondent says he completed a judicial skills course for Regional Court Magistrates in 2011 and has acted in the Regional Court for six to seven years. The respondent contends that his extensive experience in criminal litigation will put him in good stead to be employed as a senior associate in a law firm.

[7] The respondent seeks that the court consider his personal circumstances in deciding on an appropriate sanction; including that he has reached the advanced age of 56 years old; is married and is the sole breadwinner of his family; he is the father of six children, of whom four are minors; he owns immovable property, which property is in arrears with rates and taxes with his local municipality. His health is ailing, albeit improving, following him suffering a stroke in 2013. He asks that the sanction imposed on him should not render him unemployable.

DISCUSSION AND FINDINGS

[8] The court is required to determine whether the conduct complained of is established. The court then determines whether the respondent, on the established conduct, is “fit and proper.” Where a court finds that a respondent is not “fit and proper,” the court then determines the appropriate sanction; be it a striking-off or a suspension from practice.¹

[9] The respondent admits the conduct complained of by the LPC. He only sought to justify his conduct.

[10] Legal practitioners are to conduct themselves with integrity, honor and propriety. The respondent did not comport himself as required. He abused his position of trust in relation to his clients. He is not a fit and proper person, as required of a legal practitioner. His infractions include stealing trust funds and practising without a Fidelity Fund Certificate. Practising without a Fidelity Fund Certificate constitutes an offence.²

¹ The law is detailed in several decisions, including Incorporated Law Society, Transvaal v Mandela 1954 (3) SA 102 (T) at 10; Jasat v Natal Law Society 2000(3) SA 44 (SCA) at 51C –H; Law Society, Cape v Peter 2009 (2) SA 18 (SCA) at 26 B-C

² Section 93 (8) (9) of the LPA 28/2014 provides :-

93(8) Any person who contravenes sections 84(1) or (2) or section 34, in rendering legal services—

[11] The appropriate sanction where a practitioner has been found not fit and proper is informed by whether a legal practitioner can safely be trusted to faithfully discharge the duties and obligations of a legal practitioner. It is not a consideration, for example, whether a respondent suffered from his prior suspension or whether a respondent will be unable to sustain himself or his family. The court must, as far as possible, ensure that the public interest, trust, and confidence in the profession are not placed at risk.

[12] The misconduct by the respondent entails dishonesty. He did not succumb to sudden temptation. His conduct was premeditated, as illustrated by the following examples.

[13] Complaint Ms Thulisile Zandi Mahlangu- Ms. Mahlangu purchased immovable property on 29 April 2019 and deposited the purchase price in an amount of R350 000 into the respondent's trust account. The trust account was in credit in the amount of R51, 42 before the deposit. The respondent immediately transferred the deposit to his business bank account. The seller cancelled the transaction. The respondent did not inform Ms Mahlangu of the cancellation.

[14] Complaint Mr Tebogo Mokhoto- The complainant deposited R250 000 in three instalments into the respondent's trust account, as payment for immovable property. The respondent never effected transfer of the property into the name of the complainant, instead he handed a forged

-
- (a) commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and imprisonment;
 - (b) is on conviction liable to be struck off the Roll; and
 - (c) is not entitled to any fee, reward or reimbursement in respect of the legal services rendered.

(9) Any person who—

- (a) refuses or fails to produce a book, document or any article in terms of section 37(2)(a) or (b) or 87(5);
- (b) contravenes section 37(2)(c) or 87(6); or
- (c) obstructs or hinders any person in the performance of his or her functions under those provisions, commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year.

title deed to the complainant. Indeed, the property was sold to a different person. The purchase price was expended from the trust account.

[15] The respondent is not a conveyancer. He was never authorised to handle property transactions. He stole funds from at least seven clients in property-related transactions in the period 2018-2021. The LPC's investigation found a trust deficit of R1 149 939.45 as at 28 February 2022. The deficit is likely to be higher because the respondent did not disclose all his trust creditors.

[16] The LPC's investigation also found that the respondent's trust creditors were understated in the auditor's report for the period ending 28 February 2021. His accounting records were manipulated to conceal the trust deficit. These facts show the respondent as being dishonest.

[17] The respondent's conduct is at odds with the conduct expected of a member of the legal profession. His contention that a suspension is merited because he repaid clients shows a lack of insight into the serious nature of his conduct. Refunding of the money is not exculpatory. He prejudiced his clients and placed the Fidelity Fund at risk.

[18] There is no basis upon which the court can impose a sanction other than that of a striking off. A suspension would overemphasise the respondent's personal circumstances at the expense of the public and the profession at large. The respondent's misconduct is egregious.

[19] I make an order as follows:

- (1) That the respondent, VELAPHI SOLOMON MKHABELA, is hereby struck from the roll of legal practitioners.
- (2) Paragraphs 3 to 12 of the order of Court dated 13 June 2023 shall remain in force.
- (3) The respondent is directed:
 - a. to pay, in terms of section 87(2) of the Legal Practice Act, Act 28 of 2014, the reasonable costs of the inspection of the accounting records of the respondent;
 - b. to pay the reasonable fees and expenses of the curator;
 - c. to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator aforesaid;
 - d. to pay expenses relating to the publication of this order or an abbreviated version thereof; and
 - e. to pay the costs of this application on an attorney-and-client basis and on the scale B.

[REDACTED]

MATTHYS AJ

**JUDGE (ACTING) OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

[REDACTED]

I agree:

MOOKI J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Appearance:

On behalf of the Applicant: Mr R Stocker Rooth Wessels Inc

On behalf of the Respondent: Advocate Brian R Matlhape

Instructed by Maluleke Seriti Makume Matlala Inc