

SOUTH AFRICA / JUDGMENT

South African Legal Practice Council v Dube (23500/2020) [2021] ZAGPPHC 586 (27 August 2021)

[2021] ZAGPPHC 586

COURT

North Gauteng High Court, Pretoria

BEFORE

Mnyovu B F, Tlhapi V V

CASE / FILE NUMBER

23500/2020

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC

OF SOUTH AFRICA)

Case

Number: 23500/2020

REPORTABLE:

YES / NO

Of

INTEREST 10 OTHER JUDGES: YES/NO

REVISED

27

AUGUST 2021

In

the matter between.

SOUTH

AFRICAN LEGAL PRACTICE COUNCIL

Applicant

And

SIMPHIWE

FREEMAN

DUBE

Respondent

JUDGEMENT

MNYOVUAJ

Introduction

[1] This is an application for an order that the respondent be suspended from practicing as an attorney of this court, on such terms and on such conditions the court may deem to be appropriate, alternatively, that the respondent be suspended and called upon to show cause why his name should not be struck from the roll of Attorneys, as set

out in the Notice of Motion.

[2] The applicant is a regulatory body that was established in terms of Section 4 of The Legal Practice Act No 28 of 2014 (the LPA), which exercises jurisdiction over all practitioners. The applicant's main primary objective is to regulate the affairs of all practitioners, to enhance and maintain appropriate standards of professional practice, to protect public interest and exercise disciplinary procedures which are allegedly, unprofessional or dishonourable or unworthy conduct.

[3] Since the conduct complained about preceded the coming into operation of the LPA on 1 November 2018. Section 119 (3) thereof provides that anything done in terms of a law repealed or amended by the Act remains valid if it is consistent with the LPA, and is deemed to have been done in terms of the corresponding provision of the LPA.

[4] The applicant contended that the respondent is guilty of unprofessional or dishonourable conduct and, consequently, that he is a repeat offender and he is not a fit and proper person to continue to practice as a legal practitioner.

[5] This application is vehemently opposed by the respondent. The respondent has also filed an application for condonation that was unopposed and granted by this court on 9 February 2021.

Background

[6] The respondent is an admitted legal practitioner and was enrolled as member of the applicant on 12 February 2007. He was suspended on 13 October 2011 from practicing as an attorney for a period of one year.

He was prohibited from practicing as such of his own account for a period of two years, following the expiry of the period of his

suspension.

Complaint

- [7] The facts and circumstances which prompted the applicant to launch the investigation is a complaint against the respondent that was lodged by Mr Carlos Joaquin Mazive, his former client; (Mazive). Mazive instructed the respondent on 20 August 2010 to act on his behalf in a claim against the Road Accident Fund. They agreed that the respondent would be entitled to a fee equivalent to 15 per cent of the proceeds of the claim. Mazive alleges that on the day of trial in court the respondent coerced him to sign a Contingency Fee Agreement, without explaining the agreement. He alleges that the respondent debited a fee of 25 per cent of the proceeds of the claim instead of 15 per cent as agreed upon. The respondent indicated that the Mazive complaint and his trust funds, relate to the developments which took place before his suspension on 13 October 2011.
- [8] On 18 October 2017, 17 November 2017 and 24 January 2018 respectively, an enquiry was held.
- [9] The respondent was notified to appear before the disciplinary committee of the council in order to answer to the following charges:

That he is guilty of unprofessional or dishonourable or unworthy conduct on the part of a practitioner in that he:

1. Contravened Rule 47.2 of the Rules for the attorney's Profession in that he failed to bring the file content to the Investigating Committee Meeting held on 6 March 2017;
2. Contravened Rule 68.7 of the Rules of the Law Society of the Northern Provinces alternatively Rule 35.11 read with Rule 40.7 of the Rules for the Attorney's profession, in that he failed to, within a reasonable time after the performance or earlier termination of any mandate received from his client Mr Mazive, account to his client in writing and retain a copy of such account for not less than five years, each account containing details of:
 - a) all amounts received by it in connection with the matter concerned, appropriately explained;
 - b) all disbursements and other payments made by it in connection with the matter;
 - c) all fees and other charges to or raised against the client and, where any fee represents an agreed fee, a statement that such fee was agreed upon and the amount so agreed upon; and
 - d) the amount due or by client.
3. Contravened Rule 89.24 of the Rules of the Law Society of the Northern Provinces alternatively Rule 49.6 of the Rules for the Attorney's Profession, in that he overreached Mazive or overcharged the debtor of Mazive which is unreasonable high, having regard to the circumstances of the matter; and

4. Misappropriated funds in the matter of Mazive alternatively Rule 40.14 of the Rules for the Attorney's Profession, in that he brought the profession into disrepute by inter alia misappropriating funds in the matter of Mazive

[10] At the disciplinary enquiry on 18 October 2017 he pleaded not guilty on charges 1,2, and 4, and pleaded guilty to charge 3. On 17 November 2017 he amended his pleas to guilty on charges 2 and 4. On 24 January 2018 he amended his plea on charge 1 to that of guilty, thereby confirming his plea of guilty on all four charges.

[11] The complaint from Mazive and the responses from the respondent are summarized below:

11.1 On 12 October 2011 the respondent furnished Mazive with a "Summary Account" as appears below. Analysis of Mazive's capital award is indicated as follows which was the only ccounting received by him, from respondent without party and party costs.

Total Amount Paid

R1 333 255.00

Less 25% Contingency

R333 313.00

Less Advocates Fees

R51 000.00

Total Due Client

R948 095.00

The applicant had contended that the respondent has misappropriated Mazive's fund by debiting a fee of 25 per cent instead of 15 per cent as agreed upon. The respondent admitted guilty to such misappropriation before the disciplinary enquiry, as there was no Contingency Fee Agreement in place. In answer, respondent stated that he had entered into a contingency fee agreement even though he admitted guilt before the disciplinary enquiry, that the admission was erroneously made because there was a contingency fee agreement in place, therefore he had not contravened Rule 40.14

11.2 The applicant contended that the respondent's allegations regarding his failure to account to Mazive as found in his answering affidavit differ markedly from his testimony during the disciplinary enquiry. On 17 November 2011 after his suspension, the respondent drafted an attorney and client bill reflecting exorbitant amounts. 30 per cent was allocated to an attorney and client surcharge (which included travel charges only). Below is the respondent's attorney and client bill of costs that also served before the committee (annexure 9 to the present application):

FEES

Total

R168 492. 00 R93, 718.65

Add 30% Attorney & Client Surcharge R50, 547. 60

Subtotal

R219, 039.60

Add Disbursements

R93, 718. 65

VAT

R30, 665. 54

Due To Us

R343, 423.79

11.3 The respondent was asked to account for the 30 percent attorney and client surcharge during the disciplinary proceedings. He failed to account and conceded that 30 per cent should not have been levied. Applicant contended that he retained the sum of R51 000.00 which he received from the road accident fund as part of the party and party costs, which were due to Mazive. In a bid to remedy the alleged retention of the sum of R51 000.00 the respondent paid the sum of R51 000.00 to Mazive at the disciplinary hearing. He pleaded guilty for failing to account to client.

11.4 In answer, the respondent stated that during the disciplinary enquiry he could not reasonably be in position to reconstruct any of his former office files, for the purposes of the disciplinary enquiry because he had no files at the time. On 17 November 2011, unbeknown to him, after his suspension, the party and party costs were drawn purportedly taxed and allowed in the sum of R119 348, 61 by the registrar. The Road Accident Fund did not challenge the fact that the aforesaid purported taxation was drawn after his suspension, and after he had ceased to be the legal representative of Mazive. The aforesaid sum of R119 348.61 included an amount of disbursements of R61 971. 85. The respondent contended that Mazive received the sum of R48 623.05. From R61 971. 85, R51 000.00 was paid by the respondent leaving a residual sum of R10 971.61 for the respondent. This meant Mazive received two payments as recovery of party and party disbursements in the amount of R 99 623.05

11.5 The respondent stated that he erroneously paid the sum of R51 000. 00 to Mazive; as Mazive had already been paid the sum of R48 623.05. Therefore, in the circumstances he was entitled to the sum of R51 000 (he erroneously paid) and R 10 971.61 making up the sum of R61 971. 85.

11.6 The respondent stated that the cost consultant who settled the party and party bill of costs was entitled to R8 753.91 which comprised of drawing fee of R5154.04 and an attendance fee of R3 599.87. The money was paid to Mazive as well. Overall Mazive is currently in possession of the sum of R61 971. 85 and R8 753.91 all amounting of R70 725.56.

11.7 The respondent stated these payments reduced his fee at R333 313.00 to R282 313. 00 and increased Mazive's funds at R948 095. 00 to R 999

995. 00.

11.8 Respondent stated that the taxed party and party costs of the sum of R119 348.11 without his knowledge was paid to Maluleke Tlasi Inc. attorneys by the sheriff. Maluleke- Tlasi Incorporated returned the aforesaid sum of money to the sheriff.

[12] What also came up during the disciplinary enquiry was that there was a sum of R100 000. 00 that was paid by Mazive to the respondent. Mazive testified that on January 2012 the respondent ordered him to refund the sum of R100 000.00 that was for disbursements which were not paid by him. On 31 January 2012 Mazive paid the sum of R100 000.00 to the respondent's personal banking account. The respondent stated that the sum of R100.000.00 was the payment for the sale of his bottle store to Mazive, which happened after the finalization of the matter. Mazive denied the claims of the sale of bottle store by the respondent.

[13] In answer, the respondent denied that he misappropriated the sum of R100 000.00. Applicant's contention that he acted dishonestly to Mazive was incorrect.

[14] The disciplinary committee found the respondent guilty of the four charges and referred the matter to Council. In addition to the four counts the disciplinary committee recorded that the respondent was not truthful; had failed to reconstruct the Mazive file for the enquiry; that the respondent through his firm had served a notice of taxation in the Mazive matter during the period of his suspension; that the respondent had not been truthful during the hearing for the lifting of his suspension.

[15] Further transgressions were the following:

15.1 That a fidelity fund certificate was not issued to the respondent for the year 2020 and that he continued practicing from the 1 January 2020 without a fidelity fund certificate, his previous one having expired on 31 December 2019.

15.2 The respondent failed to pay his membership fees in the amount of R4 025.00 payable to the council on or before 1 July 2019;

15.3 The respondent had not been truthful to the Council during the hearing for the upliftment of his suspension on 25 July 2016 in that he failed to disclose that there was a pending investigation regarding the Mazive complaint the non-disclosure resulted in the Council not opposing the application. The suspension was lifted and the respondent commenced practising for his own account on 1 January 2017.

15.4 The applicant had received an anonymous complaint that the respondent had continued to practice after his suspension, and when questioned about this allegation at the disciplinary enquiry the respondent denied this allegation as having no merit. The applicant contended that this allegation was associated to the notice of intention to tax that had been issued under the style of his firm and which was annexed as annexure 9 to the founding affidavit.

[16] The respondent was found to have contravened the following:

LPC Rules

Rule 54.12; Rule 54.13; Rule 54.14.14; and Rule 54.19

All which have relevance to his responsibility to keep proper accounting records and to properly account to his client.

Code of Conduct of LPA

Rules 3.1; Rule 3.3; Rule 3.5; Rule 3.8; Rule 3.11; Rule 3.15; and Rule 3.17 These rules deal with his competence and professional conduct in the execution of mandate received from his client.

Rule 10.2; Rule 10.3; Rule 12.6 and Rule 12.3

All these rules are relevant to the complaint of Mazive and the new contraventions against the respondent in this application in that they relate to his professional conduct towards his client and the applicant.

Legal Practice Act

[17] The respondent disputes that the complaint alleged is deserving of the ultimate sanction, being that of removal as practicing attorney. The disciplinary enquiry was conducted in a manner which was not fair, just and was inconsistent with the provisions of Section 34 and 35 of the Constitution. He was not provided with all the documents that were relevant to the matter by the applicant, in order to enable him to fairly and fully prepare to face those allegations that were

levelled against him.

[18] The respondent contended that the findings of the disciplinary committee were incorrect, baseless and without merit. At the disciplinary enquiry, he was tried and caused to account on trust funds which the applicant knew well that, they were not in his possession and were not paid to him. The totality of evidence tendered and the developments at the hearing exonerated him from liability on all charges. Therefore, the applicant has failed to set out in the founding affidavit what he had done, to warrant disciplinary process and a court application.

Analysis

and Application of the law

[19] An application of this nature constitutes a disciplinary enquiry by this court into the complained conduct of the practitioner concerned.

These proceedings do not constitute ordinarily civil proceeding but are sui generis in nature. In order for the applicant to succeed in its application, it must place before this court all facts which show whether the conduct complained of has been established on a preponderance of probabilities[1], to prove whether the respondent is no longer a fit and proper person to continue in practice as an attorney.

In *Hepple v Law Society of the Northern Provinces* (5072013) [2014] ZASCA 75 (29 May 2014) Mthiyane DP stated at [3]:

".....The proceedings in applications to strike the name of attorneys from the roll are not ordinarily civil proceedings. They are proceedings of a disciplinary nature and are sui generis procedure. [4] it follows therefore that where allegations and evidence are presented against an attorney they cannot be met with denials by the attorney concerned. If allegations are made by the Law Society and underlying documents are provided which form the basis of the allegations, they cannot simply be brushed aside, the attorneys are expected to respond meaningfully to them and to furnish a proper explanation of the financial discrepancies as their failure to do so may count against them".

[20] The court also has inherent jurisdiction to determine the officer's fitness to remain on the roll of legal practitioners. In exercising its discretion, the court is faced with a three- stage inquiry:

- i) to decide whether or not the alleged offending conduct has been established on a preponderance of probabilities which is a factual enquiry;
- ii) once the court is satisfied that the offending conduct has been established, to make a value judgement from the facts, whether the legal practitioner is a fit and proper person to continue practice;
- iii) if the court is of the view that the practitioner is not a fit and proper person to practice as such, in all circumstances, to exercise its discretion whether it is proper to strike a legal practitioner from the roll or suspend him or her from practice.[2]

[21] The value judgement is made by having regard to the conduct complained about against that which is expected of the legal practitioner as determined by the LPA, the Code of Conduct and the LPC rules. The expectation is aptly stated by Eksteen JA in *Vassen v Law Society of Good Hope* 1998 (4) 532 (SCA) at [14]:

"...it must be borne in mind that the profession of an attorney, as of any other officer of the court, is an honourable profession which demands complete honesty, reliability and integrity from its members, and it is the duty of the respondent and the society to ensure as far as it is able, that its members measure up to the high standards demanded of them. A client who entrusts his affairs to an attorney must be able to rest assured that the attorney is an honourable man who can be trusted to manage his affairs meticulously and honestly"

[22] The three stage enquiry relates to whether having summarized the facts, or having considered the entire facts, whether the applicant has made out a case against the respondent and finally what the outcome should be. It is common cause that the respondent, after amending certain of his pleas at the disciplinary hearing, pleaded guilty to all charges as stated in paragraph 8.4 of the founding affidavit. It is also common cause that the respondent launched an application to review the entire disciplinary proceedings and its findings, alleging certain irregularities. He later abandoned such application. The respondent in this application recants his previous pleas in the Mazive complaint and has presented a new version. In this application additional charges have been presented by the applicant for consideration by this court.

[23] Counsel for the applicant contended that the Plascon - Evans rule was not appropriate in resolving the issues in applications which are disciplinary in nature as we find herein. The difficulty to the court would be to confine the determination of the issues on admitted facts and where disputes of fact present themselves, to attempt to resolve the matter on the affidavits so presented. This difficulty was outlined in *Van der Berg v General Council of the Bar of SA* 2007 (2) AII SA 399 (SCA) at para 2 Nugent JA stated that:

"The applicant's role in bringing such proceedings is not that of an ordinary adversarial litigant, but is rather to bring evidence of

a practitioner's misconduct to the attention of the court, in the interests of the court, the profession and the public at large, to enable a court to exercise its disciplinary powers. It will not always be possible for a court to properly fulfil its disciplinary function if it confines its enquiry to admitted facts as it would ordinarily in motion proceedings and it will often find it necessary to properly establish the facts. Bearing in mind that it is always undesirable to attempt to resolve factual disputes on affidavit alone (unless the relevant assertions are so far-fetched or untenable as to be capable of being disposed summarily) that might make it necessary for the court itself to call for oral evidence or for the cross-examination of deponents".

[24] Counsel for the respondent, and relying on the Plascon - Evans rule contended that this matter was capable of determination on the affidavits in the light of common cause and undisputed facts.

Further, that the founding and replying affidavits were replete with irrelevant matter, argument, impermissible quotations of legislation

and case law and hearsay evidence. He contended that at the disciplinary hearing the respondent was not provided with the necessary information which could have exonerated him and that in terms of the trite three stage test, this application should fail on the first stage of the enquiry.

[25] It is my view that indeed this application can in part be resolved on affidavit in respect of the charges referred for adjudication and, where not resolved they may be dismissed or referred back to the applicant for further investigation where necessary, or referred for oral evidence.

I now deal with the individual complaints.

[26] The Mazive Complaint :

First and Second Counts

Rule 42.7 of the Attorneys Profession/ Rule 68.7, Law Society of the Northern Provinces, alternatively, Rule 35.11 read with Rule 40.7 of the Rules of the Attorneys Profession:

i) Money deposited into a trust account belongs to the client and not the attorney. Therefore, it is incumbent upon an attorney to be transparent where it concerns a client's trust account. The above rules provide for the manner in which such accounting is to occur, among others being, a proper narration of the activity on the account regarding fees and disbursements, any agreed fees and finally, what is due to the client.

ii) Mazive mentioned an amount of a R151 000.00 in his complaint and in the disciplinary enquiry the amount was split into two, R51 000,00 representing that amount the respondent refunded to Mazive and, the R100 000.00 pertained to the amount Mazive alleged was paid to respondent for disbursements, whereas the respondent alleged that it was for the purchase of his bottle store by Mazive.

iii) The respondent has conceded that the only accounting he gave to

Mazive regarding the amount of R 1 333 255.00 received from the RAF, was annexure 'F4' to the answering affidavit. The respondent

contended that he explained the content of the document to Mazive. The document has four entries only, being monies received, the 25% contingency fee on the amount received in the amount of R333 313.00 and what was due as advocate's fee of R 51 000.00. Lastly what was due to client was in the amount of R 948 095.00 and Mazive confirmed having received this amount, albeit that it was reduced further to R800 000.00 by payment to the respondent of the R100 000.00.

iv) The respondent gave this statement to Mazive on the eve of his suspension on 12 October 2011 without giving any account on the other expenses in the litigation which should have been for the account of

Mazive. I say so because a contingency fee agreement pertains to a fee due to the attorney, apart from disbursements incurred which have to be paid by the client. In my view it is this failure to account properly in "F4" which constitutes the subject of the complaint or charge. One gets a sense that indeed expenses were incurred in that it is submitted that a bill of costs, preceded by a Notice of Taxation which was lodged with the registrar for taxation, although knowledge of such taxation is denied by the respondent. The issue of the R100 000.00 and taxed bill is dealt with below.

v) It is contended by counsel for the respondent that the applicant

failed to give the respondent relevant information to enable him to prepare for the hearing. His files had been distributed to other attorneys and that there was no way in which he could have sourced the necessary information pertaining to the complaint. According to the applicant the information was available if the respondent had exercised diligence to look for the information from the RAF, the Sheriff and, as I see it, also from the court file in custody of the Registrar.

In my view when "F4" was drafted, the respondent should have had available to him all the information that was necessary to properly account to Mazive as this payment occurred prior to his suspension. When the file was handed over to a tax consultant, there must have been information available to him to properly account to Mazive. If he had done so, he would have been in a position to give explanation to the applicant, by either making available the client file or he would have been in a position to reconstruct his file and provide proper accounting to Mazive. I am satisfied that the applicant made out a case in this regard.

Third Count:

Rule 89.24, of the Rules of the Law Society of the Northern Provinces alternatively Rule 49.6 of the Rules of the Attorneys Profession

- i) It is necessary to move from the premise that on the first day of the disciplinary hearing on 18 October 2017, the respondent pleaded guilty to a contravention of the above rules and, that he retained the plea of guilty at the conclusion of the hearing. In the record of the hearing at Volume 2 it is evident how the issue of the refund to Mazive came about. In my view it was not as a result of a determination in the hearing but it seems it came about as a result of negotiations apparently made outside of the hearing between the respondent and Mazive and, this was later communicated to the Chair. In the answering affidavit the respondent states that he erroneously paid the amount of R51 000.00 to Mazive and, therefore erroneously pleaded guilty because the party and party costs were not paid to him.
- ii) As I see it, the respondent's recanting of his plea is as a result of knowledge that the RAF paid costs to the Sheriff after he had ceased to be the attorney for Mazive. This money was subsequently paid to Maluleke Tlasi Attorneys who had employed the respondent during the period of his suspension and, before he resumed practicing of his own account. The other reason was that he was only made aware on the last day of the hearing that the applicant, represented by the initiator at the hearing was in possession of the RAF file in the Mazive matter. He contended

that he was greatly prejudiced in preparation of his disciplinary hearing.

According to the record it seems the exhibits were handed up at the hearing of 24 January 2018. I am of the view that the respondent who was legally represented could have amended his plea to one of not guilty at that stage of the proceedings, instead he retained it.

iii) I am of the view that caution should be exercised not to convert by the backdoor, this application into an appeal or a review of the disciplinary hearing. These are disciplinary proceedings sui generis, to determine whether the respondent is a fit and proper person to be allowed to practice as an attorney. It was contended that also to be taken into consideration, was the fact that the respondent had been previously suspended and that in this matter he was a repeat offender.

iv) The respondent relying on the last page of the Bill of Costs filed

with the record made certain calculations as dealt with from paragraphs 15.19 onwards of the answering affidavit. Certain assumptions and conclusions are made by him. These being disciplinary proceedings it is expected of the respondent to deal as comprehensibly as possible, also supporting his assumptions and conclusions with credible evidence. It seems as if the bill of costs annexed to the records has not been examined by the Registrar, alternatively, there seems to be no bill of costs properly taxed, stamped and signed by the Registrar annexed to volume of the record.

If the RAF paid over an amount to the Sheriff, then one would assume there is a proper copy on the court file, more so when it came to light that the RAF only paid after warrants of executions had been issued and served upon it. I would have expected the respondent to have availed such copy or if not available, for him to make it possible for this court to understand how he arrived at certain

calculations or the source of such calculations, and not for the court to second guess or juggle figures around in an attempt to

understand his calculations in the answering affidavit. In my view again, the issue of what the respondent would have been entitled to or not entitled to, does really not assist the respondent because he cannot deny these disbursements were incurred and that Mazive was entitled to a portion of these disbursements, which on his own version he failed to give an account to as far back as 12 October 2011.

v) It is my view, that it is to the totality of the evidence that the court looks to and, in the end it is to the impressions it has of the attitude of the litigants in the proceedings, which also plays a role in assisting the court in exercising its discretion and to arrive at a decision which is fair. The respondent contends that the totality of the evidence exonerated him from liability, however, when the review application was withdrawn and as appears in a letter annexed to the answering affidavit dated 3 April 2019 from his attorneys TT Hlapolosa Inc, there was an undertaking that the respondent would account fully to Mr Mazive. As at that time the respondent could have recanted his plea and not feel obligated to account to

Mazive.

vi) In my view an accounting to Mr Mazive still remains outstanding,

because when the order was granted no mention is made of the existence of a contingency fee agreement. No reasons are advanced why it was not availed to the court. No explanation is given why the respondent failed to comply with requirements for recognition of the contingency fee agreement. An explanation that it may have been during a time when practitioners were not obligated to mention same to the court does not assist the respondent. He conceded that there was no copy available. Further, in the disciplinary hearing he conceded that he had not accounted to Mazive with regard to his cost contribution.

vii) Another issue not resolved is that while the respondent claimed to have no knowledge of the notice of intention to tax, which was issued under his name and the bill of costs which was apparently done by a tax consultant, there is no explanation on whose instructions the tax consultant appeared before the Registrar. The respondent faces serious charges and while he has a right to challenge the conduct of the conveners of the disciplinary hearing, there is no room for inconsistencies as displayed in dealing with his accounting in these proceedings; *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) 851

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viii) In order to gain an understanding of the admissions the respondent now recants, an examination of Volume 3 of the record gives insight into the details of the calculations relied upon from the taxed bill of costs. Over and above the R1 333 255.00 received from the RAF the respondent conceded receiving a further payment of R128 000.00 and that he was entitled to R42 000.00 from this amount. The respondent was extensively questioned on the figures he relied upon. There was an admission by him that over and above the 25% he accounted for in "F4" he charged Mazive an additional 30% surcharge which he was not entitled to, which appeared in the bill of costs but not in "F4". There was also the VAT which appeared in the bill of costs which the respondent admitted was not paid over to the Receiver. The issue of the surcharge and VAT did not form part of the disciplinary hearing.

ix) What remained was that having regard to the R51 000.00 refunded to

Mazive there was a concession that an additional R80 000.00 was still outstanding and that it was on these grounds that the respondent

pleaded guilty on charge 3. In my view as long as there is no contingency fee agreement that can be produced and further, that

respondent has not properly accounted to Mazive, "F4" should be disregarded because on the respondent's own version it does not reflect a true accounting to Mazive.

x] A letter from Mr Tlasi was communicated to the conveners of the disciplinary hearing on 17 November 2017, which explained that after an investigation at their offices it was discovered that the sheriff had indeed paid the monies to Maluleke- Tlasi Inc. An amount of R129 538,48 was

consequently paid back to the Sheriff and proof of payment was provided. According to Mr Tlasi there were files brought to his firm by the respondent before his suspension which he requested they assist with. In his answer the respondent explains that the Mazive file was delivered to Mr Chaza the tax consultant

prior to his suspension and that he had no control over the bill of costs after his suspension, and that Mr Chaza had no recollection of what happened to the Mazive file. Mr Tlasi stated that there was no record of the Mazive file at their office.

xi) However, the warrants of execution were issued and signed for by Mr Maluleke during the period that the respondent was employed in their office. As a result of which the RAF paid his office.

xii) The unsigned Notice of Intention to tax on record was under the name of the respondent and that was shortly after his suspension. In this application the respondent contended that he pleaded guilty because he assumed that the money was received by him. On the other hand, he insists that the experts and other disbursements have been paid. The respondent does not explain why, if having been made aware at the disciplinary hearing that the amount R129 538. 48 was paid back to the Sheriff, he failed to pursue the matter prior to this application being launched. The respondent has provided additional information in this hearing to support a different version and as indicated he withdrew his application to review the findings of the disciplinary hearing.

Fourth count

Misappropriation of funds of Mr Mazive alternatively contravention of Rule 40.14 of the Rules for the Attorneys Profession by misappropriating funds in the matter of Mr Mazive

i) Mazive's complaint also involved his allegation that the respondent demanded that he repays a R100 000.00 from the R948 095.00 that was paid out to him, to enable him to pay the experts and counsel's fee. The respondent on the other hand maintained that payment was made for the purchase of a bottle store, that is why he initially pleaded not guilty to that charge and he maintained this stance throughout. The respondent contended that the payment by Mazive of the R100 000.00 did not involve a transaction on the trust account into his personal bank account, therefore the conclusion that he acted dishonestly was incorrect.

ii) In the replying affidavit, the applicant referred to the transcript

which demonstrated why the respondent converted his plea of not guilty to one of guilty. On perusal of the transcript it seems during cross examination on the amounts in the bill of costs, where the respondent conceded that he had withheld R4 000.00 which he should have paid over to Mazive. He pleaded guilty to misappropriating R4 000.00 and continued to adduce evidence that R 100 000.00 was for the sale of the bottle store. The founding affidavit and reply do not deal with his plea of guilty in respect of R4 000.00. As I see it the issue around the R100 000.00 remains outstanding.

iii) The word misappropriation has varied meaning and it could include a form of theft. I am not satisfied that there were facts to support the alternative charge of putting the profession into disrepute. It later transpired in the hearing according to the respondent, that it was no longer the sale of a "bottle store" but the sale of stock which excluded the licence. The hearing did not follow through with questioning on the legal process to be engaged in the sale of a business of that nature, there was fleeting reference to the Insolvency Act and the Liquor Board. The R100 000 .00 was not paid out of Mazive's trust account but was paid from his personal account.

iv) However, in my view the applicant had a right to investigate the

complaint on the version of Mazive and, on the allegation that the R100 000.00 was paid back to the respondent barely two weeks after he was paid the amount of R948 095.00, thereby reducing award to R800 000.00. Further, for purposes of this application the respondent is expected, as a practicing attorney, to bring such evidence, to show that a lawful process was engaged in the sale of his business to his former client and, that no impropriety was involved. In view of the dispute of fact, this is an aspect which requires a referral to oral evidence in order to establish properly Mazive's complaint and the alleged impropriety.

Fifth count:

Practicing without a Fidelity Fund Certificate commencing 1 January 2020

In the answering affidavit the respondent contended that a Fidelity Fund Certificate for the year 2020 was issued on 9 December

2019. When the application was launched on 28 May 2020 the respondent was already in possession of a fidelity fund certificate. In reply the applicant conceded that its records had not been updated when it launched the application.

Sixth Count

Failed to pay Membership fees for the year 2020 to council

The respondent says that contrary to the plaintiffs allegation the subscription fees were due on 9 February 2020 and not 9 July 2019 and payment was late by three months and paid on 25 August 2020. In terms of Rule 4 the LPC fixes dates upon which these fees should be paid. Important herein is that when the application was launched on 28 May 2020 these fees were outstanding and that constituted a transgression in terms of the rules.

Seven count:

The respondent was not truthful during his appearance before the council on 25 July 2016 in not disclosing Mazive complaint

The applicant received the complaint from Mazive on 10 August 2014, and at that time the respondent was not allowed to practice of his own account. The respondent was made aware of the complaint and he states that he responded to it. In my view, the complaint involved impropriety on the part of the respondent, which had not been resolved by any process engaged

by the disciplinary committee of the applicant. The complaint related to a substantial amount. Mazive's complaint was made a few years after the respondent had paid him in terms of "F4" on 12 October 2011. The respondent states in his answering affidavit that he responded to an enquiry into the complaint, however, he does not tell this court what his response was at the time. In my view, the fact that he responded to the complaint meant that the matter was still pending and that did not absolve him from disclosing such facts to the Council, even where there was no opposition to the lifting of his suspension.

Eight count:

The respondent continued to practice while on suspension in (contempt)

The applicant relied on a rumour and it does not seem that an investigation was launched. What appears from the transcript is that

there was an unsigned Notice of Intention to Tax. It is not clear when the Notice was issued and on which date the bill of costs was taxed. It is also not clear whether the Notice was issued and taxed after the respondent was employed by Maluleke-Tlasi Inc., and there is no demonstration that the said Notice was served on the RAF or its attorneys of record. Therefore, I am not satisfied that the applicant has proved this case on a balance of probabilities.

Is the respondent a fit and proper person to practice

[27] As stated in Jassat supra the second enquiry entails a value judgement, being the exercise of a discretion having regard to the facts and, by weighing up the conduct complained about against what is expected of the respondent in his position as a practitioner. The evaluation of whether a practitioner is a fit and proper person is an exercise among a plethora of qualities into the integrity, reliability and honesty of a practitioner. The qualities required of a practitioner are not only his concern, but are the concern of the applicant being the body whose laws, rules and code of conduct he undertook to abide by. Most importantly the public to whom a practitioner renders service must be protected. In *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA) Harms JA stated at para 9:

"The exercise of this discretion is not bound by rules and precedents consequently have limited value. All they do is to indicate how other courts have exercised their discretion in the circumstance of a particular case. Facts are never identical, and the exercise of a discretion need not be the same in similar cases. If a court were bound to follow precedent in the exercise of its discretion it would mean that the court has no real discretion". (See *Naylor v Jansen* 2007 (1) SA 16 (SCA) at para 21.)

[28] It was contended by the applicant that the respondent was a repeat offender of various acts of dishonesty, as reflected in the Mazive complaint and, other conduct also referred for adjudication. In exercising this value judgment, it is important to have regard to counsel for respondent's contention that he was unfairly treated. Further, it was contended that the disciplinary proceedings leading up to this application flouted the respondent's

constitutional rights and was a mistrial, in particular the applicant withheld information which could have exonerated the respondent.

- [29] The onus rests on the applicant to prove that the respondent is not a fit and proper person to remain in practice. In these proceedings the litigants did not only rely on the three affidavits in the motion proceedings, they relied also on the record I transcript of the disciplinary hearing and it would be remiss of this court to disregard the content thereof, where relied upon, this also being a disciplinary hearing. The criticism I could level against the applicant was not to have availed a copy of the bill of costs to the respondent when it came to their attention to enable him to prepare his defence. However, the defence as such would not have assisted him in that he transgressed the most important duty which was to properly account to Mazive, in "F4" which is his account to Mazive a day before his suspension and "F4" can in no manner be likened to a bill of costs. Before his suspension the respondent had ample opportunity to properly account to Mazive as required by the rules of LPA, the code of conduct and the LPA.
- [30] It is common cause that the issue revolved mainly around the Mazive complaint which was brought to the attention of the respondent during
2014. The responsibility to avail information regarding a particular complaint does not rest with the applicant only. In terms of the rules and code of conduct the respondent has to diligently do everything in his power to avail such information during an investigation; "broad denials and obstructionism have no place in these proceedings" Kleynhans supra and the allegations cannot be "brushed aside" or ignored, Hepple Supra .
- [31] At the time the complaint was lodged the respondent was a professional assistant at Maluleke -Tlasi Inc. and he conceded at first that he did not offer an explanation at an earlier enquiry which preceded the disciplinary hearing (Volume 2, pages 190-191,) that he could not avail the client file to the applicant. He later stated that he knew that he had to respond and that Maluleke-Tlasi Inc did respond on the matter. The disciplinary hearing was heard about three years after the complaint.
- [32] As a repeat offender, the respondent was no longer be considered a fit and proper person to be allowed to practice as a member of a learned, respected and honourable profession . In my view the most important complaint in determining whether the respondent is a fit and proper person relate to the Mazive complaint, and the Bill of Costs; the overreaching in respect of the R100 000.00 and, his failure to disclose Mazive's case when his application to uplift his suspension was being considered. These transgressions on their own are sufficient to have the respondent removed from the roll of practicing attorneys. However, through the proper exercise of the discretion entrusted on the court, certainty is required before such drastic decision is taken.

[33] In considering an appropriate sanction, it is my view that the issues relating to disputes of facts require to be referred to oral evidence. In *Hewetson v Law Society of the Free State* (948/2018)

(2020) ZASCA 49 All SA 15; (SCA) (5 May 2020), the court stated at:

Para 38... .. "A court is loath to impute dishonesty on the basis of untested allegations in motion court proceedings in the absence of clear proof and where these allegations were denied on grounds that cannot be described as far- fetched. But because of the sui generis nature of these proceedings it is in the interest of the public and the appellant herself that these issues be referred to oral evidence in the high court. Only then can a court properly exercise its inherent jurisdiction to penalise the appellant by either striking her from the roll of practising attorneys or suspending her from practising for a specific period. For obvious reasons any bench constituted should not include those judges who presided over the original application" and

Para 39..... "Rather than imposing the ultimate penalty on what is, in my view, inadequate evidence, a referral to oral evidence would serve the interests of justice and fairness".

Although the facts in *Hewetson* are distinguishable in that, in the present matter the respondent is said to be a repeat offender, the issue regarding Mazive's bill of costs and the complaint regarding the R100.000.00 were not in my view determinable in this application. It is only after the court has heard relevant evidence that a deserving sanction can be imposed.

It is my view therefore, before considering an appropriate sanction the respondent be referred to oral evidence on the issues outlined in the order.

[34] Accordingly, I make the following order:

The application to suspend or strike the respondent from the roll of attorneys is referred to a freshly constituted bench of this Court for its determination after hearing such oral evidence, on the following aspects,

- (a) On the bill of costs which respondent alleges he was not given proper opportunity to prepare his defence;
- (b) That the circumstances under which the payment of R100 000.00 was demanded from Mazive; whether this constitutes a transgressions of the LPC Rules, Code of Conduct of LPA, and certain sections of the Legal Practice Act,
- (d) The applicant is ordered to obtain a date for the hearing from the registrar within thirty days from the date of this order.

MNYOVU B F

Acting Judge of the High Court

Gauteng Division

I concur

TLHAPI V V

Judge of the High Court

[1] Prokureursorde van Transvaal v Kleynhans 1995 (1) SA 839 (T)

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

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Prepared on 12 October 2026 · Esheria