

SOUTH AFRICA / JUDGMENT

SA Legal Practice Council v Louw (10606/2023) [2024] ZAWCHC 88 (20 March 2024) [2024] ZAWCHC 88

COURT

Western Cape High Court, Cape Town

BEFORE

A G Binns-Ward, J Cloete

CASE / FILE NUMBER

10606/2023

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FLYNOTES:

PROFESSION – Attorney – Fidelity Fund
Certificate – Practitioner whose trust account in
deficit as result of theft by employee – Unable to make good
trust
creditors' claims – No dishonesty on attorney's
part and no persuasive evidence that he is not fit and proper
to
continue practising pending finalisation of disciplinary
proceedings – Attorney directed to make application for
fidelity fund certificate and should he not be issued with such
certificate to institute an application compelling Legal
Practice
Council to issue certificate – Legal Practice Act 28 of
2014, ss 84 and 85.
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
Case
No: 10606/2023
In

the matter between: THE
SOUTH AFRICAN LEGAL PRACTICE COUNCIL
Applicant
and
ERIK
LOUW
Respondent

Coram: Justice A G Binns-Ward et Justice
J Cloete

Heard: 8 February 2024, supplementary notes delivered on 16 and 21 February
2024
Delivered
electronically: 20 March 2024

JUDGMENT

CLOETE J (BINNS-WARD J concurring):

Introduction

- [1] The central issue in this matter is whether the respondent, an attorney (legal practitioner), who has been cleared of dishonesty by an investigating committee of the applicant (“LPC”), should nonetheless be suspended from practice and prohibited from operating his firm’s trust account pending the finalisation of certain disciplinary proceedings against him (which have not yet been instituted) arising from the same facts. It is also common cause that the respondent no longer holds a fidelity fund certificate given the LPC’s failure to renew it.
- [2] The disciplinary proceedings in question pertain inter alia to the investigating committee’s other “finding” that the respondent is guilty of contravening LPC rule 54.14.19[1] ‘in that a firm shall ensure that no account of any trust creditor is in debit’. It must immediately be stated however that an investigating committee of the LPC is not authorised by the Legal Practice Act (“LPA”)[2] or its rules to “find” a legal practitioner guilty of misconduct, despite the investigating committee purporting to have done so in letters to the respondent dated 25 April 2022 and 29 September 2022.
- [3] Section 37(3) of the LPA provides inter alia that an investigating committee must if satisfied that the legal practitioner concerned ‘...may, on the basis of available prima facie evidence, be guilty of misconduct that, in terms of the code of conduct, warrants misconduct proceedings, refer the matter to the Council for adjudication by a disciplinary committee’. LPC rule 40.5 is to almost identical effect. Not even LPC rule 40.4, which caters for the situation where a legal practitioner admits guilt (which is not the case here), authorises an investigating

committee to make such a finding. Be that as it may, there is no challenge to this procedural irregularity before us.

- [4] It must also be pointed out that the relief sought by the LPC includes suspension and a prohibition on the respondent operating his firm's trust account, not only pending finalisation of disciplinary proceedings, but also any subsequent internal appeal in terms of s 41 of the LPA. However s 41 of the LPA has not yet been brought into operation and accordingly, if the respondent is found guilty by a disciplinary committee and disputes that finding, his only remedy will be a review in the High Court.[3]

Relevant factual background

- [5] The respondent was admitted as an attorney on 9 February 2001 and has been practising as the sole director of Basson & Louw Inc., which he describes as 'a duly incorporated body doing business as a firm of attorneys' since September 2008. For convenience I will refer to this entity as "the firm". A Ms Antoinette Aucamp ("Aucamp") was employed as the firm's bookkeeper from 2001 until 2022 and also performed the duties of a conveyancing secretary. Prior to this she worked for a business run by the respondent's erstwhile co-director, in a clerical/managerial capacity, including managing administration orders. She thus dealt with funds of the business as part of her duties. According to the respondent, Aucamp displayed great diligence and trustworthiness over an extended period of time. This ultimately cemented his trust in her until, in his words, it became almost absolute.
- [6] The respondent's undisputed evidence is that despite this he did not relax his vigilance over the funds under the firm's control. Only he and Aucamp could pay disbursements from its accounts. If she wished to post a disbursement she had to requisition and submit it to him in writing. He would only authorise the disbursement once they had, if necessary, discussed it and he approved it.
- [7] In addition the firm employed (and still employs) the "Lexpro" computerised bookkeeping system. This operates on a server separate from the server on which the other programs used by the firm are housed. According to the respondent this means that it is inaccessible to anyone but authorised personnel who at the relevant time were Aucamp and himself. The system also immediately logs all receipts and disbursements which, again according to the respondent, means in theory that reconciliation can take place relatively quickly between that which is held in the firm's accounts according to the books of account and that which is actually in the firm's bank accounts.
- [8] The respondent candidly states that during the course of a business day a busy attorney's practice with a number of employees will always be involved in a large, diverse range of transactions, receiving payments from many sources and making disbursements of many kinds, both large and small. Although daily reconciliation is theoretically possible, it is not practical. He states that it always takes time and effort to bring the accounts to an exact balance. Like any firm of attorneys of which he has had experience, he had to mostly satisfy himself with a monthly reconciliation.

- [9] His evidence is also that the risk of loss through underhandedness which might have been created by the difficulty of keeping the records of the firm in a continuous state of exact and complete balance was, to his mind, effectively “combatted” by the firm’s independent auditors, who carried out spot-checks on a regular (at least quarterly) basis, as well as by the firm having the books audited thoroughly each year (as required by law) so that a clean audit certificate could be timeously provided at the end of every year for submission to the Western Cape office of the LPC.
- [10] He states that a large amount of time was (and still is) spent on the compulsory audit requirement of the LPC. He arranges consultations and inspections with the auditors as early as May of each year. They commence their work then and it is ongoing until the end of that year. Of course, in the process the accounts are rigorously examined. In addition the respondent made a habit, whenever he worked on a matter, of asking for a printout of the account in the Lexpro records. According to him Lexpro is able to generate an instant, up-to-date printout of each account in the system. This would enable him to examine what was going on in the books of account with regard to that specific client.
- [11] The respondent’s evidence is further that the Covid-19 total lockdown at the end of March 2020 meant that the normal business of the firm ceased. No work whatsoever could be effected for a considerable time. This included conveyancing and entries regarding it in the books and records of the firm, save for what could be done at home. Work thus fell behind schedule and by the time the lockdown was eased, the bookkeeping of the firm was considerably behind. Aucamp also began to experience health problems and had to undergo major orthopaedic surgery during November 2020 from which she took a period of about two months to recover, during which she could not attend to her bookkeeping duties. It was felt that if someone else were to take over from her during this period as much time would be lost as it would be if she stayed on.
- [12] It was thus agreed that she would retain her employment and others in the firm would assist her as much as possible. She would continue in the role of bookkeeper, but would work from home. The physical records she needed would be ferried back and forth between the office and her home. She would also have remote access on her computer to the Lexpro system and would write and type one handed as best she could. A further loss of time was the inevitable result. However the respondent believed he had successfully coped with the problems caused by the lockdown and Aucamp’s inability to work at her normal speed. He remained no less vigilant than before and, despite the difficulties, had no cause to suspect that Aucamp was doing anything improper, although it seemed that she never managed to bring the bookkeeping up to date.
- [13] The firm’s auditor too remained vigilant. He raised a number of queries and in December 2020 informed the respondent that Aucamp had not been responding to all the audit queries for that year which he had raised with her. The respondent then requested the accounting firm that attended to his personal affairs to also become involved in assisting the firm to bring its books up to date, and he believed that the situation was under control. Although the

firm's auditor spoke about the queries which he had raised, at no time did he indicate to the respondent that he believed something was amiss.

He too did not have any suspicions.

[14] However Aucamp somehow managed over the period December 2020 to December 2021 to steal funds from the firm's trust account totalling R4 133 056.78, predominantly, it would seem, in respect of conveyancing transactions. This was discovered by the respondent during February 2022. He immediately suspended her, appointed his accountant and auditor to conduct an internal investigation to establish the status of his trust accounts, and reported the theft to the LPC and SAPS on 15 March 2022, when he also laid a criminal charge against Aucamp. From the respondent's report to the LPC dated 8 June 2022 it appears that the funds in question were stolen by Aucamp from nine of the firm's clients. To make matters worse for the respondent, Aucamp had failed without his knowledge to renew the firm's private indemnity insurance.

[15] From March 2022 onwards the respondent co-operated fully with the LPC in relation to what had occurred, also keeping it up to date on a regular basis about what further investigations revealed. In the LPC's letter to the respondent dated 25 April 2022, he was informed that no dishonesty could be found on his part but that he was "guilty" of contravening rule 54.14.9 read with rule 54.19. The latter provides that:

'Every partner of a firm, and every director of a juristic entity referred to in section 34(7) of the Act... will be responsible for ensuring that the provisions of the Act and of those rules relating to trust accounts of the firm are complied with.'

[16] The respondent was further informed that he would be given: (a) an opportunity of 30 days to regularise his trust account to the extent of the shortfall; and (b) 14 days to advise the investigating committee of the status of his firm and outstanding 2021 audit report, and provide a copy of the firm's trust account bank reconciliation as at 21 February 2022. By letter dated 24 June 2022 the LPC notified the respondent that since he was not in possession of his 2022 fidelity fund certificate he should not be practising. He was given another opportunity of 30 days '...to regularise your trust account to the extent of the shortfall due to the theft of trust funds by your employee as your failure to do so will result in the Investigating Committee [sic] proceeding with urgent suspension proceedings'. On 21 July 2022 the respondent submitted the firm's qualified 2020/2021 audit report. The qualification of the auditors concerned was that: '[i]n our opinion, except for the instances of non-compliance listed in the preceding paragraph, the legal practitioner's trust accounts of Basson Louw Incorporated for the period from 1 March 2020 to 28 February 2021 were maintained, in all material respects, in compliance with the Act and the Rules'. The non-compliance referred to pertains to the funds stolen by Aucamp.

- [17] By letter dated 5 August 2022 the LPC informed the respondent of the investigating committee's "direction" that he provide information '...as to the plans you had [this should presumably read 'have'] set in place to regularise your trust account'. This was followed by further letters to similar effect dated 7 and 29 September 2022.
- [18] In an email dated 17 November 2022 the respondent explained that he had been able to recover in excess of R809 000 of the stolen funds and was confident that through civil process and the pending criminal prosecution he would be able to recover most of them. By this time he had also informed all affected clients of their right to submit claims to the Fidelity Fund. He had previously (on 19 September 2022) informed the LPC that he did not have funds at his personal disposal to settle the full shortfall on the firm's trust account. It is apparent that the LPC did not regard these factors as mitigating, since on 30 November 2022 he was informed that, in addition to contraventions of rule 54.14.19 and 54.19, the investigating committee had "directed" that further charges would also be put to him and that legal proceedings against him were to commence should his firm's trust account not be regularised to the extent of the shortfall.
- [19] On 5 January 2023 the respondent notified the LPC that he had now also brought an application to sequester Aucamp's estate and was hopeful to recover more of the stolen funds within the next few months. On 23 February 2023 the LPC advised the respondent that his 2022 audit report remained outstanding, which might result in his suspension from practice, and that '[w]e look forward to confirmation of the regularization of the balance to your trust account and outstanding audit requirements'. On 16 March 2023 the respondent submitted the firm's 2022 audit report and advised the LPC that Aucamp's estate had been finally sequestered, with a first meeting of creditors scheduled for 29 March 2023. He also reported on progress in the criminal investigation.
- [20] The 2022 audit report was qualified for the same reason as before. On 3 April 2023 the respondent notified the LPC (amongst other things) that he had arranged a date with the firm's auditors to commence the 2023 audit. He also advised that '[f]rom March 2022 until current the Trust account has reconciled and balanced completely. I am confident that the measures put in place is sufficient to stop any future recurrence of theft of Trust funds by an employee'. This was a reference to additional checks and balances implemented by the respondent subsequent to discovery of the theft.
- [21] There appears to have been no further interaction with the respondent until 29 June 2023 when the LPC launched the current application on an urgent basis. The founding affidavit deposed to by one of its members set out, seemingly for the first time, the further charges which the LPC intended preferring against the respondent (without having given him any prior notification of their nature or the opportunity to deal therewith as is required in terms of the LPC rules in an investigating committee process). It is convenient to quote directly from the founding affidavit:

‘52. Based on all of the above, and notwithstanding that the respondent appears not to have been directly responsible for the theft of moneys entrusted to him, the Investigating Committee and the LPC are of the opinion that the respondent is guilty of gross misconduct for the following reasons:

52.1 Contravening Rule 18.3 in that the respondent had a duty to exercise proper control over his staff. In the opinion of the Investigating Committee, this failure is evident from the fact of all the theft (which indicates a patent failure to exercise proper control);

52.2 Contravening item 21.1 of the Code of Conduct for Legal Practitioners in that the respondent has breached the LPC Rules and has failed to remedy any breaches. This breach is exacerbated by the fact that the respondent did not maintain his private indemnity liability insurance policy with AON.

52.3 Contravening Rule 54.14.7.1 and all its subrules, in that he failed to maintain or have proper controls in place at his place of work and to control his staff;

52.4 Contravening Rule 54.19 in that the respondent had a responsibility to ensure compliance with the Rules and failed to do so;

52.5 The respondent continues to practice without a valid fidelity fund certificate, which is in contravention of Section 84(1) of the LPA.

53. In summary, in the opinion of the Investigating Committee and the LPC, the respondent’s conduct in failing to regularise his trust accounts, despite being given numerous opportunities to do so, constitutes gross misconduct in circumstances where the respondent is solely responsible for his firm’s compliance with the Rules referred to above. Furthermore, it is the opinion of the Investigating Committee and the LPC that it is unacceptable for a legal practitioner in the position of the first respondent to defer his responsibilities in respect of the regularisation of his trust accounts to the criminal justice system and the resolution of a dispute with his insurer. In this regard, it is also inexplicable that the respondent allowed his private indemnity insurance policy to become expired – all the more so in circumstances where he should have known, had he exercised proper controls and oversight, that his trust accounts were in deficit.

54. Accordingly, on 19 May 2023, having afforded the respondent ample opportunities to regularise his trust accounts, the Investigating Committee resolved that the matter be referred to the Provincial Council, acting on delegated authority from the LPC, for authorisation that an urgent application in terms of section 43 of the LPA be brought to suspend the respondent from practising as legal practitioner, inclusive of a curatorship order, pending the finalisation of a disciplinary hearing into the matter.’ (my emphasis)

[22] It is evident from the above that the LPC introduced 4 new charges without following due process. It must also be pointed out that not once during the period March 2022 (when the respondent reported the theft) until the date upon which the application was launched at the end of June 2023 did the LPC advise the respondent that it required a curator to take control

of his firm's trust account while its investigating committee process unfolded. There is nothing in the history of the matter to suggest that the respondent would not willingly have given the LPC his full cooperation in any investigation it might wish to conduct into the operation of his trust account or his firm's accounting system.

Discussion

[23] Section 53 of the LPA provides that the Attorneys Fidelity Fund established by s 25 of the erstwhile Attorneys Act[4] continues to exist as a juristic person under the name "Legal Practitioners' Fidelity Fund". Section 84 of the LPA deals with the obligations of a legal practitioner relating to handling of trust monies and reads in relevant part as follows:

'84. (1) Every attorney... other than a legal practitioner in the full-time employ of the South African Human Rights Commission or the State... and who practises or is deemed to practise –

- (a) for his or her own account either alone or in partnership; or
- (b) as a director of a practice which is a juristic entity,

must be in possession of a Fidelity Fund certificate.

- (2) No legal practitioner referred to in subsection (1) or person employed or supervised by that legal practitioner may receive or hold funds or property belonging to any person unless the legal practitioner concerned is in possession of a Fidelity Fund certificate...'

[24] 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.'

[25] Important for present purposes is rule 54.30 which reads as follows:

'Where the audit or inspector's report in respect of the trust account of the firm is qualified by the auditor or inspector, as the case may be, the firm shall provide the Council with such information as the Council may require to satisfy itself that the firm's trust account is in good order, that the trust account practitioner remains fit and proper to continue to practise and that Fidelity Fund certificates may be issued to the members of the firm.' (my emphasis)

[26] Accordingly, on a plain reading of LPC rule 54.29 together with rule 54.30, a qualified audit report may nonetheless permit the issue of a fidelity fund certificate, provided that the LPC is satisfied that the firm's

trust account is in good order and that the trust account practitioner remains fit and proper to continue to practise. On the undisputed evidence before us there is no indication by the LPC that it requires any other information to satisfy itself on this score since, were this the case, it would no doubt have requested it. There is also no suggestion that the respondent had not faithfully and

diligently brought the theft of funds from his firm's trust account to the attention of the LPC at the earliest possible opportunity; taken all possible reasonable steps to procure recovery of the full amount stolen; and done everything reasonably within his power to obtain clean audits in 2022 and 2023, it being common cause that the only reason for qualified audits in these years is the fact of the previous theft of trust monies by his erstwhile bookkeeper, which theft came to an end in 2021.

[27] The LPC appears to interpret rule 54.14.9, namely that a firm shall ensure that no account of any trust creditor is in debit, as some sort of overarching requirement precluding: (a) the issue of a fidelity fund certificate; and (b) the respondent from continuing to practise. This is in circumstances where the LPC itself accepts there was no dishonesty on the respondent's part and it has failed to put up any persuasive evidence that he is otherwise not fit and proper to continue practising, at least pending the finalisation of disciplinary proceedings against him, which have yet to be instituted and in respect of which some of the charges are being advanced without the LPC having followed its own prescribed internal processes to ensure procedural fairness.

[28] The LPC relies inter alia on *South African Legal Practice Council v Harper*[5] in persisting with the relief claimed in respect of the appointment of a curator even if the respondent is not suspended from practising,

submitting that such an order was granted therein 'in circumstances similar to the present'. However the facts in that case are entirely distinguishable and for all the reasons already given, we are not persuaded that good cause has been shown at this stage to prohibit the respondent from operating on his firm's trust account, this being the statutory requirement for the appointment of such a curator in terms of s 89 of the LPA. In the current case the only basis for the appointment of a curator is the respondent's lack of a fidelity fund certificate. He only lacks such a certificate because the LPC has declined to issue him with one until he has paid into trust the money stolen from some of his trust account creditors by a dishonest employee. On the evidence before us the LPC does not appear to be justified in its

refusal to issue the respondent with a fidelity fund certificate.

[29] That having been said, the respondent must clearly be in possession of a fidelity fund certificate if he is to continue to practise, since this too is a statutory requirement, prescribed by s 84 of the LPA. The continuance of the current impasse cannot be countenanced. It is accordingly incumbent on the respondent to take swift steps to procure one, if necessary by approaching court should the LPC persist in its failure to issue such a certificate. I must, however, immediately qualify what I have said by making it clear that it is not for this court, at this stage, to direct the LPC to issue the respondent with that certificate.

[30] There may be other information which the LPC requires, even though it has not called upon the respondent to provide it to date, and we cannot usurp the LPC's function in this regard. It will be for another court to determine this issue should the LPC refuse the respondent's application for a fidelity fund certificate. But on the facts before us, there would appear to be

no valid reason for the LPC to refuse to issue the respondent with a fidelity fund certificate. Its refusal to do so because of the deficit in the respondent's trust account appears to be due to a failure to have regard to LPC rule 54.30, properly construed. A trust account is in good order within the meaning of the subrule if the account correctly reflects the state of affairs in accordance with the requirements of s 87(1) and (2) of the LPA.

- [31] The rules do not have the effect of precluding an innocent practitioner whose trust account is in deficit as a result of defalcations by an employee from obtaining a certificate simply because he or she has been unable to make good his trust creditors' claims. A practitioner with a qualified audit is entitled to be issued with a fidelity fund certificate provided he or she is able to give a satisfactory explanation for the qualification and that the practitioner remains a fit and proper person to continue in practice. The evidence suggests that the respondent has met these requirements.
- [32] In the peculiar circumstances of the matter, the order that falls to be made is one directed at the expeditious regularisation of the respondent's entitlement to practise and providing a framework for the further conduct of proceedings if that is for any reason not achieved.
- [33] The following order is made:
1. The respondent is directed to make application, in terms of section 85(1)(a) of the Legal Practice Act 28 of 2014 ("LPA") within five days from date of this order, for a fidelity fund certificate as required by s 84 of the LPA; and should he not be issued with such a certificate within 15 days from the date of this order, to, within five days of the expiry of the aforementioned 15-day period, institute an application, as a matter of urgency, for an order compelling the Legal Practice Council to issue him with such a certificate.
 2. In the event of the respondent failing to procure a fidelity certificate within the period stated in paragraph 1 or failing thereafter to institute an application to compel the Legal Practice Council to issue him with such a certificate within the period stipulated in paragraph 1, the applicant is granted leave to re-enrol this application for the respondent's suspension from practice as a matter of urgency on supplemented papers.
 3. In the event of the Legal Practice Council opposing any application by the respondent, as contemplated by paragraph 1 of this order, to compel the Council to issue him with a fidelity fund certificate, it shall have leave, on supplemented papers, to reinstate this application for the respondent's suspension from practice for determination together with the respondent's application to compel.
 4. In the event that the Legal Practice Council issues the respondent with a fidelity fund certificate upon application by him in terms of paragraph 1 of this order, the application for his suspension from practice and the appointment of a curator to his practice's trust account will thereupon be deemed to have been refused with no order as to costs.

J I CLOETE

Judge of the High Court

A G BINNS-WARD

Applicant's counsel: Adv A. Christians

Instructed by: Riley Inc.

Respondent's counsel: Adv D. Uys SC

Instructed by: Basson & Louw Inc.

[1] LPC rules published in GG 41781 of 20 July 2018.

[2] No 28 of 2014.

[3] Kellerman v Legal Practice Council Western Cape Office and Others (16305/22)

[2024] ZAWCHC 81 (14 March 2024) at para [3] and [54].

[4] No 53 of 1979, repealed by s 119 of the LPA.

[5]

[2021] ZAGPJHC 829 (21 December 2021).

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Prepared on 12 October 2026 · Esheria