

SOUTH AFRICA / JUDGMENT

Law Society of the Northern Provinces v Mphela (2018/61533) [2019] ZAGPPHC 609 (12 November 2019) [2019] ZAGPPHC 609

COURT

North Gauteng High Court, Pretoria

BEFORE

Mokose, Mothle

CASE / FILE NUMBER

2018/61533

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 2018/61533

In

the matter between:

THE
LAW SOCIETY OF THE
NORTHERN
PROVINCES
Applicant
and

MPHELA:

TITUS
MATSIEPANE
Respondent

JUDGMENT**MOKOSE J**

- [1] An application was brought by the applicant for an order, inter a/ia, removing the name of the respondent from the roll of attorneys in terms of Section 22(1){d) of the Attorneys Act 53 of 1979 upon such conditions as the court deemed necessary. The matter came before Teffo Jon 4 September 2019 and in the urgent court where the respondent was suspended from practice pursuant to an order granted in terms of Part A of the Notice of Motion.
- [2] The application before us is in respect of Part B of the Notice of Motion for the respondent's name to be removed from the roll of practising attorneys of this court. Section 116(2) of the Legal Practice Act 28 of 2014 ("LPA) provides that any matters which have not been concluded at the date of commencement of the LPA must be continued and concluded as if that law had not been repealed. A reference in the provisions relating to such suspension or removal by the Law Society must be construed as a reference to the Legal Practice Council.
- [3] This court granted an order on 12 November 2019 as per the prayers in the Notice of Motion. These are the reasons of that decision.
- [4] It is common cause the respondent, who had been admitted to practice as an attorney on 27 May 1997, as a notary public on 7 January 1999 and as a conveyancer on 12 September 2000, practised as a single practitioner for his own account under the style of Mphela Attorneys at Block 1, Entrance 5, Financial Square Building, First Floor, Corner Mandela & Woltemade Street, Witbank.
- [5] The facts that prompted the applicant to bring this application to the court included the following:
- (i) that there is a substantial trust deficit in the respondent's bookkeeping. Prima facie there appears to be a trust deficit of R1 385 460,01:
 - (ii) the respondent misappropriated trust funds;
 - (iii) the respondent failed to account to his clients;
 - (iv) the respondent delayed the payment of trust funds;
 - (v) the respondent failed to keep proper accounting records in respect of his practice;
 - (vi) the respondent contravened several provisions of the Attorneys' Act, Rules of the Attorneys' Profession and Law Society's Rules relating to bookkeeping by attorneys;
 - (vii) the Law Society received serious complaints against the respondent.

[6] The applicant, in its founding affidavit, averred that the respondent had contravened various rules of the Law Society and provisions of the Attorneys' Act.[1] As such, this conduct constituted a deviation from the standards of professional conduct and that the respondent is not fit and proper to continue to practise as an attorney, conveyancer and notary public.

[7] Section 119(2)(b) of the LPA provides that any rule, code, notice, order, instruction, prohibition, authorisation, permission,

consent, exemption, certificate or document promulgated, issued, given or granted and any other steps taken in

terms of the said law immediately before the promulgation of the LPA and having the force of law, remains in force except in so far as it is inconsistent with the LPA, until amended or revoked by a competent authority under the provisions of the LPA.

[8] In response to the founding affidavit, the respondent maintained that he is a fit and proper person to remain on the roll of practising attorneys. He confirmed that the money which formed a part of the complaint was indeed entrusted to him and paid into his trust account. However, the said money was erroneously paid over to certain clients but not with the intention to deprive the complainant of such moneys. Accordingly, such conduct does not warrant the sanction as prayed for in the Notice of Motion. He alleged further that payment arrangements had been made to the trust creditor to refund him the money in instalments.

[9] He denied the averments of the applicant as to his conduct and in particular denied having been grossly negligent, failing to comply with the rules of the profession, utilising one client's funds to pay another, not having sufficient trust funds to pay trust creditors and not proffering a valid explanation for the trust deficit.

[10] Applications for the striking of an attorney from the roll of practitioners are not ordinary civil proceedings but are disciplinary in nature and are sui generis. The court in the matter of Solomon v Law Society of the Cape of Good Hope[2] said the following:

Now in these proceedings the Law Society claims nothing for itself.....It merely brings the attorney before the court by virtue of a statutory right, informs the court what the attorney has done and asks the court to exercise its disciplinary powers over him The Law Society protects the interests of the public in its dealings with attorneys. It does not institute any civil action against the attorney. It merely submits to the courts facts which it contends constitute unprofessional conduct and then leaves the court to determine how to deal with this officer."

[11] Smalberger ADCJ in the matter of Middelberg v Prokureursorde van Transvaal[3] undertook a full analysis of the nature of an application to strike off the roll. He concluded that such proceedings are sui generis but for the purposes of appeals which would constitute civil proceedings. A three stage enquiry is conducted where the following is ascertained:

(i) whether the offending conduct has been established on a preponderance of probabilities;

(ii) whether the respondent is a fit and proper person to continue to practise as an attorney, taking into account the respondent's conduct;

(iii) whether, and in consideration of all the circumstances, the respondent should be removed from the attorney's roll or whether an order of suspension from practise for a specific time will suffice.

Jasat v Natal Law Society[4]

[12] A court may, mero motu, initiate steps to strike a respondent's name from the roll of attorneys and can do so notionally, without the reliance of the Law Society's cooperation or indeed, against the Law Society's wishes.[5]

[13] It is evident from the respondent's answering affidavit that the respondent has failed to address the complaints in an acceptable

manner. He has failed to give a justifiable explanation as to the existence of the trust deficit. He also gives vague information not supported by evidence and/or documentation as to the payment of the R1 385 460,00 out of the trust account. Such a response in the answering affidavit is unacceptable for an attorney and officer of the court to deal with facts under oath in this manner. The respondent merely denies wrongdoing aimed at assertions that he is fit and proper and that he should not be removed from the roll of practising attorneys.

[14] It is also evident that the respondent is guilty of contravening the provisions of both the Rules of the Law Society and the Attorneys' Act. His conduct falls short of the standard of behaviour required of an attorney of this court. He has been afforded with an opportunity to take the court into his confidence and explain his conduct and more particularly the payment of the amount of R1 385 460,00 out of the trust account and other complaints. He appears not to have grasped the gravity of his conduct and the proceedings and demonstrates a complete disregard for the seriousness of his actions in the conduct of his practice.

[15] It was brought to the court's attention that despite the respondent having been suspended from practise by Teffo Jon 4 September 2019, he has continued to practise as an attorney. This has been ascertained from complaints which have been lodged with the applicant subsequent to the granting of the order suspending him from practise.

[16] Accordingly, the court was of the view that the applicant had established that the respondent was guilty of the offences referred

to above. The conduct of the respondent was found to be serious and conduct unworthy of an attorney and was accordingly found not to be fit and proper to continue to practise as an attorney, conveyancer and notary public.

[17] Accordingly the court struck the respondent from the roll of practising attorneys and made an order in terms of Annexure "X"

attached to this judgment.

Judge of the High

Court of South

Africa Gauteng

Division,

PRETORIA

I agree and is so ordered

MOTHLE J

Judge of the High Court of South Africa

Gauteng Division,

For the Applicant:

Adv C Jooste

instructed by

Iqbal Mahomed Attorneys

Date of hearing: 12 November 2019

Date of judgment: 5 December 2019

GAUTENG DIVISION. PRETORIA

AT PRETORIA ON TUESDAY, 12 NOVEMBER 2019, COURT 4C

BEFORE THE HONOURABLE JUDGES MOTHLE and JUDGE MOKOSE J,

Case number: 61533/18

THE LEGAL PRACTICE COUNCIL

Applicant

MR TITUS MATSIEPANE MPHELA

Respondent

ORDER

IT IS ORDERED THAT IN TERMS OF THE PRAYERS IN THE NOTICE OF MOTION:

1. That the name of MR TITUS MATSIEPANE MPHELA (the respondent) be removed from the roll of attorneys of this Honourable Court.
2. That respondent immediately surrenders and delivers to the registrar of this Honourable Court his certificate of enrolment as an attorney and conveyancer of this Honourable Court.
3. That in the event of the respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) 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 them to the Registrar of this Honourable Court.
4. That respondent be prohibited from handling or operating on his trust accounts as detailed in paragraph 5 hereof.
5. That Johan van Staden, the head : members affairs of applicant or any person nominated by him, be appointed as curator bonis (curator) to administer and control the trust accounts of respondent, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by respondent at a bank in the Republic of South Africa in terms of section 78(1) of Act No 53 of 1979 and/or any separate savings or interest bearing accounts as contemplated by section 78(2) and/or section 78 {2A) of Act No. 53 of 1979, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said subsections or in which monies in any manner have been deposited or credited (the said accounts being hereafter referred to as the trust accounts), with the following powers and duties:

5.1 immediately to take possession of respondent's accounting records, records, files and documents as referred to in paragraph 6 and subject to the approval of the board of control of the attorneys fidelity fund (hereinafter referred to as the fund) to sign all forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which respondent was acting at the date of this order;

5.2 subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and unlawfully from the 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 respondent in respect of monies held, received and/or invested by respondent in terms of section 78(1) and/or section 78(2) and/or section 78 (2A) of Act No 53 of 1979 (hereinafter referred to as trust monies), 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 respondent was and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);

5.3 to ascertain from respondent's accounting records the names of all persons on whose account respondent appears to hold or to have received trust monies (hereinafter referred to as trust creditors); to call upon respondent to furnish him, within 30 (thirty) days of the date of service of this order or such further period as he may agree to in writing, with the names, addresses and amounts due to all trust creditors;

5.4 to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of, the board of control of the fund, to determinewhether any such trust creditor has a claim in respect of monies in the trust account(s) of respondent and, if so, the amount of such claim;

5.5 to admit or reject, in whole or in part, subject to the approval of the board of control of the fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;

5.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the board of control of the fund;

5.7 in the event of there being any surplus in the trust account(s) of respondent after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce (as the case may be), firstly, any claim of the fund in terms of section 78(3) of Act No 53 of 1979 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of respondent, the costs, fees and expenses referred to in paragraph 10 of this order, or such portion thereof as has not already been separately paid by respondent to applicant, and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the board of control of the fund, to

respondent, if he is solvent, or, if respondent is insolvent, to the trustee(s) of respondent's insolvent estate;

5.8 in the event of there being insufficient trust monies in the trust banking account(s) of respondent, in accordance with the available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which may be available in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the Attorneys Fidelity Fund;

5.9 subject to the approval of the chairman of the board of control of the fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and

5.10 to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of respondent has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.

6. That respondent immediately delivers his accounting records, records, files and documents containing particulars and information relating to:
 - 6.1 any monies received, held or paid by respondent for or on account of any person while practising as an attorney;
 - 6.2 any monies invested by respondent in terms of section 78(2) and/or section 78 (2A) of Act No 53 of 1979;
 - 6.3 any interest on monies so invested which was paid over or credited to respondent;
 - 6.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by respondent, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;
 - 6.5 any insolvent estate administered by respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;
 - 6.6 any trust administered by respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;
 - 6.7 any company liquidated in terms of the Companies Act, No 61 of 1973, administered by respondent as or on behalf of the liquidator;
 - 6.8 any close corporation liquidated in terms of the Close Corporations Act, 69 of 1984, administered by respondent as or on behalf of the liquidator; and
 - 6.9 respondent's practice as an attorney of this Honourable Court, to the curator appointed in terms of paragraph 5 hereof, provided that, as far as such accounting records, records, files and documents are concerned, respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.
7. That should respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on respondent (as the case may be), the sheriff for the district in which such accounting records, records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator.
8. That the curator shall be entitled to:
 - 8.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;

8.2 require from the persons referred to in paragraph 8.1 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or respondent and/or respondent's clients and/or fund in respect of money and/or other property entrusted to respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;

8.3 publish this order or an abridged version thereof in any newspaper he considers appropriate; and

8.4 windup of the respondent's practice.

9. That respondent be and is hereby removed from office as

9.1 executor of any estate of which 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);

1.25cm; marginbottom: 0cm; lineheight: 150%"> 9.2 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;

9.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;

9.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973;

9.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;

9.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984; and

9.7 administrator appointed in terms of Section 74 of the Magistrates Court Act, No 32 of 1944.

10. That respondent be and is hereby directed:

10.1 to pay, in terms of section 78(5) of Act No. 53 of 1979, the reasonable costs of the inspection of the accounting records of respondent;

10.2 to pay the reasonable fees of the auditor engaged by applicant;

10.3 to pay the reasonable fees and expenses of the curator, including travelling time;

10.4 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;

10.5 to pay the expenses relating to the publication of this order or an abbreviated version thereof; and

10.6 to pay the costs of this application on an attorneyandclient scale.

11. That if there are any trust funds available the respondent shall within 6 (six) months after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, shall satisfy the curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to him (respondent) in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof;
12. That a certificate issued by a director of the Attorneys Fidelity Fund shall constitute prima facie proof of the curator's costs and that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.
13. That further and/or alternative relief be granted to applicant.

BY ORDER OF THE COURT

COURT REGISTRAR

Applicant's Attorney: Amelia Strecker (Iqbal Mahomed Attorneys) 072 211 6860

[1] Act 53 of 1979

[2] 1934 AD 401 at 408409

[3]

[2001] 3 All SA 166 (A)

[4] 2000 (3) SA 44 (SCA) at para 10

[5] Law Society of the Northern Provinces v Soller [2002] ZAGPPHC 2 (26 November 2002)

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