

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

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

08 March 2022

DATE



SIGNATURE

CASE NUMBER: 52311/19

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

APPLICANT

And

THABISO JEREMIAH NTSIE

RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

- [1] The respondent was admitted as an attorney on 9 December 2005 and as a conveyancer on 27 October 2006. He is a single practitioner, practicing of his own account under the style as TJ Ntsie Attorneys in Pretoria, Gauteng. The applicant is *custus morum* of all legal practitioners, including the respondent. The applicant also exercises disciplinary jurisdiction over all legal practitioners in respect of conduct which is allegedly unprofessional, dishonourable and unworthy of the profession. The applicant now brings this application before the court in terms of section 44(1) of the Legal Practice Act 28 of 2014, (LPA), for a determination as to whether the respondent was a fit and proper person to continue to practice as an attorney and for the striking of the respondent from the roll of attorneys of the above court. Legal Practitioners who conduct practices as attorneys, conveyancers, notaries and advocate are expected to observe and comply with the LPA, the LPA Rules and Code of Conduct.
- [2] The LPA came into effect on 1 November 2018. Section 116 (2) of the LPA provides that any proceedings in respect of the suspension of a legal practitioner from practice ‘which proceedings were instituted in terms of any law repealed by the LPA and which were not concluded at commencement date of the LPA must be continued and concluded as if that law had not been repealed.’
- [3] The application was opposed. At a previous hearing the parties were granted leave to file further answering and replying supplementary affidavits by order of Fourie J and Toni AJ of 28 August 2020 and important was paragraph 5 of that order which read:
- “Pending finalisation of the main application the respondent shall be suspended from practicing as a legal practitioner (attorney and/or conveyancer). The further order attached hereto and marked” X” shall apply in its entirety to the respondent and his interim suspension pending finalisation of the main application.”

- [4] The hearing did not proceed on 22 April 2021 and the respondent was granted leave to file a supplementary affidavit. The respondent filed his affidavit out of time and failed to apply for condonation. A notice of set down was served at the offices of the respondent's attorneys of record Leso Attorneys on 25 May 2021 which also stipulated that the parties file heads of argument on particular dates, the applicant on 13 January 2022 and the respondent on 20 January 2022.

The applicant's heads of argument were served via email on the respondent's attorneys on 2 December 2021. The respondent failed to file his heads of argument. Having read the papers a directive was issued that the matter would be decided on paper.

THE FACTS

- [5] There were a plethora of complaints against the respondent as set out in the founding and supplementary affidavits. The nature of these complaints were stated in paragraph 5 of the founding affidavit and these included those addressed in the investigation reports. What I also found helpful was a schedule of contraventions pertaining to complaints lodged by the respondent's clients from the year 2015 to 2019, and correspondence. The schedule is annexed to the applicant's heads of argument. The schedule shall form part of this judgment as annexure 'A'¹ as filed on case lines 024 -46 to 024-57. I take cognizance of the content of all the complaints against the respondent as addressed in the founding affidavit and mention that these were not addressed in the answering affidavit. As a result, I shall not mention the complaints individually. A supplementary answering affidavit was filed by the respondent and only the facts of those complaints addressed by him are summarised.

¹ COMPLAINTS SCHEDULE (Annexure 'A')

COMPLAINTS SCHEDULE				
No.	Date of Complaint	Complainant	Brief Description	Reference
1.	10/02/2015	J B Hugo & Cronje Incorporated obo SSP & I Mokwena	The Mokwenas were purchasers of an immovable property. On 12/08/2014 the respondent confirmed instructions to effect transfer. Respondent not responding to enquiries regarding progress of transfer.	002-89 to 002-92, par 6 (inspection report) and 002103 to 002104(complaint)
2.	15/04/2015	E P Mtshweni	<p>Mtshweni was the purchaser of an immovable property. Mtshweni deposited R110,000.00 on trust.</p> <p>Respondent paid funds to seller and the property was not transferred. Respondent says that when he was to effect transfer the property was already sold to somebody else.</p> <p>Ledger account reflects the immediate transfer of funds to seller and debiting of fees. Respondent breached client's trust, negligent in handling of trust monies, has a trust deficit.</p>	002-92 to 002-95, par 7 (inspection report) and 002-105 to 002-117 (complaint)

3.	21/01/2015	S D Mohapi	<p>Mohapi was the purchaser of an immovable property. R475,000.00 (purchase price) plus R12,773.00 (transfer costs) paid onto trust. No progress being made and respondent not returning telephone calls.</p> <p><u>From trust bank statement:</u> Respondent has drawn more funds from this trust creditor than available.</p> <p><u>From ledger account:</u> No proper narrations of entries. Funds withdrawn prior registration of transfer. Respondent did not provide proof of payments. Ledger doesn't illustrate all transactions. Trust deficit, failure to account, inappropriate withdrawal of funds.</p>	002-95 to 002- 99, par 8 (inspection report) and 002-118 to 002-137 (complaint)
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4.	13/11/2013	N S Radebe	Radebe sold property for R250,000.00. Respondent made several piecemeal payments to client but has not accounted to client, nor for balance of funds, R30,010.00.	002-153, par 5 (inspection report) and 002-184 to 002-185 (complaint)
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5.	11/03/2014	T J Mabaso	<p>Mabaso purchaser of property.</p> <p>Transferred purchase price (R350,000.00) and transfer costs (R9,498.00) to respondent between 11/10/2013 to 21/10/2013. Respondent not attending to instruction.</p>	002-153, par 6 (inspection report) and 002186 to 002-200 (complaint).
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6.	Undated	T P Nnzeru	Nnzeru was the seller of a property. Respondent to register transfer. Respondent failing to execute instructions, not providing feedback, not account after early termination of mandate, not handover file and did not refund funds paid to him.	002-155, par 7 (inspection report) and 002201 to 002-208 (complaint).
7.	19/05/2016	J M Motloun	<p>Motloun was the purchaser of an immovable property. Respondent to register transfer. R20,000.00 deposited on trust for respondent's fees. Respondent not effecting transfer and not answering calls. Respondent indicates that property is stuck in an estate.</p> <p>The respondent did not open a trust ledger for Motloun and Swart unable to find trust deposit in records. Swart unable to find trust deposit in records.</p>	002-157 to 002-159, par 8 (inspection report) and 002-210 to 002-214 (complaint)

8.	16/07/2016	Lebala Moloi Attorneys obo Executor E/L Mathonsi.	Respondent instructed to transfer the immovable property out of the estate in 2011. All fees paid but the respondent is not effecting transfer, not responding to correspondence.	002-159 to 002-160, par 9 (inspection report) and 002-215 to 002-223 (complaint)
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9.	14/09/2016	M Z Gwensa	<p>Gwensa purchased an immovable property. Respondent to attend to registration of transfer. R450,000 (purchase price) plus R15,000.00 (transfer costs) deposited on trust on 04/03/2016. Respondent not effecting transfer, not responding to correspondence until threatened with Law Society and made no further progress thereafter. Respondent transferred property on 30/01/2017.</p> <p><u>From bank statements and ledger accounts:</u></p> <p>1. Respondent utilised funds to effect payments not associated with transfer i.e to Estate Mogano and to Maluleke transaction.</p> <p>2. Maluleke transaction recorded in respondent's ledger account as "client payment".</p> <p>Respondent rolling trust funds and accounting records are unreliable.</p>	002-161 to 002-164, par 10 (inspection report) and 002224 to 002-232 (complaint), 002-233 to 002236 (ledger account and bank statements)
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10.	17/02/2017	N Langa	<p>Langa deposit R300,000.00 onto the respondent's trust account on 22/03/2016 towards purchase of a property. Transaction failed (seller not owner of property). Respondent has failed to refund trust deposit and respond to communications.</p> <p><u>From ledger account and bank statements:</u></p> <p>1. Receipt of funds captured in incorrect ledger account (E/L Langa / Madiba / Zondo). Funds utilised for fees, client payments, and as part of a large payment to Maila.</p> <p>2. Records reflect accounting record manipulation, rolling trust funds, trust deficit and that accounting records cannot be relied upon.</p>	<p>002-164 to 002-167, par 11 (inspection report), 002-237 to 002-257 (complaint), 002-258 to 002-261 (bank statements and ledger account)</p>
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11.	07/05/2015	SLS Moeng	<p>R164,225.21 paid into the respondent's trust bank account n 23/12/2014 from sale of a property. The respondent is not accounting for our paying over the funds.</p> <p>**Note: Swart could not locate the funds in cashbook and ledger account. The records perused by Swart were, however, for the incorrect financial period.</p>	<p>002-167 to 002-168, par 12 (inspection report) and 002-262 to 002-270 (complaint)</p>
12.	31/10/2017	B L Madiba	<p>Executor in E/L E N Langa authorised payment to Madiba on 18/07/2016, R20,000.00, from estate funds held in trust. Respondent refused to effect payment and wanted to deduct R5,000.00 from payment.</p> <p><u>From ledger account:</u> The ledger account reflects that the respondent did not have sufficient funds available in trust from June 2016.</p> <p>**Same ledger account referred to in complaint no. 10, above.</p>	<p>002-168 to 002-169, par 13 (inspection report), 002-272 to 002-278 (complaint), and 002-279 (ledger account).</p>

13.	25/11/2017	J Pascoal	<p>Respondent attended to the transfer of an immovable property for Pascoal.</p> <p>Municipality issued rates and taxes rebate to Pascoal. The rebate cheque was drawn in the respondent's name. Pascoal delivered the cheque to the respondent personally and in the four months that followed the respondent failed to pay the refund to Pascoal.</p> <p>Swart was unable to find a Pascoal ledger account nor a deposit for the rates and taxes in the respondent's accounting records. Further indication of unreliability of records.</p>	<p>002-169 to 002-170, par 14 (inspection report) and 002-280 to 002-284 (complaint)</p>
14.	04/06/2018	K Hlatshwayo	<p>Hlatshwayo sold an immovable property for R250,000.00. The respondent's fees amounted to R11,000.00. From the proceeds of the sale, the respondent paid over an amount of R182,000.00. The balance of R57,000.00 is unaccounted for.</p>	<p>002-170 to 002-171, par 15 (inspection report) and 002-285 to 002-289 (complaint)</p>

15.	20/02/2018	Samsodien Attorneys obo Sekwaila	<p>Sekwaila was the purchaser of an immovable property. Deposited R260,000.00 on the respondent's trust account to this end on 06/12/2016. Respondent not effected transfer and not accounted for funds.</p> <p><u>From ledger and bank statements:</u></p> <ol style="list-style-type: none"> 1. Funds used for payments to Hamn and Pascoal (within two months of receipt). 2. Accounting records reflect payments to Hamn and Pascoal as "client payment". <p>Respondent rolling trust funds and accounting records inaccurate.</p>	<p>002-172 to 002-175, par 16 (inspection report), 002-290 to 002-299 (complaint), and 002-301 to 002303 (bank statements and ledger account)</p>
16.	28/05/2018 (complaint) and 20/09/2019 (fidelity fund claim)	C J Muller	<p>Between 16/03/2017 and 06/08/2017, Nzama deposited R236,353.00 on trust towards purchase of property and transfer costs. The respondent did not transfer the property and has not accounted for funds deposited on trust.</p> <p>**Plethora of correspondence addressed by various attorneys and complainants to respondent with no response.</p> <p>On 20/09/2019 Nzama lodged</p>	<p>002-304 to 002-376 (complaint) and 008-29 to 008-53 (fidelity fund claim).</p> <p>(Correspondence at 002-314 to 002-376).</p>

			claim against attorneys' fidelity fund based on the misappropriation of his trust funds by the respondent.	
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17.	19/02/2018	M S Mnisi	In February 2016, R199,000.00 deposited on the respondent's trust bank account for the purchase of an immovable property and for the transfer costs. The respondent has failed to effect transfer of the property.	002-377 to 002-382 (complaint).
18.	12/02/2018	N M Masango	R190,000.00 deposited into the respondent's trust bank account on 31/10/2016 for the purchase of an immovable property. The respondent failed to transfer the property and was not responding to the client's telephone calls.	002-383 to 002-387 (complaint)

19.	26/10/2018	R V Mooka	Mooka was the purchaser of an immovable property. R278,000.00 was deposited on the respondent's trust account towards the purchase price and the respondent's fees. The respondent paid R120,000.00 to the seller, has failed to pay over the balance, and has failed to effect transfer.	002-388 to 002-392 (complaint)
20.	26/10/2018	P T Makhuvele	R170,000.00 deposited on the respondent's trust bank account in 2014 towards the purchase of an immovable property. The sale could not proceed and Makhuvele wants the funds returned.	002-393 to 002-397 (complaint).
21.	02/07/2019	R G Modjadji	R519,562.00 deposited onto the respondent's trust bank account for the purchase of an immovable property and the transfer costs. The property has not been transferred, the respondent is not providing updates in this regard, whereabouts of funds unknown.	007-15 to 007-31 (complaint)

22.	11/06/2019	M E Tswele	On 18/09/2018 the respondent was paid R3,000.00 to effect amendments to a title deed. The respondent did not attend to the instruction and did not honour subsequent undertakings to do so.	007-32 to 007-43 (complaint).
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23.	29/05/2019	B R Magagula	On 18/03/2016 the respondent was paid R10,000.00 to transfer an immovable property into the name of Magagula that she had inherited from her late mother. The respondent did not attend to instruction and did not honour subsequent undertakings to do so.	007-44 to 007-49 (complaint).
24.	21/06/2019	M S Lesenyego	Between 24/08/2017 and 13/09/2018 a total amount of R8,500.00 was paid onto the respondent's trust account for the respondent to transfer an immovable property into the complainant's name. The respondent failed to do so and did not respond to communication.	007-50 to 007-78 (complaint).
25.	26/06/2019	M T Mphahlele	R260,000.00 was due to Mphahlele from the proceeds of the sale of an immovable property. The respondent (after much hassle) only paid R200,000.00 to Mphahlele and has failed to account for the balance. Delayed payment of trust funds, failure to account for trust funds, probably misappropriation.	007-79 to 007-81 (complaint)

- [6] This application was preceded by an investigation conducted by an internal auditor and chartered accountant Ms Mapfumo (Kaserera). It was prompted as a result of complaints received by the applicant (the then Law Society) and from the non-compliance by the respondent with the LPA, LPA Rules and Code of Conduct. The terms of reference entailed a wide investigation into the accounting records of the practice, the individual complaints and an account of engagement with the respondent through correspondence. The attempts to arrange consultations with the respondent and with his bookkeeper failed because, despite request, they did not make themselves available to discuss the report. However, the respondent's trust account records were furnished by his external bookkeeper via email and were recorded on a Pastel Accounting System, with the accounting records written up to 30 April 2015 and with the trust account reflecting a balance of R1 544 997.63. Ms Kaserera's report was prepared in 2015. Further complaints necessitated another investigation which was conducted by Mr Swart (chartered accountant) during 2018. He also considered Kaserera's report after she had left the employment of the applicant.

[7] The respondent indicated that did not have receipt books. The clients deposited monies direct into his trust account. His contraventions are listed below. Ms Kaserera also prepared a report which is annexed to the founding papers and is referred to where applicable in the founding affidavit:

- 7.1 practised without a fidelity fund certificate commencing 1 January 2019;(sections 84(1) .85(1) and 93 (8) of the LPA)
- 7.2 there were trust deficits in the respondent's bookkeeping; (Rule 69.3.2
- 7.3 failure to report such trust deficits to the applicant;
- 7.4 the current and true trust position could not be established; and failure to record trust position correctly and accurately; trust creditors accounts reflected debit balances; (Rule 68.1; Rule 68(2)
- 7.5 the excessive transfers from the trust account into the business banking account and the transfer of rounded amounts into the business banking account from the trust account;
- 7.6 irregular withdrawals from the trust account which was held at Standard Bank, Pretoria Branch; (Rule 69.5)
- 7.7 appropriating fees prior to registration of transfers of immovable property;
- 7.8 mismanagement of trust funds;
- 7.9 incomplete narration of transactions in ledger accounts;
- 7.10 delayed payment of trust funds to clients and failure to properly account to clients; (Rule 54.12, 54.13, 68.7, 68.8)
- 7.11 contravention of several provisions of the LPA, LPA Rules and Code of Conduct
- 7.12 Failure to cooperate with the Council and its inspectors when seeking to conduct an inspection of the respondent's accounting records. (Rule 89.25)
- 7.13 Failure to distinguish between trust account and business account

[8] The applicant contended that according to the reports the respondent was not involved in the preparation and review of his accounting records; and that as a result of the complaints and non-compliance with the applicant's requirements placed his trust creditors and the Fidelity Fund at risk

[9] In the supplementary founding affidavit the applicant dealt with the complaints of Ms M G Malamula submitted to applicant on 3 October 2019 and that of M CJ Muller obo Ms SGL Nzama submitted to applicant on 28 May 2018.

Complaint, Ms NG Malamula: The complainant sold her immovable property in Mamelodi Gardens to a certain Mr Zwane for an amount of R650 000.00 and respondent attended to the transfer. An amount of R507 840.54 was allegedly owed to the City of Tshwane which was disputed by the complainant. Instructions were given to the respondent to negotiate a reduction and to pay the amount owing. The complainant was given R210 000.00 from the proceeds of the sale. The complainant alleged that the respondent failed to pay the balance to City of Tshwane. The respondent with the assistance of an employee of City of Tshwane misappropriated the balance in the amount of R440 000.00. The respondent failed to return the complainant's calls.

*Complaint, CJ Muller obo Ms SGL Nzama: C J Muller lodged a claim with the Legal Practitioners Fidelity Fund on behalf of Ms Nzama. She had paid an amount of R236 353.00 towards purchase of the immovable property and transfer costs. The respondent failed to attend to the transfer, the bond was not approved as a result of the delay occasioned by the respondent. He retained the money and failed or refused to repay it.

[10] In answer the respondent raised a number of *Points in Limine*:

10.1 Misjoinder: - The applicant failed in terms of Rule 10(3) or the common law to join the practice of the respondent as part of the proceedings

10.2 Review in terms of PAJA: - That the resolution by the applicant to launch the application was reviewable in terms of sections 6(2)(b) and /or 6(2)(c) and/or 6(2) (iii), (iv) and (vi) and /or 6(2)(f)(I) and /or 6(2)(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and on

grounds that the decision was unlawful, unreasonable, procedurally unfair and irrational.

10.3 Right of access to the financial records of the practice: - That the main opposition to the application was that the applicant had no right under the Act to demand access to the books of the respondent; or that he be obliged to furnish records to the Registrar. He contends that such right is not one contemplated in the Act, and he denies the applicant such access. It is contended that the applicant can only obtain the record in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA).

[11] The respondent contends that regardless of the findings of Ms Kaserera there was a balance of R 1 544 997.63 as at 30 April 2015 available in the trust account, and that the list of trust creditors and the balance in the trust account did not reflect any deficit. Further, Ms Kaserera's report was never adopted or considered by the applicant or provided to the respondent to consider and deliberate upon until six years later, and that the lapse of time was prejudicial to him and made it impossible to send it to his own accountant for consideration and advise.

[12] The respondent contended that the applicant failed to demonstrate that there was any harm or even threat to the complainants, further that the records as confirmed by the applicant's accountants and relied upon by the applicant were scientifically incorrect. The respondent denies every allegation inconsistent to what is in his answering affidavit and applies for the application be reviewed and set aside and application be struck off the roll.

[13] The respondent denied any misappropriation of funds with regard to Ms Malumela's complaint. He contended that as the transferring attorney he was not approached by the applicant to give his version. He paid a sum of R210 000.00 which was more than what she was entitled to. The outstanding unresolved bill with the City of Tshwane did not fall within the ambit of his

instructions and he cannot be blamed for what seems to be an accusation that he failed to negotiate a reduction of what she owed to the City of Tshwane. In reply the applicant contended that the respondent has not given any explanation or give details or provide any records of how the balance of the proceeds in the amount of R440 000.00 was dealt with by him

- [14] The respondent denied that he misappropriated funds relating to the Ms Nzama complaint. The property was being purchased from a couple who were going through a divorce and the delay in finalizing the transaction was not occasioned by him, but by ongoing talks between the couple and Tim Durant Attorneys who had instructions to foreclose. He advised Ms Nzama to await resolution of the problem but she insisted on occupying the property having made arrangements with the agents. Ms Nzama gave instructions to the respondent to pay an amount of R39 000.00 on the outstanding electricity bill. Ms Nzama complained of a damaged ceiling, the agents obtained a quotation, the ceiling and gate were repaired for an amount of R5000.00 and he was given instructions to pay.
- [15] While dealing with Tim Durant Ms Nzama through the same agents went and purchased another property. He had already given Tim Durant a guarantee before the sale was cancelled. There was also the issue on the couple's demand for occupational rent from the remainder of the funds held on behalf of Nzama which monies are still held in trust and were not misappropriated.
- [16] There was a demand to him to close the file and to pay over all monies to the attorneys Ms Nzama had instructed. The attorneys were unwilling to resolve the issue. The respondent contends that Ms Nzama was kept abreast of developments. According to the respondent he was never called by the applicant to give his version or called to an enquiry. In reply the applicant contended that the respondent's explanation was not convincing. He had failed to present his complete accounting records, all supporting source documents and proof that the monies were still held in trust.

THE ISSUES

[17] The issues are:

- (a) whether the points *in limine* raised have merit;
- (b) whether the respondent is a fit and proper person to continue to practice as an attorney

THE LAW

Points *in limine*

[18] The contention by the respondent that the applicant had not made out a case for access to his accounting records in terms of PAIA, in my view, is a display of a complete ignorance of the role the applicant plays as *custus mores* of the profession, and in the interest of the public; of the provisions of the Act, the Code of Conduct, and the Rules pertaining to the keeping of an attorney's books of account. The applicant had been in practice for 15 years till his suspension in 2020. I do not find it necessary to refer to the particular rules at this stage, save to state that the respondent had knowledge that an attorney's books, in particular his trust account is subject to audit every year, that a clean audit report should precede the issue of a fidelity fund certificate, which is also valid for only a year. The audit report is filed with the applicant by an auditor who is appointed by the attorney and not the applicant. Therefore, I consider this point to be a mockery of the processes in place, if a practitioner suggests that an investigation into his books be subjected to a PAIA application first, knowing full well that the trust account and all monies in such account belongs to his clients, and that he is only entitled to a fee from such monies properly accounted for. This point is dismissed.

[19] In my view, having regard to the nature of the proceedings before this court as dealt with below, the resolution which the applicant seeks to review, is a

necessary preliminary step towards launching the disciplinary procedure, to be adjudicated by the court in terms of section 44(1) of the Act. The resolution in itself does not directly affect the respondent in that it does not pronounce on the conduct and the ultimate sanctions to be given. Therefore, in my view the application in terms of PAJA at this preliminary stage is misconceived, alternatively should it be possible for these *sui generis* procedure to be reviewed, the application is at this stage pre-mature. This point is dismissed.

[20] It is not necessary to cite the respondent's practice because it is not a separate juristic person and the respondent is a sole practitioner. This point is dismissed.

[21] The respondent has not pleaded that the lapse of time from preparation of Ms Kaserera's report made it impossible for his expert to consider the said report. Further, the respondent had not pleaded that the records were no longer available because the matters of his clients were finalized or mandate withdrawn and five or seven years had passed being the period he was obliged to keep such records. I mention 5 of 7 years because in the Rules under the old Act 5 years was provided for and the present Rules provide for 7 years. In my view, it is not the lapse of time that is important, but the availability of the records which should have been in the custody of the respondent, and which he should have been availed to his expert to consider. If the applicant had taken possession of such records, then access to such records should have been requested. This point too should be dismissed.

The present enquiry

[22] A broad outline of some excerpts from the preamble of the Legal Practice Act 28 of 2014 state the aim and purpose of the Act as follows:

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

“AND BEARING IN MIND THAT-

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

AND IN ORDER TO-

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

*ensure that legal services are accessible;

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

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

- [23] Section 36 of the Act provides for the development of a code of conduct which legal practitioners must adhere to, and obliges the applicant to publish such code of conduct. Where complaints have been received by the applicant against legal practitioners, Section 37 of the Act provides for the institution of an investigation by a committee or a disciplinary procedure by a disciplinary committee (section 39(1) of the Act). which includes a disciplinary procedure by the high courts launched by the applicant (sections 40(3) and 44(1) of the Act), the latter being the final determinant on the striking of a legal practitioner on a finding, having heard evidence that such a legal practitioner is not a fit and proper person to continue to practice as a legal practitioner. The investigation envisaged in section 37 of the Act would entail an examination of any book, document, article, related to the complaint which is in the possession of the legal practitioner and in terms of 37(1)(h) the legal practitioner “may not, subject to the provision of any other law, refuse to produce the book, document or article, even though he or she is of the opinion that it contains confidential information belonging to or concerning his or her client.” (my emphasis)

The provisions in the Act, Rules and Code of Conduct which the respondent contravened:

- [24] Section 87 of the Act requires proper accounting records to be kept in respect of a trust account, recording of monies received and paid out on behalf of a client; this includes monies invested on behalf of clients and interest paid on such investments. The Rules 54.6 prescribes the format in which these records should be presented and examples are: (i) Records containing entries from day to day of all monies received and paid by it, (ii) Records containing particulars and information. Rule 54.12 and 54.13 provides for proper accounting on what is due to a client and that monies be paid within a reasonable time after mandate has been performed or termination thereof. Rule 54. 14 provides for when withdrawals from the trust account may be made, which is to a trust creditor and into the business account of the firm. The latter transfer may only occur in respect of what is due to the practice. The Rule also provides for when disbursements may be paid out of the business account. Section 84(1) enjoins every attorney practising for his own account to be in possession of a Fidelity Fund Certificate valid from 1 January to 31 December. The provision is peremptory and an attorney who contravenes this provision renders himself liable to a fine or imprisonment.
- [25] The nature of the enquiry before the court was aptly described by Brand JA in *Summerly V Law Society; Northern Provinces* 2006 (5) SA 613 {SCA}
- “It has now become settled law that the application of s22 (1)(d) involves a threefold enquiry (see e.g. *Jassat v Natal Law Society* 2003 (3) SA 44 (SCA) in para10 at 51C1-1, and *Law Society of the Cape of Good Hope* 2003 v *Budricks* (2) SA 11 (SCA) in para [2] at 131-14B. The first enquiry is aimed at determining whether the Law Society has established the offending conduct upon which it relies. on a balance of probabilities. The second question is whether in the light of the misconduct thus established, the attorney concerned is not a fit and proper person to continue to practice as an attorney’. Although this has not always been the position, s22(1)(d) now expressly provides that the determination of the second issue requires an exercise of it discretion by the court (see e.g. *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 851 (C-E). As was pointed out by Scott JA at (51E-F), the third enquiry again requires the Court to exercise discretion. At this stage the court must decide. In the exercise of its discretion, whether the person who has been found not to be a fit and proper person to practice as an attorney deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice

- [26] In *Hepple and two others and the Law Society of the Northern Provinces* (507/2013 [2014] ZASCA 75 (29 May 2014) Mthiyane DP states at [9]"

"In considering whether a case has been made out against an attorney sought to be struck from the roll it is necessary to bear in mind that their evidence presented by the law society is not to be treated as though one is dealing with a 'criminal case' or ""an ordinary civil case. The proceedings in applications to strike the names of attorneys from the roll are not ordinary civil proceedings. They are proceedings of a disciplinary nature and are *sui generis*.: It follows that where allegations and evidence are presented against an attorney they cannot be met with mere denials by the attorney concerned. If allegations are made by the law society and underlying documents are provided which form the basis of the allegation, they cannot be simply brushed aside; the attorneys are expected to respond meaningfully to them and to furnish a proper explanation of the financial discrepancies as their failure to do so may count against them. In this regard the remarks of Harms ADP in *Malan v Law Society of the Northern Provinces* [2008] ZASCA 90 2009 (1) 216 (SCA) para 27-28

"If one turns to bookkeeping charges, the position is simply that there is no allegation of a realisation of the seriousness of the offences. They are brushed off on the basis that the society failed to prove a trust shortage that the bookkeeper had erred, that they did not know the rules, that their auditors had erred or simply by not dealing with the pertinent allegations. Furthermore, instead of dealing with the merits of the allegations, the appellants conducted a paper war and they attacked the Society and its officers, they attacked the Fidelity Fund and they attack the attorneys who had to take over the files – in short, their approach on paper was obstructionist. These factors are aggravating and not extenuating because they manifest character defects, a lack of integrity, a lack of judgement and a lack of insight."

- [27] The respondent has only attempted to deal with two of the complaints levelled against him and, the rest as stated in annexure 'A' and some additional offences based on the Act, Code of Conduct and the Rules remain unanswered. It is my view that the contention by the respondent that the applicant failed to give him opportunity to address the complaints with him personally, by way of an enquiry before the applicant, should not be given as an excuse for not dealing with them because, in these proceedings the respondent is given yet another opportunity to address the said complaint. This is so because the court is not only confined to pronouncing on the transgressions of the Act, the Rules and Code of Conduct, the court, depending on the gravity of the offences is also required to

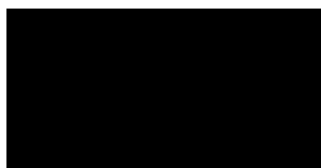
exercise a discretion whether to suspend or to strike the respondent from the roll of practising attorneys. It is common cause that the respondent is presently suspended, so he has to give reasons why the court should not strike him from the roll. What the court is faced with are bare denials, where the respondent has not defended with any particularity the complaints against him.

- [28] The respondent did not have receipt books and clients had to deposit direct into the trust bank account. The investigation found that the balances in the trust ledger did not mirror the balances in the trust bank account. The respondent and his bookkeeper declined or did not honour an invitation by Ms Kaserera to discuss the discrepancies in the accounting records. A credit balance in the trust account on any given day does not necessarily manifest the absence of a trust deficit.
- [29] I find that the defences given to the complaints of CJ Muller and Malamula cannot be considered without the respondent providing evidence in support of his explanations. Such evidence can only be found in the client files and books of account.
- [30] The complaint of CJ Muller has already been referred to the Fidelity Fund. If certain transactions were done on the instructions of Ms Nzama then the respondent should have been in a position to furnish such information. He contends that the client file was in the possession of the applicant, this should not have precluded him from gaining access to the file on request to the applicant. Further, whatever motivation he had for making payments on behalf of Ms Nzama for other issues unrelated to the transfer for example alleged payment of the R39 000.00, in my view, constituted a breach of his duty to make payments only related to the real mandate being transfer of property. Further, if indeed the client file was with the applicant my question is, what is the source of his explanation in his answering affidavit, he has not annexed any document.

- [31] With regard to the Malamula, if only R210 000.00 was paid to the complainant, the respondent has not explained how the R440 000.00 was utilized where, according to his version he had no instructions to settle the municipality bill.
- [32] As seen from the schedule attached and aside from the complaints from clients, or the failure to comply with the Act and Rules, most of the contraventions emanate from the investigations into the books of the practice that was conducted by Ms Kaserera and Mr Swart. They have to deal with the keeping of the books of account in an attorney's practice, the recording of transactions in the trust accounts, the recording of transactions in the trust ledgers, the cash book, the lack of source documents to justify certain transactions and debiting fees prematurely and without justification; and the responsibility to account to clients; appropriating monies from the trust account
- [33] A legal practitioner remains fully accountable to the applicant for compliance with the Act and should be able at short notice to avail accounting records when requested to do so by the inspectorate appointed by the applicant as happened in this instance. The respondent is obliged by law to give his full co-operation when such investigation is conducted. He has failed, as already mentioned to respond to the findings of the investigation. In my view, the unreasonable challenge to the authority vested in the applicant by the Act, the respondent's refusal to deal with the twenty-eight contraventions among others, complained about as also appears in the schedule, especially those dealing with the management of the books relating to the trust account is a serious dereliction of his constitutional duty to ensure the protection of funds entrusted to him by members of the public. Such conduct amounts to dishonesty and I find that the respondent is not a fit and proper person to be allowed to practice as an attorney and that he be struck off the roll of practicing attorneys.

[34] In the result the following order is granted:

1. The respondent Thabiso Jeremiah Ntsie be struck from the roll of attorneys (legal Practitioners);
2. Paragraphs 3 to 12 of Annexure X to the order of 28 August 2020 shall remain in force;
3. The respondent is to pay costs on the application on an attorney and client scale.



TLHAPI V V

(JUDGE OF THE HIGH COURT)

I agree



BOKAKO T

(ACTING JUDGE OF THE HIGH COURT)