



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

(1) REPORTABLE: YES / NO

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

(3) REVISED

4 March 2022

DATE

SIGNATURE

CASE NUMBER: 5921/21

DATE: 4 March 2022

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

V

SHUMANI SYDNEY TSHAKAFA

Respondent

JUDGMENT

KOOVERJIE J (Bokako AJ concurring)

- [1] This application has been instituted by the applicant for the removal of the respondent from the roll of legal practitioners in terms of the Legal Practice Act.

- [2] On 14 September 2021 the applicant obtained an order suspending the respondent from practicing as a legal practitioner. The applicant now seeks the removal of the respondent as a legal practitioner.
- [3] Initially the said application commenced as a suspension application and was to be dealt in the ordinary course. The applicant received further information following an inspection into the practice affairs of the respondent. A supplementary affidavit and an amended notice of motion were filed in order to have the matter heard on an urgent basis (Part A) for the suspension of the applicant (Part B) and for final relief, namely the removal of the applicant from the roll of legal practitioners. The application is now before us in terms of Part B, which is for the final relief.
- [4] For the purposes of this application the applicant filed a second supplementary affidavit to which the respondent did not timeously respond. The respondent had, shortly before the hearing, at the last hour, filed his affidavit. No condonation application accompanied the said affidavit. Upon hearing submissions from both parties, we have allowed the affidavit on the premise that it is in the interest of justice to dispose of this matter and to consider the representations made by the respondent.
- [5] The applicant relied on the submissions made in its founding papers as well as both supplementary papers for the purposes of this application. The second supplementary affidavit brought the court up to speed with the findings of the *curator bonis* (appointed in September 2021) as well as the two additional complaints that were made against the respondent.
- [6] The salient facts in this matter are set out below. The respondent established his practice on 2 February 2011 and practiced as a single practitioner up until his suspension in September 2021. The respondent was last in possession of a fidelity fund certificate for the 2019 year. In terms of the recent curator's report it has also come to

light that only an amount of R124.57 is reflected in the respondent's trust banking account. This information was obtained from the bank as the *curator bonis* was not placed in possession of any of the respondent's accounting records or the clients' files.

- [7] Additional complaints were lodged by Mr Nxumalo and Mr Netshiwani. According to Mr Nxumalo, he complained that the respondent failed to carry out instructions received from him. He also failed to transfer the file to another attorney when requested to do so. This resulted in Mr Nxumalo being sequestered.
- [8] With regard to Mr Netshiwani the respondent failed to execute his mandate and respond to Mr Netshiwani or advise him of any progress made in his matter. This was in direct contravention of Rule 3 of the Code of Conduct in that the respondent failed to carry out the work in a competent and timely manner and failed to put the interests of his clients first.
- [9] We have noted that the respondent did not respond to the first supplementary affidavit. He informed this court that he would be relying on his answering affidavit (which was filed when Part A was heard). In response to the second supplementary affidavit the respondent dealt mainly with the complaint of Mr Twala. In essence, in Mr Twala's case, the respondent had misappropriated an amount of R350,000.00 deposited in the respondent's trust account. When Mr Twala requested the funds to be paid back, the respondent was unable to do so as the funds were already misappropriated by then. Arrangements were then made to pay Mr Twala in instalments. We noted that Mr Twala in his confirmatory affidavit (filed together with the respondent's affidavit in response to the second supplementary affidavit) confirmed that he received the funds and that the respondent was no longer indebted to him.
- [10] The respondent explained that he was unable to obtain his fidelity fund certificates due to the fact that his auditor failed to finalise the audit reports timeously. He undertook to

ensure that the reports would be filed timeously so that he would be in possession of the fidelity fund certificates. He specifically pleaded that he be given a second opportunity to make sure that he complies with his obligations in terms of the Legal Practice Act. The respondent also advised that his subscriptions to the Legal Practice Council were paid but he conceded that such payments were also not timeous.

- [11] In respect of Mr Nxumalo's complaint, it was explained that the respondent had in fact communicated with Mr Nxumalo telephonically that it was difficult to get a copy of the charge sheet and the endorsement that the matter was withdrawn. The Respondent had undertaken to locate such documents, particularly when the matter against Mr Nxumalo was withdrawn but was unable to do so.
- [12] With regard to Mr Netshiwani it was explained that due to the fact that the respondent was unable to pay his rental, he no longer occupied the office premises where he was practising from at the time. It was during this period that his clients, like Mr Netshiwani, were unable to make contact with him.
- [13] It was argued that the respondent appreciated that his conduct was unbecoming of that of a legal practitioner and requested that he rather be suspended instead of being removed from the roll. It was suggested he be allowed to practice under a firm of attorneys as a professional assistant or associate in any organisation. In that way he would neither be holding a trust account nor a practice for his own account during the period of his suspension.
- [14] In exercising our discretion, this court has to firstly establish if there was offending conduct on the part of the respondent. Once the court is satisfied that the offending misconduct has been established the next enquiry that would follow - would be whether he is fit and proper to continue to practise. In this regard the court has to weigh the complaint against the conduct expected of a legal practitioner. The court's role is not

there to impose a penalty but the prime consideration is to ensure that the interests of the public is protected¹.

[15] In summary the court is required to have regard to a threefold enquiry process, namely:

- (a) the court must first decide as a matter of fact whether the alleged offending conduct by the legal practitioner has been established;
- (b) if the court is satisfied that the offending conduct has been established, a valued judgment is required to decide whether the person concerned is not a fit and proper person to practise as a legal practitioner;
- (c) if the court decides that the legal practitioner concerned is not a fit and proper person to practise as a legal practitioner, it must decide in the exercise of its discretion whether in all the circumstances of the case the legal practitioner in question is to be removed from the roll or merely suspended from practice. Ultimately this is a question of degree;
- (d) the court's discretion must be based upon the facts before it and facts in question must be proven upon a balance of probabilities. The facts upon which the court's discretion is based should be considered in their totality. The court must not consider each issue in isolation².

[16] In essence the respondent does not dispute the findings of the inspection. But for the dealing of Mr Twala's complaint, the respondent has not responded to the allegations regarding the issue of the fidelity fund certificates adequately. We note that he pleaded guilty before the disciplinary hearing on the fidelity fund certificates issue and the fact

¹ Jasat v Natal Law Society 2000 (3) SA 44 SCA at 51 B-I

² Jasat v Natal Law Society 2000 (3) SA 44 SCA par 10

that he failed to submit his annual audit reports timeously. He does not deny that he was serving the public without being in possession of fidelity fund certificates.

- [17] With regard to the membership fees, the respondent submitted that such fees were eventually paid. The fact however remains that he failed to timeously pay subscription fees to the Legal Practice Council for the 2020 and 2021 years.
- [18] It further cannot be gainsaid that the audit reports were not submitted timeously for at least 8 years, that is from the 2012 financial year to the 2020 financial year. Each year there was a delay, anything from a few months to over one year. Consequently in those years he was practicing without fidelity fund certificates, more particularly from 2014 to 2017.
- [19] The applicant pointed out that the respondent's conduct was serious. By virtue of both the Attorneys Act and the Legal Practice Act, his conduct is considered to be serious transgressions and offences punishable by a fine or imprisonment.
- [20] We have noted that from his answering papers the respondent does not proffer an explanation for his conduct in practising without fidelity fund certificates. It is also noted that although he pleaded guilty to all the charges at the disciplinary hearing, he failed to pay the fine imposed. He only did so on 22 February 2021 after these proceedings were instituted for his suspension as a legal practitioner.
- [21] He further does not deny that he misappropriated trust fund monies of his client, Mr Twala. It was also not disputed that Mr Twala was paid from the respondent's business account as the trust account did not hold the monies that were paid to Mr Twala.
- [22] It is also noted that the respondent failed to cooperate during the inspection, more specifically he failed to submit the relevant documentation being the business bank

statements despite repeated requests from the inspector. At some stage the respondent's bookkeepers provided the inspector with the majority of the requested documents.

[23] It has also become evident from the record that the respondent held an amount of R700,549.00 on trust as at January 2019. Between January 2019 and 30 November 2019 he transferred an amount of R409,150.00 to his business banking account. Mr Twala was then paid from his business account in an amount of R290,000.00. At 30 November 2019 the trust account had an amount of R11,862.52 remaining.

[24] What the inspection revealed was that the trust creditors' account was in debit and this was because other trust creditors' funds were being used. This constituted the rolling of trust funds.

[25] The respondent's conduct in respect of Mr Twala was that he received Mr Twala's funds on trust; misappropriated Mr Twala's funds; delayed repayment to Mr Twala; utilised the funds of other trust creditors when he made payment to Mr Twala; and manipulated his accounting records to conceal the accurate state of affairs. These findings were not disputed by the respondent.

[26] It is a fundamental duty of every practising attorney to ensure that the books of the firm are properly kept and there are sufficient funds at all times to meet the trust account claims. The keeping of proper accounting records underpins the rationale that the interest of the public must be protected at all times. Any failure to do so would be considered to be serious. It is paramount for a legal practitioner to ensure that the trust account is managed properly. The very essence of a trust is the absence of risk.

[27] It is not in dispute that the respondent delayed the payment of the trust funds. He effected irregular transfers from his trust account to his business account. Such

misappropriation of the trust funds caused substantial trust deficits in his bookkeeping and accounting records. In turn his accounting records were manipulated to conceal the existence of the trust deficit. It was also not in dispute that he failed to keep proper accounting records.

[28] As alluded to above the issue for determination is whether the misconduct in question is so serious and of a nature that it manifests the lack of integrity and dishonesty rendering him unfit to be a legal practitioner.

[29] In the belated affidavit of the respondent, the respondent advised that he had undertaken to remediate the various acts of misconduct; that his subscription fees were paid, and that the amount with Mr Twala has been settled. However, no evidence to illustrate same was presented to us. Furthermore, even though Mr Twala confirmed that he received payment, and his account was settled, the fact remains that the trust funds were misappropriated.

[30] In our view the misappropriation of trust funds constitutes theft and the respondent further concealed this misconduct by manipulating his accounting records. This in itself, portrayed dishonesty and a lack of integrity on his part.

[31] This then brings us to what the appropriate sanction would be. It was submitted that his misconduct warrants his removal. It was proffered that this court could only order the suspension in exceptional circumstances. In these circumstances it was argued that no such exceptional circumstances exist.

[32] It is expected of a legal practitioner to comply with the provisions of the Legal Practice Act, the Attorneys Act and the rules of the attorneys' profession. The issue of trust accounts and the managing of clients' trust funds are at the helm of legal practitioners'

practice. Trust money does not form part of the assets of a legal practitioner. The objective of operating with trust funds is to eliminate the risk of client's money being abused.

- [33] The unjustifiable handling of trust money is totally untenable and not only frustrates the legal requirements relating to trust money but also undermines the principle that a trust account is completely safe in respect of money held therein by a legal practitioner on behalf of another person.
- [34] A legal practitioner is duty bound to act in the interest of his/her clients above his/her own and in so doing, exercise the highest degree of good faith in his/her dealings with his/her clients.
- [35] As the regulator for the legal profession, the Legal Practice Council, is mandated to ensure that the legal practitioners comply with the relevant legislation and the code of conduct. The Legal Practice Council has the duty to act where a legal practitioner falls short on his/her conduct. All legal practitioners are required to conduct themselves with utmost honesty and integrity and in the best interests of their clients.
- [36] It is trite that in applications of this nature, there is no *lis* between the applicant and the respondent. The applicant, by virtue of its statutory duties, furnishes the court with the relevant facts and findings.
- [37] Ultimately the court has to exercise its own discretion after having heard both parties.
- [38] In the exercise of our discretion, having considered the facts in their totality and having heard submissions of both parties, we find that the respondent's acts of misconduct were serious and dishonest. We are mindful that the main consideration is the protection of the public. It was not disputed that he manipulated the accounting records to conceal

the deficits in the trust account. He failed to make full disclosures to the *curator bonis* and the inspectors.

[39] In our consideration we did not only consider his failure to administer his trust account but the fact that his misconduct involved dishonesty. Moreover, the respondent's misconduct was repetitive and he failed to provide plausible explanations for his actions. As alluded to above, he filed a brief answering affidavit and a short response to the second supplementary affidavit. He failed to adequately address the various findings against him. This court was therefore limited to make a finding on the papers before it.

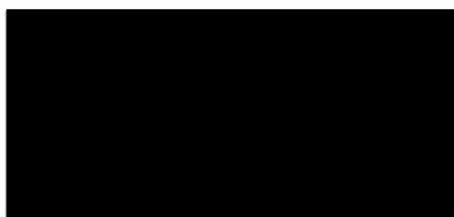
[40] In the circumstances the removal of his name from the roll of legal practitioners is justified.

[41] We are mindful that the applicant is entitled to costs. An order has been sought that the respondent pay the costs of this application on the scale as between attorney and client. We have considered the submissions and find that in these circumstances punitive costs is justified³.

[42] In the premises the following order is made:

- 1. The respondent be struck from the roll of attorneys (legal practitioners) of this court;**
- 2. Paragraphs 3 to 10 of the order of 14 September 2021 shall remain in force;**
- 3. The respondent be and is hereby directed:**
 - 3.1 to pay the reasonable costs of the inspection of the accounting records of the respondent;**
 - 3.2 to pay the reasonable fees and expenses of the curator;**
 - 3.3 to pay the reasonable fees and expenses of any person engaged by the curator;**

³ Law Society of the Northern Provinces v Mogami 2010 (1) SA 186 SCA

3.4 to pay the costs of this application.

H KOOVERJIE
JUDGE OF THE HIGH COURT



T BOKAKO
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:	Mr L Groome
Instructed by:	Rooth & Wessels Inc
Counsel for the respondent:	Mr Rambau
Instructed by:	Langa Rambau Inc
Date heard:	8 February 2022
Date of Judgment	4 March 2022