

SOUTH AFRICA / JUDGMENT

# Legal Practice Council v Kleynhans (6160/24) [2024] ZAWCHC 196 (5 August 2024) [2024] ZAWCHC 196

## COURT

Western Cape High Court, Cape Town

## BEFORE

A Montzinger

## CASE / FILE NUMBER

6160/24

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IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case number: 6160/24

In the matter between:

THE LEGAL PRACTICE COUNCIL Applicant and STEPHANUS JACOBUS KLEYNHANS Respondent  
Coram: Acting Justice A Montzinger Heard: 29 July 2024 Delivered electronically: 05 August 2024

**REASONS**

## FOR POSTPONEMENT

Montzinger AJ:

## Summary introduction

1. The Legal Practice Council (LPC), as the applicant, sought an order suspending the respondent from practice.
2. The respondent is an admitted legal practitioner practising for his own account. If the suspension order is granted the LPC also seeks certain consequential relief that effectively places the practice of the respondent in its hands.
3. The basis for the LPC's application was the respondent's non-compliance with ss 84(1) of the Legal Practice Act[1] (the "LPA"). This section requires of every attorney who practices for his or her own account or who is a director of a practice which is a juristic entity, to be in possession of a Fidelity Fund certificate.

4. The LPC is the body that issues Fidelity Fund certificates, on application, to legal practitioners in terms of the provisions of the LPA. Subsection 85(6) of the LPA prescribed certain considerations the LPC must consider in conjunction with the LPA Rules before a legal practitioner may be issued with a Fidelity Fund certificate. Among the considerations is that the practitioner must obtain an unqualified audit of the trust account under his/her control[2].
5. The respondent did not submit an audit report for his trust account for the financial year 1 March 2022 to 28 February 2023 (the “period under review”) within the prescribed cut-off date of 31 August 2023.
6. The failure to lodge an audit of the trust account, rightly so, unlocked great concern for the LPC, as the respondent by virtue of being a practitioner with a trust account, is entrusted to control and manage public money. The LPC, almost 8 months later, issued interdict proceedings during April 2024 on an urgent basis to suspend the respondent from practice. The respondent filed an answering affidavit and opposed the application. The matter came before Erasmus J on 5 April 2024. On this day the parties reached agreement and Erasmus J issued an order by agreement (the “Erasmus J order”).
7. The Erasmus J order postponed the matter for hearing to 29 July 2024 and also obliged the respondent to take proactive measures to comply with the auditory regulations of the LPC for the period under review. The respondent was also required to pay certain prescribed fees to the LPC. In addition the respondent was interdicted and prohibited from practising as an attorney until 29 July 2024, unless he was issued with a Fidelity Fund certificate before then.
8. His suspension from practice meant that the respondent could not, without first obtaining the counter-signature or written approval of the Director of the LPC’s Western Cape Provincial office:
  - 8.1 Issue a cheque drawn, or cause funds to be withdrawn from the trust account under his control.
  - 8.2 Make a withdrawal from a separate savings or interest-bearing account.
  - 8.3 Issue a cheque or make a withdrawal from the account of a deceased, insolvent or curatorship estate under his control.
9. The matter then came before me on 29 July
2024. At the hearing of the matter Mr. Fischer appeared for the respondent. He requested leave to hand up an affidavit deposed to by the respondent on the previous day. This affidavit essentially conveyed the fact that the LPC has been provided with a signed audit report for the period under review. In light of this development the respondent sought a postponement of the application for a further 30 days so the LPC can consider the audit report and decide whether it will issue the respondent with a Fidelity Fund certificate.

10. Mr. Whitcomb, who appeared for the LPC, informed me that his instructions were to oppose the request for a further postponement. He made the submission that the fact that the audit report has been lodged does not mean that the LPC is not entitled to an order suspending the respondent from practice. Mr. Whitcomb insisted on moving for what I will term the 'proposed order'. His submission was that the effect of the proposed order is substantially the same as the Erasmus J order of 5 April
2024. To me it was apparent that the proposed order was significantly more extensive, in its terms and effect, than the Erasmus J order.
11. The proposed order envisaged a suspension of the respondent of a more permanent nature. While the Erasmus J order suspended the respondent until such time that he is issued with a Fidelity Fund certificate, the proposed order was to the effect that[3]:
- 11.1 The respondent would be suspended from practicing as an attorney until he provides a valid Fidelity Fund certificate for 2024 or comply with the applicant's closure requirements. The suspension and consequences thereof will be lifted if the respondent either comes in possession of the Fidelity Fund certificate or complies with the LPC's closing requirements.
- 11.2 The respondent had to surrender his Certificate of Enrolment within two weeks. If he failed to do so, the Sheriff would be authorised to take possession of the certificate and deliver it to the Registrar of the court.
- 11.3 A curator had to be appointed.
- 11.4 Within one week, the respondent would be required to deliver his practice's financial records, documents, and practice-related information to the appointed curator. The records would include details of any money handled, investments, and deceased estates administered. The respondent would be allowed to access these documents under the curator's supervision.
- 11.5 If the respondent failed to comply, the Sheriff would be authorised to seize these documents and hand them to the curator. The curator could then distribute the documents to entitle persons to resolve any disputes over fees and disbursements.
- 11.6 The respondent would be prohibited from operating his trust account, and the Director of the Western Cape Provincial Office would be appointed as curator to manage the practitioner's trust account. The curator would be authorised to handle transactions, recover funds, and pay claims to trust creditors. The curator could also appoint assistants and provide returns to the Board of Control of the Fund until his/her duties are concluded.
- 11.7 The respondent would have to pay the curator's fees and the expenses the curator incurred for appointing consultants, if necessary. In addition the respondent would be liable for the costs of the application on an attorney and own client scale, including the cost of counsel.

12. I decided to admit and receive the supplementary affidavit of the respondent and also to grant the postponement of the matter in line with the Erasmus J order and decline at the time to grant the proposed order. I did not give reasons at the time.
13. However, having regard to the nature of matter, and since it is the duty of the LPC and the court to act where a practitioner's conduct falls short of what is expected to curb the erosion of the values in the profession and to give consideration to the court's duty to uphold the law by protecting the integrity of the courts and the legal profession, I found it necessary to provide reasons for admitting the supplementary affidavit, the decisions to decline to suspend the respondent in terms of the proposed order and why I granted a postponement.

#### Admitting the supplementary affidavit

14. The affidavit although styled a 'supplementary affidavit' rather served the purpose of requesting the court to postpone the matter. It also contained evidence on the status of the respondent's attempts to comply with the requirements by submitting an audit report to have his Fidelity Fund certificate issued.
15. The affidavit was filed very late. In fact, it was deposed to over the weekend and this matter came before me on the Monday. It meant that the LPC could only effectively consider the effect of the allegations in the supplementary affidavit on the morning of the hearing. However, during argument Mr. Whitcomb confirmed that the LPC did receive the audit report but has not had time to consider whether it is unqualified and if whether the respondent could be issued with his Fidelity Fund certificate.
16. The LPC did not request that the Erasmus J order remain in place to provide it with an opportunity to take its time to consider the audit report and then take a view on how it would treat the respondent. The LPC's approach was rather that it was not enough to simply file the audit report, and therefore the information in the supplementary affidavit did not take the matter any further. The LPC maintained that in the absence of a Fidelity Fund certificate the respondent should still be suspended in the terms as per the proposed order.
17. I was persuaded to accept the supplementary affidavit for at least the following reasons:
  - 17.1 Given the circumstances, where the respondent faces the severe consequence of suspension from practicing law, it is imperative that the court considers all relevant information to make an informed decision. The proposed order involved significant implications, including the surrender of the respondent's certificate of enrolment, the appointment of a curator or curators, and a comprehensive restriction on the financial and professional activities over the trust account. As a result, the respondent should be provided an opportunity to place facts before the court that may have an impact on how the court evaluate the matter.
  - 17.2 The respondent's audit report was only finalised on 26 July 2024. He therefore could not have approached the court to file the affidavit earlier.

17.3 While the position he finds himself in was no doubt partly due to his own leisured conduct, he has explained in his answering affidavit that he had some health setbacks, which had an impact on his ability to see to it that the audit report was finalised in time. I had no reason, on the papers, why I had to entirely reject his explanation for not having complied with the prescripts of the LPA and the LPA rules.

17.4 The respondent has been a legal practitioner for approximately 26 years in various capacities and in different provinces since

1998. Except for the transgression of not complying with the submission of the audit report for the period under review there is no allegation by the LPC that the respondent was or is a habitual offender or that he has a history of disciplinary misconduct or regularly acted in contravention of the legislation or rules that governs the profession.

17.5 The fact that the LPC declined to rather take an opportunity to go on oath and respond to the allegations by the respondent in the affidavit, indicated that there was at least compliance with the requirement of submitting an audit report for the period under review. Whether it would be unqualified remained to be seen.

17.6 Even a qualified report would not necessarily mean the LPC will refuse to issue him with a Fidelity Fund certificate[4].

17.7 The prejudice to the respondent, who stands to lose his ability to practice law.

18. For the reasons foreshadowed I exercised my discretion to admit the 'supplementary affidavit'.

The application for postponement

19. I will briefly restate the legal principles and then summarise the basis for granting the postponement.

The legal principles guiding postponements

20. When considering an application for postponement, the court exercises a discretion. The discretion is guided by principles that ensure fairness, justice, and efficiency in judicial proceedings. The party seeking a postponement must provide a 'compelling justification', often supported by evidence under oath, demonstrating the necessity for delaying the matter.

21. The 'compelling justification' is particularly crucial as the request for postponement is considered an indulgence, interfering with the other party's procedural right to proceed and the overarching interest in the timely resolution of cases[5].

22. The court's discretion is influenced by several factors. As underscored in Hall[6] and Koen[7] the application must be made in good faith and not as a tactical manoeuvre to gain an unfair advantage and not due to any deliberate

delay tactics.

23. The court is generally inclined to grant a postponement if the reason for the postponement is fully explained and justified, especially if justice demands further time for the applicant to present their case adequately[8].
24. Prejudice is a vital factor in the court's consideration. The potential prejudice to either party must be weighed carefully. The court will be cautious in denying a postponement if it would cause significant prejudice to a party seeking a postponement, particularly where the reasons for the postponement are legitimate and justified, as indicated in Panigel[9]. Conversely, if granting the postponement would unfairly disadvantage the other party, the court may refuse the request.
25. Additionally, specific circumstances such as the need to gather relevant and material evidence that is not immediately available through no fault of the party seeking a postponement could also support a justification for a postponement[10].

Evaluation whether to grant or refuse the postponement

26. While a refusal of a further postponement appeared on the face of it prudent, especially in light of the cautious approach a court should take in matters involving legal practitioners and the management of public funds, I was not persuaded the terms of the proposed order had to be enacted at the time the postponement was sought.
27. A great deal for my difficulty in refusing a postponement of the matter was in the apparent prejudice the proposed order would cause the respondent.
  - 27.1 The proposed order enforced an immediate suspension of the respondent's practice[11], whereas the Erasmus J order postponed the suspension until there is compliance with the LPA and LPC Rules. In essence when the Fidelity Fund certificate is issued.
  - 27.2 The proposed order is not contingent on compliance with the Fidelity Fund certificate requirements, but also includes the closure of the respondent's practice. The consequence of the 'closure of a practice' and the obligation to surrender his Certificate of Enrolment were more in line with when the court strike or suspends a practitioner of the roll after a finding of misconduct.
  - 27.3 A curator or curators had to be appointed with extensive powers to manage the respondent's practice, financial records, and trust account. Also, to take control of financial records and to allow the curator(s) to access, manage, and distribute the respondent's documents and funds.
  - 27.4 The respondent is also required to be liable for the cost and fees of these curator(s).
  - 27.5 The proposed order entirely prohibits the respondent from operating a trust account, while the Erasmus J order allows restricted access with LPC Director approval.

28. In the circumstances where the only outstanding step in the process was for the LPC to consider the lodged audit report by the respondent and in the absence of any allegation of a history of impropriety in the management of his trust account I was not persuaded that a refusal of a postponement would be just in the circumstances. To me a more cautious approach seemed more prudent and the Erasmus J order catered for enough safeguards until such time that the LPC has finalised its review of the respondent's audit report.

No proper case for suspension as envisaged by the proposed order

29. Another major consideration why I decided to rather grant the postponement is the vast difference between the relief sought in the 'proposed order' and the case that was advanced on the papers.
30. Prima facie, even without the admission of the supplementary affidavit, the LPC would have had a difficult task to convince me to grant the 'proposed order'. The reasons were at least threefold.
31. Firstly, the case on the papers simply lacks the averments to sustain a suspension as envisaged by the applicant. The absence of allegations

on the papers of how often the respondent failed to submit his annual audit report by the prescribed deadline, his professional conduct as an attorney in general or any allegations of impropriety in the management of the respondent's trust account were all absent from the applicant's papers[12]. I was therefore in no position to make a decision on whether the respondent is in fact a fit and proper person to order a suspension

of the nature envisaged by the proposed order.

32. The papers failed to address the three-stage enquiry[13] that an application for the suspension or removal from the roll of a practitioner generally require. Apart from the single allegation that the respondent does not have a Fidelity Fund certificate, there is nothing else that addressed the consideration whether the respondent is a fit and proper person to continue to practice law.
33. The papers simply did not address any repeated conduct of non-compliance, allegations of fear of misappropriation of trust money or even an intended investigation to determine impropriety, in order for the LPC, if the investigation confirms its concern, to seek more drastic relief as detailed in the proposed order.
34. I accept that the LPC is not ordinarily required to conduct a disciplinary hearing before approaching a court to strike-off a practitioner or suspend him from practice[14]. However, on a reading of the various provisions of the LPA and the prevailing case law, an investigation by the LPC followed by a disciplinary hearing before a court is approached to strike-off or suspend a practitioner should be the preferred approach. Alternatively, the court should be presented with facts to allow it to take up the role as a disciplinary panel[15]. This is not what happened here. The only allegation is the failure of not having a Fidelity

Fund certificate.

35. Certainly, there would be instances that the misconduct of the practitioner is so serious that to first conduct an investigation and then a disciplinary hearing would not suffice. That is not the situation here.
36. Secondly, the LPC's own rules require of it to first consider the audit report and determine if the report is unqualified or not. Even an unqualified report is not necessarily a bar for a legal practitioner to be issued with a Fidelity Fund certificate. I say so as rule 54.30 requires that if a firm's trust account audit or inspector's report is qualified, the firm must provide the Council with necessary information to confirm that the trust account is in good order, the practitioner remains fit to practice, and a Fidelity Fund certificate can still be issued to a practitioner[16].
37. Thirdly, the practice in this division is that any relief where the suspension or striking-off of a legal practitioner is sought on the basis that the practitioner is no longer a fit and proper person, must be heard by two judges[17]. Since the consequences of the relief sought in the proposed order would require of me to make a determination on whether the respondent is a fit and proper person, I was prohibited by the practice of this division to embark on such an exercise without another judge being appointed to hear the matter with me.

## Conclusion

38. In light of the reasons foreshadowed, I was satisfied that the supplementary affidavit be admitted and the matter be postponed.
39. To rather grant a postponement and keeping the Erasmus J order in place, as opposed to granting the 'proposed order'

balances the potential prejudice equally as the interest of the LPC is protected while the respondent and his clients are not negatively

affected while the issuing of his Fidelity Fund certificate is being considered by the LPC.

40. Lastly, the prejudice to the LPC in terms of the costs of the day could be addressed by an appropriate costs order.
41. For these reasons I issued the following order:
  - (1) The respondent is granted leave to file the supplementary affidavit dated 28 July 2024.
  - (2) The interdict granted by Erasmus J on 5 April 2024 is extended until 30 August 2024, subject thereto that the date of 29 July 2024 in paragraphs 2.1, 2.2 and 2.3 of the Erasmus J order should be read with reference to 30 August 2024.
  - (3) The matter is postponed to 30 August 2024 for hearing on the urgent roll by the urgent duty judge on the day.

- (4) The applicant to file a replying affidavit, if any, to the respondent's answering and supplementary affidavits on or before 28 August 2024.
- (5) Should the respondent comply with the terms of the Erasmus J order before 30 August 2024, the applicant is directed to file a notice of removal of the matter from the court roll. Upon the filing of the aforementioned notice the effect of the Erasmus J order shall immediately lapse.
- (6) The respondent shall pay the applicant's wasted costs of 29 July 2024 for the postponement application as well as the wasted costs occasioned by the granting of the postponement on an attorney and client scale.
- (7) Costs in respect of the main application stands over for later

**determination.**

- (8) A copy of this order shall be served on the Master of the High Court.

A MONTZINGER

Acting Judge of the High Court

Appearances: Applicants' counsel: Adv D Whitcomb Applicant's attorney: CK Attorneys

Respondent's counsel: Adv W Fischer Respondent's Attorney: Stephanus Jacobus Kleynhans

[1] 28 of 2014

[2] LPC rule 54.29 provides that: 'In order to qualify for the issue of a Fidelity Fund certificate, a trust account practitioner must ensure that an unqualified audit or inspector's report is issued in respect of any firm or firms of which he or she is or was a partner or director or sole practitioner during the financial period under review, and is delivered timeously to the Society.'

[2] LPC rule 54.29 provides that:

'In order to qualify for the issue of a Fidelity Fund certificate, a trust account practitioner must ensure that an unqualified audit or inspector's report is issued in respect of any firm or firms of which he or she is or was a partner or director or sole practitioner during the financial period under review, and is delivered timeously to the Society.'

[3] duly truncated as it is rather extensive

[4] South African Legal Practice Council v Louw (10606/2023) [2024] ZAWCHC 50 (20 March 2024 at par 26 ("Louw"))

[5] See for an expression of these sentiments: *Gentiruco AG v Firestone SA (Pty) Ltd* 1969 (3) SA 318 (T) and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*

[1999] 1 All SA 643 (C).

- [6] Hall v Multilateral Motor Vehicle Accidents Fund 1998 (4) SA 195 (C) (“Hall”)
- [7] Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others 2012 (2) SA 378 (WCC) (“Koen”)
- [8] As highlighted in Madnitsky v Rosenberg 1949 (2) SA 392 (A) 399 and Garden Route Casino (Pty) Ltd and Others v Premier of the Western Cape and Others
- [2021] 4 All SA 445 (WCC).
- [9] Panigel v Kremetart Kliniek (Pty) Ltd 1976 (4) SA 387 (T) (“Panigel”)
- [10] Estate Norton v Smerling 1936 OPD 44 54
- [11] This was strange considering that the LPC on 11 April, after the Erasmus J order, granted the respondent consent to act as practitioner in 8 matters. The proposed order did not address this situation.
- [12] Wild v Legal Practice Council (31120/2019) [2023] ZAGPPHC 521 (19 May 2023) at para [62] endorsed the approach that the LPC should submit facts to the court when seeking suspension or striking-off.
- [13] Law Society, Northern Provinces v Mogami and Others 2010
- (1) SA 186 (SCA).
- [14] Law Society of the Northern Provinces v Morobedi (1151/2017) [2018] ZASCA 185 (11 December 2018) at para [25]; Cape Law Society v Gihwala [2019] 2 All SA 84 (WCC) at para [110] (“Gihwala”)
- [15] v Gihwala at para [80] of the information a court would be require to consider.
- [16] See Louw for endorsement of this approach (fn 4 supra)
- [17] The practice to allocate two judges to a matter involving the striking or suspension of an attorney certainly falls under the
- power afforded to a Judge President or Deputy Judge President of the division in terms of section 14(1)(a) of the Superior Courts Act 10 of 2013 that provides; ‘Save as provided for in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine.’
- [17] The practice to allocate two judges to a matter involving the striking or suspension of an attorney certainly falls under the

power afforded to a Judge President or Deputy Judge President of the division in terms of section 14(1)(a) of the Superior Courts Act 10 of 2013 that provides;

‘Save as provided for in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine.’

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