



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/ NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/ NO.

(3) REVISED.

23/11/2021
DATE

SIGNATURE

Case Number: 76471/2018

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

FORMERLY LAW SOCIETY OF THE NORTHERN

PROVINCES

Applicant

and

WYCLIFFE ERNEST THIBE MOTHULOE

First Respondent

MOTHULOE INCORPORATED ATTORNEYS

Second Respondent

JUDGMENT

POTTERILL J

- [1] In this matter the applicant, the Legal Practice Council (the LPC) (previously the Law Society) applied in terms of section 22 of the Attorneys Act 53 of 1979 [the Act] that the first respondent, Mr. Wycliffe Ernest Thipe Mothuloe (Mr. Mothuloe) be struck from the roll with ancillary relief (the main application). Mr. Mothuloe opposed the application and filed an answering affidavit. Mr. Mothuloe in turn brought an application for the review of the decision of the LPC to launch the main application. He also issued a notice of motion to refer the review application to oral evidence. The application to review the decision of the LPC has not been set-down or prosecuted further by Mr. Mothuloe. The notice of motion to refer the review matter to oral evidence has no affidavit attached and was not served on the LPC and accordingly did not comply with the Uniform Rules of Court and is an abortive '*application*'.
- [2] Mr. Mothuloe is a senior practitioner, admitted as an attorney, notary, and conveyancer of this Honourable Court on 19 March 1996 and his name still appears on the respective rolls. According to the LPC's records, Mr. Mothuloe was, until being interdicted from practising for his own account on 20 August 2019, practising as a single practitioner for his own account under the style of Mothuloe Incorporated Attorneys (the second respondent) at No 20A St John Road, Houghton Estate, Johannesburg, Gauteng Province. The LPC informed the court that it had come to the LPC's attention that Mr Mothuloe has also been operating a further unregistered practice under the style Mothuloe Attorneys, Notaries and Conveyancers.

Practising without Fidelity Fund Certificates

- [3] It is common cause that Mr. Mothuloe practised as an attorney without being in possession of a Fidelity Fund Certificate [FFC] since January 2016 in contravention of section 41(1) of the Act and thus committed an offence in terms of section 83(10). Mr. Mutholoe failed to submit his auditor's reports to the LPC for the periods ending 28 February 2017 and 28 February 2018. The auditor's report for 28 February 2016 was qualified with his auditors reporting irregularities in his bookkeeping.
- [4] But Mr. Mothuloe contended that he had not practised as an attorney since 1 January 2016, thus he would not require a FFC. Yet, it is undisputed that he had not informed the LPC that he ceased to practise and no closing auditor's report was filed. Mr. Mothuloe averred that this accounting records for the 2019 auditor's report had '*perished at the hands of the Applicants*', but if he had ceased practising there would be no accounting records. In paragraphs 1 and 32 of his answering affidavit he admitted that he practised without being in possession of a FFC. In paragraphs 1, 14, 15, 30, 32 and 38 of his answering affidavit he admitted that he practised without a FFC and continued to do so for at least three years. These disingenuous averments are unconvincing and Mr Mothuloe is guilty of practising without a FFC since February 2016

Failure to allow inspection and to avail documents to LPC and Curator

- [5] The LPC repeatedly requested a proposed inspection of Mr. Mothuloe's accounting records and practice affairs, but he refused to grant the LPC access to his accounting records for purposes of an inspection thereof. This division of the High Court (Louw J) ordered on 17 September 2015 that Mr Mothuloe make documents and records available to the LPC prayed for in the LPC's counter-application while dismissing Mr. Mothuloe's review application of the LPC's directive to Mr. Mothuloe to act in terms of section 70(1) of the Act to avail the records. These orders were confirmed by the Supreme Court of Appeal, yet Mr Mothuloe stays in contempt of both these orders. He is also in contempt of this

Court's order dated 20 August 2019 in that he is still practising and has not provided his records to the appointed curator. This conduct of an officer of Court is dishonourable, unprofessional and indeed shockingly contemptuous of the Courts and must also be taken into account when considering the main application. Pursuant to the court order the curator has to date not had access to Mr. Mothuloe's accounting records despite four months of engagement in attempting to schedule an inspection.

- [6] In the supplementary answering affidavit Mr. Mothuloe averred that due to impossibility he could not hand over the records. The LPC is responsible for this impossibility in that they caused an attachment of his office equipment and furniture and therefore his records for the 2019 year were destroyed. But, Mr. Mothuloe was in terms of the Rules obliged to keep hard copies, as well as back-up versions of the electronic records, that had to be kept and maintained at an offsite location. If he did not have same, he again did not comply with the bookkeeping rules of his profession. It is in any event common cause that Mr. Mothuloe's auditor's report for the periods ending 28 February 2017 and 28 February 2018 remained outstanding which, was due long before any attachment took place.
- [7] A new '*defence*' is then raised, seven years after the fact, not applicable at the relevant time when the records were sought, that Mr. Mothuloe only kept his records for five years as required, therefore they are no longer available. This new justification for his contempt of the court order is *mala fide*. He stated that his records were destroyed by the sheriff in February and March 2018. The only inference is that in fact the records existed contradicting his reliance now on the fact that the records were destroyed after five years. But, in any event, on his own evidence the averred five-year rule affected records up '*to the years 2007 to 2010*' and records '*up to 2012*'. These are not periods for which the court order catered.

- [8] In summary, pertaining to the records Mr. Mothuloe's defence as to why he has not in terms of the rules and court orders provided the records or allowed for inspection thereof to the LPC or the curator were replete with contradictions, is *mala fide* and is rejected as untenable and untruthful. In his answering affidavit he contended that his bookkeeper attempted to submit the outstanding records but the LPC told her not to waste her time, but in contrast he submitted that he had recently instructed his bookkeeper to prepare the requisite reports. Mr. Mothuloe averred that the LPC destroyed his records, yet he tendered in his latest affidavit, two years after attachment, the delivery of his auditors' reports. He did not in any way address the qualification of his 2016 auditors' report. Mr. Mothuloe has not submitted his auditors' reports, neither has he allowed for inspection of his records and is accordingly guilty of the offending conduct.

Non-attendance of disciplinary hearing

- [9] The LPC proceeded to institute a disciplinary hearing against Mr. Mothuloe for his failure to submit the records. He did admit that he failed to appear before disciplinary committees on 23 November 2017 and 8 February 2018. The matter proceeded before a disciplinary committee on 12 September 2018 in his absence and Mr. Mothuloe was found guilty on all charges. Mr. Mothuloe averred that he was present at the hearing of 12 September 2018, but that the matter was called prematurely and prior to his arrival. Mr. Mothuloe did not avail any remedies against the findings of the committee. However, as the accounting records were not provided, it is not foreseeable that a different outcome could have resulted.

Practising as attorney contravening court order

- [10] According to the LPC's records Mr. Mothuloe has practised under the style of the second respondent from 23 February 1998 until 20 August 2019. It is undisputed that in the High Court Division, North West, case number 2327/2018 Mr. Mothuloe cited himself in the summons as '*MOTHULOE ATTORNEYS NOTARIES AND CONVEYANCERS* a firm of attorneys at 20A St John Road,

Houghton, Johannesburg'. In his discovery affidavit Mr. Mothuloe described himself as:

'A major male Attorney, Notary Public and Conveyancer of the above Honourable Court, practising as such under the name and style of MOTHULOE ATTORNEYS, NOTARIES AND CONVEYANCERS at NO. 20 ST JOHN ROAD, HOUGHTON ESTATE, JOHANNESBURG in the GAUTENG PROVINCE.'

- [11] As on 25 June 2020 a maintained website for Mothuloe Attorneys Notaries and Conveyancers is active. On 15 January 2018 Mr. Mothuloe wrote to the Office of the Chief Justice on the letterhead of Mothuloe Attorneys Notaries and Conveyancers. Upon perusal of this letter it reflected that he practised at No 20 St John Road, Houghton Estate and that he employs three other attorneys; C Machingura, ME Mogashu and T Makgala. This Court can confidently find that the assertion that Mr. Mothuloe has ceased practising is untrue and is rejected.

Misappropriation of trust funds

- [12] The LPC received complaints from an attorney's firm Koikanyang Inc, on behalf of complainants, that funds were deposited in Mr. Mothuloe's trust account for the purposes of property transfers which was not affected and Mr. Mothuloe's subsequent failure to refund the complainants. The complainants and the amounts that were paid over to Mr Mothuloe was as follows:

JT Modise (R40 573.05)

KR Moabi (R90 270.80),

CS Mpolokgeng (R45 346.95)

Diale Catering (R111 415.76).

The complaints were submitted in 2013/2014. The claims were also submitted to the Attorneys Fidelity Fund on 2 December 2013 by JT Modise, 21 August 2014 by KR Moabi and CS Mpolokgeng and Diale Catering on 6 September 2013. The total of the monies deposited is R530 903.73.

- [13] Mr. Mothuloe asserted that the complainants were already refunded before 31 July 2008. This assertion is belied by the fact that he refunded JT Modise her trust funds on 26 February 2014. Mr. Mothuloe is sparse with the truth in his opposition to this application.
- [14] The curator, Mr. Reddy, without access to the accounting records, resorted to utilising the figures of the complaints and compared those figures with Mr. Mothuloe's audit reports for the period ending 28 February 2007. From that he concluded that Mr. Mothuloe as at 31 July 2008 held a minimum trust deficit of R19 402.95. On a preponderance of probabilities this version is to be accepted. Mr. Mothuloe makes a bald averment that he paid the monies back. His assertion that this was done before 31 July 2008 is contradicted with objective proof that he paid JT Modise only on 26 February 2014, after a claim was lodged against the Fidelity Fund. But, tellingly the claims and complaints were all submitted in 2013/2014, years after Mr. Mothuloe alleges he repaid the monies. Furthermore, the qualified 2016 auditors report on a preponderance indicated serious irregularities; Mr. Mothuloe admitted this qualified audit report and on a preponderance a finding of a trust deficit in Mr Mothuloe's trust account is concluded.

Other offending conduct

- [15] Mr Mothuloe admitted that he failed to account to his clients and that he placed his trust creditors as well as the Attorneys Fidelity Fund at risk.

Fit and proper person

[16] The conduct of Mr. Mothuloe in these proceedings, the disciplinary hearings and his contempt of court orders, constituted conduct that is dishonourable, unworthy and unprofessional of an officer of court. His conduct of attacking the LPC, his professional body, is frowned upon by courts.¹ All of the above constitute in itself unprofessional conduct. A legal practitioner acting as an attorney is expected to adhere to the specific requirements of the Act and Rules pertaining to trust monies. This is so because trust monies is money of the public which is placed under control and custody of an attorney. Lodging an auditor's report as required serves a safety mechanism for the public and the client's money and is a prerequisite for an attorney to be issued with a FFC. In failing to do so Mr Mothuloe had not aspired to meet the standard of behaviour which is required of an attorney.

[17] Mr. Mothuloe is not a fit and proper person to continue to practise as a member of a learned, respected and honourable profession. In ***General Council of the Bar of South Africa v Geach and Others 2013 (2) SA 52 (SCA)*** par 87 Wallis J profoundly expressed the duty of legal practitioners as follows:

'After all they are the beneficiaries of a rich heritage and the mantle of responsibility that they bear as the protectors of our hard-won freedoms is without parallel. As officers of our courts lawyers play a vital role in upholding the Constitution and ensuring that our system of justice is both efficient and effective. It therefore stands to reason that absolute personal integrity and scrupulous honesty are demanded of each of them.'

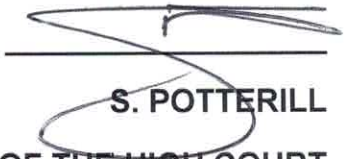
He has been untruthful, obstructive and has disobeyed court orders. Mr. Mothuloe's conduct reflects character defects which cannot be tolerated and

¹ *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 846G-H and 853E-I

does not meet the standard of behaviour, conduct and reputation required of attorneys. He has committed serious offences with elements of dishonesty.

Sanction

- [18] The next question to be answered is whether Mr. Mothuloe should be permitted to continue to practise as a legal practitioner. The court has to consider the protection of the public and how to discipline, Mr. Mothuloe. The conduct displayed and offences committed by Mr. Mothuloe renders a sanction of suspension wholly inappropriate. The only appropriate sanction is striking from the roll. Mr Mothuloe's conduct deviated completely from the conduct expected of an attorney and his conduct cannot be excused. He is not fit and proper to further practise as an attorney.²
- [19] I am also satisfied that the LPC has made out a proper case for the related orders as prayed for in the notice of motion and in the circumstances the prayer for costs on an attorney and client scale is also warranted.³
- [20] I accordingly order that the draft order be made an order of court.



S. POTTERILL
JUDGE OF THE HIGH COURT

² *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA)

³ *Botha v Law Society of the Northern Provinces* 2009 (1) SA 227 (SCA) at 236F-G

I agree



M. MUNZHELELE

JUDGE OF THE HIGH COURT

CASE NUMBER: 76471/2018

HEARD ON: 28 October 2021

FOR THE APPLICANT: MR. L. GROOME

INSTRUCTED BY: Rooth & Wessels Inc.

FOR THE RESPONDENTS: NO APPEARANCE

DATE OF JUDGMENT: 23 November 2021

"X"  23/11/21

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 76471/2018

HELD AT PRETORIA THIS 23rd DAY OF NOVEMBER 2021

BEFORE THE HONOURABLE JUSTICE POTTERILL

BEFORE THE HONOURABLE JUSTICE MUNZHELELE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

Applicant

and

WYCLIFFE ERNEST THIBE MOTHULOE

First Respondent

MOTHULOE INCORPORATED ATTORNEYS

Second Respondent

~~DRAFT ORDER~~

Having perused the papers filed of record and having considered the submissions made by counsel for the applicant

IT IS ORDERED

1. That **WYCLIFFE ERNEST THIBE MOTHULOE** (first respondent) be struck from the roll of attorneys of this Honourable Court.
2. That paragraphs 4 to 10 of the order of 20 August 2019 will remain in effect.

 23/11/21

3. That first respondent be and is hereby removed from office as –
- 3.1 executor of any estate of which first respondent has been appointed in terms of section 54(1)(a)(v) of the Administration of Estates Act, No 66 of 1965 or the estate of any other person referred to in section 72(1);
 - 3.2 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;
 - 3.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;
 - 3.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973;
 - 3.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;
 - 3.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984.
4. That, in addition to paragraph 8 of the order of 20 August 2019, the curator shall be entitled to:

- 4.1 publish this order or an abridged version thereof in any newspaper he considers appropriate.
5. That the first respondent be and is hereby directed:
- 5.1 to pay, in terms of section 87(2) of the LPA, the reasonable costs of the inspection of the accounting records of the respondent;
- 5.2 to pay the reasonable fees and expenses of the curator;
- 5.3 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;
- 5.4 to pay the expenses relating to the publication of this order or an abbreviated version thereof; and
- 5.5 to pay the costs of the application, and those costs reserved in the order of 20 August 2019, on an attorney-and-client scale.

**BY ORDER OF COURT
REGISTRAR**

**ATTORNEYS ON BEHALF OF THE APPLICANT:
COUNSEL ON BEHALF OF THE APPLICANT:**

RW Attorneys Inc
Mr L Groome (0793467203)

**ATTORNEYS ON BEHALF OF THE RESPONDENT:
COUNSEL ON BEHALF OF THE RESPONDENT:**

Morris Pokroy Attorneys

RW
ATTORNEYS

CA 23/11/21