



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

Case No: 66719/2020

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

16 February 2022

In the matter between:

South African Legal Practice Council

Applicant

And

Thabiso Aaron Moleko

Respondent

JUDGMENT

Thupaatlase AJ (Munzhelele J concurring)

Introduction

[1] This is an application by the applicant against the respondent in terms of Legal Practice Council Act No. 28 of 2008 (the Act). The applicant is established in terms of section 4 of the Act as a corporate body with full legal capacity which it

exercises over legal practitioners as contemplated in the Act. The powers given to the applicant by the Act includes the jurisdiction to make rules as to conduct that constitutes unprofessional or dishonourable or unworthy conduct; to enquire into any case of alleged unprofessional or dishonourable or unworthy conduct.

[2] In addition, the applicant has jurisdiction can apply for the suspension or striking off of an attorney on the ground that the attorney is not fit and proper person to continue to practise as an attorney; to prescribe the books, records certificates or other documents to be kept and inspection thereof; and to direct any practitioner to produce for inspection any book, document, record or thing.

[3] The respondent is an admitted attorney having been admitted on 16th April 2009. He has practised as an attorney of this court since from the time of his admission to date.

[4] The applicant avers that the respondent is no longer a fit and proper person to practice as an attorney and seeks an order that the defendant's name be removed from roll of practising legal practitioners alternatively that the respondent be suspended for a specified period.

[5] The applicant seeks the following further relief:

5.1. That the respondent immediately surrenders and delivers to the Registrar of this court his certificate of enrolment as an attorney and conveyancer.

5.2. That in the event of the respondent failing to comply with the terms of this order within two weeks from the date of this order, the sheriff of the district in which the certificates are, be authorised and directed to take possession of the certificates and to hand it to the registrar of the court.

5.3. That the respondent be prohibited from handling or operating on his trust account(s).

5.4. That Johan van Staden, Head: Risk Compliance Officer or any person nominated by him, in his capacity as such, remains a suitable person to act as curator *bonis* to administer and control the trust account(s) of respondent, including account(s) relating to insolvent and deceased estates and any estate under curatorship connected with the respondent's practice as an attorney and including also, the separate banking accounts opened and kept by the respondent at a bank in the Republic of South Africa in terms of sections 86(1) and 86 (2) of the Act and/or separate savings accounts as contemplated by sections 86(3) and 86(4) of LPA , in which monies from such trust banking accounts have deposited or credited, with the following powers and duties:

5.4.1. immediately to take possession of the respondent's accounting records, files and documents and subject to the approval of the board of control of the Legal Practitioners' Fund, but only to the extent and for such purpose as may be necessary to bring to completion current transactions in which the respondent was acting as at the date of the order.

5.4.2. subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and unlawfully from 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 section 86(3) and 86(4) of the LPA, 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).

5.4.3. to ascertain from the respondent's accounting records, the names of all persons on whose account the respondent appears to

hold or have received trust monies and to call upon the respondent to furnish him, within 30 days of the date.

[6] In short, the applicant is applying for the suspension or struck off of the respondent and to also take control of the financial affairs of the respondent's practice. This is so that clients of the respondent can be saved from any form of financial embarrassment as a result of his conduct.

[7] The application is opposed by the respondent. The respondent has deposed to an affidavit in opposing the relief sought by the applicant. He specifically denies that the conduct alleged by the applicant can amount to the respondent be found not fit and proper to practice as an attorney.

[8] In summary the respondent indicates that he hasn't been practising as an attorney due to ancestral and/or spiritual calling and that his practice was dormant. He further states that he didn't have an active trust account. He was unable to pay membership fees as he didn't have money.

[9] In support of its application the applicant alleges various conduct of the respondent being that it deems to be offending inter alia:

9.1. that the respondent practised as an attorney without being in possession of fidelity certificates since 01st January 2019 and previously during 2010, 2012, 2013, 2014, 2016, 2017 and 2018.

9.2. that the respondent failed to submit auditor's report for financial periods ending 28th February 2018 and 29th February 2020 to the Council.

9.3. that the respondent failed to submit the auditor's report for period 28th February 2018 timeously and that same when subsequently submitted was qualified auditor's report.

9.4. that the respondent failed to pay subscription fees (membership fees) for the period 2018 to 2020.

9.5. that the respondent failed to appear before the disciplinary committee of the Council despite proper notice being given and failed to pay a fine imposed by the Disciplinary Committee after a hearing had found him guilty and imposed such fine.

[10] The approach in these applications was succinctly stated in *Law Society of the Northern Provinces v Mogami* (588/08) [2009] ZASCA 107 (22 SEPTEMBER 2009) that:

"Applications for the suspension or removal from the roll require a three-stage enquiry. First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. Second, it must consider whether the person concerned is 'in the discretion of the Court' not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. And third, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice (*Jasat v Natal Law Society* 2000 (3) SA 44, [2000] 2 All SA 310 (SCA); *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216; [2009] 1 All SA 133 (SCA) at para 10)".

The first Enquiry Offending Act

[11] The affidavit of the applicant clearly shows that from the periods 2019 and previous periods of 2010; 2013; 2014; 2016; 2017 and 2018 the respondent was not issued with a fidelity certificate. He appears to suggest otherwise. He admits his inability to keep proper records by indicating that with diligent search he'll be able to produce certificates for other periods that it is alleged he didn't have same. In terms of section 41(1) and 83(10) of the Act, it is a serious criminal offence. It is clear from the papers that the respondent is in the circumstances a serial offender. See *Law Society of the Northern Provinces v Mamatho* 2003 (6) SA 467 (SCA).

[12] The respondent failed to file annual auditor's report for the period 28th February 2020 and previously 29th February 2018. Upon subsequent submission the report was qualified. According to him he expected to be reminded to submit such report by the applicant. The applicant indeed reminded the respondent to submit the

report. The respondent lied on his submission when he said he was not reminded. There was correspondence from the applicant, a copy of which is attached, shows that such reminder was sent to the respondent and also pointing out the consequence of failure to submit the report.

[13] In terms of the rules of the applicant and in particular rule 70 the respondent is obliged to file an annual auditor's report. The report must not be qualified. The purpose of this rule is clear. This serves to satisfy the applicant as the controlling body that an attorney's accounting records are kept in accordance with the Act and the rules, and that an attorney handles and administers trust money properly and responsibly. The answer given by the respondent is that he had a dormant trust account. This ignores the fact that the point of the manner is not how much money is in the account but whether there is proper accountability on the part of an attorney.

[14] The fact that the 2018 report was qualified is a clear indication that the respondent didn't handle records in accordance with the prescripts of the Act.

[15] The respondent was called to a disciplinary hearing. He states that he was not able to attend as he had no access to internet and didn't receive notice to appear. In terms of the rules of the applicant; failure to answer correspondence (rule 89.3) is breach of the professional conduct expected of an attorney. It follows that the respondent as an attorney and member of the applicant, is obliged to ensure that he is always able to be contacted by the applicant.

[16] The disciplinary hearing that led to a fine of R 15 000.00 being imposed was held on 20th July 2018. The failure by the respondent to attend is not clearly explained by the respondent. In his affidavit the respondent doesn't deal with this serious allegation. The corresponding rule is 3.11 of the Code of Conduct.

[17] He accepts, he received the subsequent notice to attend the enquiry on 03rd March 2020; but that due to lock-down regulations the meeting didn't proceed. He doesn't say what steps he took to follow up on the matter. This will be expected of any diligent attorney.

[18] A further conduct complained of is that the applicant has failed to pay subscriptions fees to the applicant as prescribed. This in breach of rule 4.1 read with section 6(4) (c) and section 95(1) of the Act.

[19] It is clear from all the above instances of breaches of conduct on the part of the respondent that he has been a serial offender in all matters. I am satisfied the applicant has established that the respondent committed offending offences as described in terms of the Act and Code of Conduct.

Second Enquiry: Is the respondent fit and proper persons to continue practising?

[20] The question is whether given what has been described above, it can be concluded by this court that the respondent is not fit and proper person to continue practising as an attorney of this court. The conduct of the respondent indicate that the respondent is not able to do professional work. He has even admitted as much. He indicated that the practice is dormant and was adversely affected by lock-down regulations and issues around his ancestral calling.

[21] On the other hand one would have expected that the respondent will have taken steps to remove his name from a roll of practising attorneys into the roll of non-practising attorneys. The view of this court is that this is more incompetence and inattention on the part of the respondent. Whilst the court doesn't want to downplay the breaches of conduct by the respondent, it is found that the most serious of such breaches is failure to submit auditor's report and the fact that he practised without fidelity fund certificate on numerous occasions. It should be noted that there were instances where this happened for shorter periods.

[22] This court is prepared to give the respondent the benefit of doubt and accept that some transgressions didn't not involve element of dishonesty on the part of the respondent. As the court has found; these lapses were more to do with incompetence and inattention. This court concludes that the respondent is guilty of unprofessional conduct but that he is fit to continue to practise as an attorney.

The sanction

[23] The third leg of the enquiry is the sanction. This court exercise its discretion to discipline the respondent based on its finding. The sanction can take the form of a reprimand or suspension from practise for a specified period with or without conditions. See *Malan and Another v Law Society of the Northern Provinces* [2009] 1 All SA 133 (SCA) at para 5.

[24] It is the view of this court that a reprimand is not appropriate in this matter. As the court showed during the judgment; the respondent was a serial offender. Reprimanding the respondent will send a wrong message to the rest of the profession. The seriousness of practising without fidelity certificate cannot be over emphasised, firstly the conduct is contrary to peremptory legal requirements which makes himself guilty of an offence.

[25] The second point is that the respondent's conduct places his trust creditors who may suffer pecuniary loss as a result of misappropriation. In pecuniary matter legal practitioners are expected to be punctual and diligent. It is therefore the view of this court that a conditional suspension will be an appropriate sanction.

Costs

[26] The applicant has a statutory duty to approach the court. In light of the *sui generis* nature of these proceedings the applicant is entitled to its costs on attorney and client.

Order

[27] In the light of the foregoing the following order is made:

1. The respondent Mr Thabiso Moleko is hereby suspended from practising as attorney for a period of two (2) years effective from the date of this judgment on the following conditions as stated on the signed draft order.
2. The draft order marked 'x' is made an order of court.



T.T Thupaatlase
Acting Judge of the High Court
Pretoria

I agree.



M. Munzhelele
Judge of the High Court
Pretoria

Virtually Heard: 11 October 2021

Electronically Delivered: 16 February 2022

APPEARANCES:

For the Applicant: Liam Groome

Instructed by: Rooth & Wessels

For the Respondent: In person

Instructed by Mthembu Attorneys