

SOUTH AFRICA / JUDGMENT

Melato v South African Legal Practice Council (3380/2020) [2021]

ZAFSHC 364 (18 February 2021)

[2021] ZAFSHC 364

COURT

Free State High Court, Bloemfontein

BEFORE

R D Hendricks, F M M Snyman

CASE / FILE NUMBER

3380/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
FREE STATE DIVISION,
BLOEMFONTEIN
CASE NO: 3380/2020

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Magistrates:	YES/NO
In the matter between:	TSWANTSO PHILLEMONT MELATO Applicant and THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL Respondent DATE OF HEARING : 25 JANUARY 2021

DATE
OF JUDGMENT
:
18 FEBRUARY 2021
FOR
THE APPLICANT
:
ADV. FERREIRA
FOR
THE RESPONDENTS
:
ADV. SNELLENBURG SC
with
ADV. MAZIBUKO

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 18 February 2021.

Consequently, the following order is made:

- (i) The review application is dismissed.
- (ii) The applicant is ordered to pay the costs of the review application on the scale as between attorney and client.
- (iii) Such costs to include the costs consequent upon the employment of two counsel, senior and junior.

HENDRICKS DJP

[1] The applicant, Mr. Tswantso Phillemon Melato, is a practicing attorney in the Free State Division of the High Court of South Africa. The respondent, the Legal Practice Council (LPC), decided to launch an application in the Free State Division of the High Court of South Africa to have the applicant suspended from practice as a legal practitioner (attorney), alternatively to have his name struck-off the Roll of Legal Practitioners (Attorneys). This application, issued under case number 1863/2020 is still pending, as it was postponed sine die and in effect stayed, pending the finalisation of a review application instituted by the applicant. It is this review application that now serves before this Court under case number 3380/2020.

- [2] In this review application, the applicant prays that the LPC's decision to launch an application to Court for his suspension from practice alternatively the striking-off of his name from the Roll of Legal Practitioners (Attorneys) be reviewed and set aside; that the LPC's decision for the appointment of a curator bonis consequent to his removal from the roll of legal practitioners be reviewed and set aside; that the conduct of the LPC, to the extent

that it failed to inform him of the disciplinary inquiry held against him, be declared inconsistent with the rules of natural justice and the Constitution of the Republic of South Africa and thus invalid; and that the LPC be compelled to forthwith take all the reasonable steps to finalize the disciplinary inquiry against him.

- [3] The decision taken by the LPC to launch an application for the suspension alternatively striking-off application has as its genesis two complaints which it received against the applicant, as well as some other irregularities about the practice. After receiving these complaints, the LPC informed the applicant about these complaints and he replied thereto by filing affidavits. Because this Court is not called upon to adjudicate these complaints nor to determine whether or not the applicant is still a fit and proper person to continue to practice, it is not necessary to deal in any detail with these complaints. Suffice to state that after receiving the response from the applicant, the LPC took a decision to launch the application under case number 1863/2020, referred to earlier.
- [4] As alluded to earlier, it is this decision by the LPC to launch that application which forms the basis of the present review application. This application is premised on the contentions that (i) the LPC has violated the rules of natural justice by not affording the applicant an opportunity to make representations before the impugned decisions

were taken; (ii) that the LPC did not have the powers to make the impugned decisions without first finalizing the disciplinary

proceedings; (iii) that the LPC failed to apply itself to the holistic legal framework regulating the disciplinary hearing process;

and (iv) that the impugned decisions are unreasonable. As a result of the aforementioned, it was submitted that the decisions of the LPC to launch the application under case number 1863/2020, be reviewed and set aside.

- [5] Insofar as the first contention is concerned, the applicant responded to the complaints by filing affidavits in response thereto. It is quite apparent that the applicant's complaint is that no formal disciplinary hearing was conducted by the LPC. By this, the applicant has in mind that he should be called to a place (or via a virtual platform because of the COVID19 pandemic) and that a hearing be conducted and concluded. To his mind, it is insufficient that the LPC took the decision based on the complaints and the response thereto, although it is in the form of affidavits that were made under oath. This reasoning is with due respect incorrect. Nothing debars the LPC from taking a decision based on the evidence in the form

of affidavits.

- [6] The LPC, after it had investigated the complaints, made a determination based on the affidavits, to launch an application to the High Court for the suspension alternatively, the striking-off of the applicant. It is the task of the High Court to conduct an investigation to and determination of the fitness of the applicant to continue to practice as a legal practitioner (attorney). The preliminary finding or decision of the LPC is not binding on the Court. Because the decision of the LPC is not final, it can decide to launch the application in the High Court based on the facts and evidence before it. I am of the view that the rules of natural justice were observed by the LPC in this instance because the applicant seized the opportunity to reply to the complaints by filing affidavits in response thereto. The audi alterem partem principle was adhered to. This, despite the fact that it is not strictly speaking necessary to do so at the preliminary investigation stage.

See: *Park-Ross v Director for Serious Economic Offences* 1998 (1) SA 108 (C) at page 122 F.

Van der Merwe and Others v Slabbert NO and Others 1998 (S) SA 613 (N) at 624 D.

- [7] In *Cape Law Society v Gihwala* [2019] 2 All SA 84 the following is stated:

“[110] ... In the circumstances the Act clearly envisages situations where a society may decide that the evidence before a partially completed enquiry is of such a conclusive or overwhelming nature in respect of acts of serious misconduct, that it would not only be a waste of time to proceed with it to completion but in fact the interests of justice demand that application should be made immediately to a Court for an Order striking or suspending the practitioner concerned, as the misconduct does not merely warrant the imposition of a minor sanction such as a fine or a reprimand. It could hardly have been intended by the legislature that in such instances, where a society will inevitably have to proceed to Court for an Order striking or suspending a practitioner, it will have to forsake the costs it has incurred in a partially completed disciplinary enquiry. But of course, each matter will have to be decided on its own facts and particular circumstances.”

- [8] In *Law Society of the Northern Provinces v Morobadi* [2018] ZASCA 185; [2019] JOL 40677 (SCA) the following is stated:

“[25] The high court dismissed the procedural challenge, holding that the Law Society was not bound by the decision of the committee as the committee was not a disciplinary committee, but rather an investigative committee. The high court’s reasoning was that it was not peremptory for the Council to have pursued a formal charge before a disciplinary committee, if in its opinion, the respondent was no longer considered to be a fit and proper person to remain in practice as an attorney. I agree with this conclusion. In general it is correct that the Council may proceed with the application for the striking off of the practitioner or for his or her suspension from practice without pursuing a formal charge before a disciplinary committee if in its opinion, having regard to the nature of the charges, a practitioner is no longer considered to be a fit and proper person.”

- [9] Insofar as the second contention, that the LPC did not have the powers to make the impugned decision without first finalising the disciplinary proceedings are concerned, the following. The decision to launch that application is based on the evidence in the form of affidavits that served before the LPC. This entails the complaints as well as the response thereto. The LPC is perfectly entitled to take a decision based on the evidence presented that served before it. The LPC did not make a final determination of the fate of the applicant. It is the task of the High Court hearing the application to either suspend or strike-off the applicant. Seeing that the LPC did not decide on the fate of the applicant or to impose a sanction on him, the decision taken is only preliminary in nature and not final in effect. The LPC is perfectly entitled to take a decision to launch an application before the High Court in order for the High Court to decide how to discipline the applicant, if any, seeing that he is an officer of the court. It is the Court that is enjoined to take action against practitioners in the face of any serious transgressions. All that the LPC does is to investigate the complaints, launch the application and make some representations to the Court, seeing that it is the controlling body. It is the Court that has to decide.
- [10] In *The Legal Practice Council v Motlhabani* (UM 148/18) [2020] ZANWHC 76 (7 May 2020) the Court (per Hendricks DJP & Nonyane AJ) held:
- “[32] ... It is not peremptory for the applicant to have pursued formal charges before a disciplinary committee, if in its opinion’ the respondent was no longer a fit and proper person to continue to practice as an attorney. The applicant may proceed with an application to strike without pursuing a formal charge before a disciplinary committee if in its opinion, having regard to the nature of the charges, a practitioner is no longer fit and proper to remain on the roll of attorneys.*
- [34] ... As alluded to earlier, the applicant need not at first conduct a disciplinary hearing before it can decide to apply to Court for the suspension and or removal/striking off of an attorney in terms of Section 72 (6) of the Attorney’s Act.”
- [11] The third contention is that the LPC failed to apply itself to the holistic legal framework regarding the disciplinary hearing process. Section 39 of the LPA deals with the disciplinary committee and its conduct of disciplinary hearings. Section 40 states that after conclusion of a disciplinary hearing a disciplinary committee must make a decision about the guilt or otherwise of a legal practitioner and the steps to be taken. In terms of section 43, if the disciplinary committee is satisfied that the legal practitioner has misappropriated trust monies or is guilty of other serious misconduct, it must inform the Council thereof with the view to the Council instituting urgent legal proceedings in the High Court, to suspend the legal practitioner from practice and to obtain alternative interim relief.
- [12] The applicant contended that the LPC failed to honour the prescripts of these sections. The disciplinary committee of the LPC met informally with him. He exercised his right to obtain legal representation and for that reason the inquiry was postponed sine die. He was not informed when a formal hearing would be conducted. Instead, he was served with an application launched by the LPC under case number 1863/2020 to have him suspended from

practice alternatively to have his name struck off the Roll of Legal Practitioners (Attorneys). This, so it was submitted, is in breach of the provisions of sections 39 and 40 of the LPA. A formal inquiry needed to be conducted and concluded and he should have been informed of its decision. This did not happen.

- [13] Earlier on in this judgment, I have dealt with the issue of the LPC deciding to launch an application to have a legal practitioner suspended alternatively strike-off the roll without first concluding a formal internal disciplinary hearing. Same need not be regurgitated. It is quite apparent from the case law quoted that nothing prevents the LPC to launch such an application, if the evidence supports it.
- [14] The contention was further that the LPC also failed to invoke the provisions of section 43 of the LPA in that there was a delay in excess of a year before the launching of the application to suspend alternatively strike-off under case number 1863/2020, although the allegations contained in the two complaints relate to the embezzlement of trust monies. This shows that the LPC did not adhere to the legal framework of the LPA.
- [15] This contention of the LPC not adhering to the dictates of the LPA loose sight of what is contained in Section 44 of the LPA. Section 44
- (2) of the LPA makes it clear that nothing contained in the LPA precludes a complainant or a legal practitioner, candidate legal practitioner or juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or juristic entity. The LPA itself does not make a formal disciplinary hearing an absolute necessity without which a striking-off application cannot be made. Applying for the striking-off of a legal practitioner is no longer reserved solely for the LPC. Even a lay complainant can bring such an application. It could not have been, and it surely is not the intention and requirement of the LPA, that where a complainant brings the application to suspend or to strike-off, there should first be a disciplinary hearing conducted and concluded by the LPC, as submitted by Mr. Snellenburg SC. I fully agree.

See:

- Jiba and Another v General Council of the Bar of South Africa and Another; Mrwebi v General Council of the Bar of South Africa and Another 2019 (1) SA 130 (SCA).
- General Council of the Bar of South Africa and Another v Jiba & Others 2019 (8) BLCR 919 (CC) [2019] ZACC 23.
- Law Society of the Northern Province v Bobroff and Others [2017] 4 All SA 85 (GP).
- Hemetson v Law Society of the Free State 2020 (5) SA 86 (SCA).
- Johannesburg Society of Advocates and Another v Nthai and Others [2020] ZASCA 171 (15 December 2020).

- [16] The last contention is that the impugned decisions are unreasonable. It is not for this Court in this application for review of the decisions by the LPC to launch the application to suspend or strike-off, to deal in any great detail with the merits of the complaints. This should best be left for the court that will adjudicate the application in case no 1863/2020, less this Court will prejudge and pronounce on the merits of that application and to determine whether or not the applicant is still a fit and proper person to continue to practice as an attorney.
- [17] Suffice to state that the two complaints, if indeed true, are very serious and it concern the misappropriation of trust (fund) monies. I had regard to the complaints and the response thereto and I am of the firm view that the allegations and the evidence to substantiate it let to the Council's decision that it merit the launching of that application. The decisions are indeed rational and reasonable if one defers to the complaints and responses thereto under oath. These are definitely not decisions that no reasonable decision-maker would have made. It therefore suffice to state that it is understandable and reasonable that such decisions were indeed taken by the respondent.
- [18] There are also other complaints that relate to the late acquiring of fidelity fund certificates for the 2016/2017 and 2017/2018 financial years. Likewise, this should best be left for the court hearing the application under case no 1863/2020, to adjudicate and pronounce on it.

Costs

- [19] Insofar as costs are concerned, it should follow the result and be awarded in favour of the successful litigant, the LPC (respondent). Mr. Snellenburg SC on behalf of the respondent submitted that a punitive costs order be awarded on the scale as between attorney-and-client. He submitted that this application for a review of the decision to launch the application for suspension alternatively to strike-off is nothing but a stratagem to delay the finalisation of that application. Secondly, it is also custom that in cases of this nature, costs are awarded on that scale in favour of the LPC (previous the Law Societies) as controlling body, so that it should not be out of pocket as a result of the disciplinary action taken.
- [20] I am in full agreement with these contentions by Mr. Snellenburg SC. The applicant, upon being served with the application under case number 1863/2020, had the opportunity to defend himself and to present whatever evidence he had at his disposal in order for the court to decide. Instead, he chose to launch the present application, the contents of which is unmeritorious. The issues raised are not novel and had been decided in previous matters.
- [21] There was also a lot of work done in the research and drafting of the heads of argument to deal with the legal issues raised by the applicant. The respondent's heads of argument are voluminous and consist of fourthy-three
- (43) pages. The applicant's heads or argument and heads of argument in reply consist of twenty-eight

(28) pages. It behoves no argument that it took a lot of preparation work. No wonder two counsel were employed by the respondent (senior and junior). To add to this, it almost goes without saying that this matter is of vital importance to both parties. As far as the applicant is concerned, it may well be that the outcome of the suspension or striking-off application, if the respondent is successful, may have serious implications for him. Insofar as the respondent is concerned, as *custos moram*, it must look after the interest of the public. It is therefore understandable that the service of two counsel were employed.

Conclusion

[22] In conclusion, I am of the view that the application should be dismissed for the reasons advanced, *supra*. The applicant must be ordered to pay the costs of the application on an attorney-and-client scale. Such costs to include the costs consequent upon the employment of two counsel, senior and junior.

Order

[23] Consequently, the following order is made:

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

AND ACTING JUDGE OF THE FREE STATE DIVISION, BLOEMFONTEIN

I agree

F M M SNYMAN

ACTING JUDGE OF THE HIGH COURT,

AND ACTING JUDGE OF THE FREE STATE DIVISION, BLOEMFONTEIN

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