

SOUTH AFRICA / JUDGMENT

South African Legal Practice Council v Harper and Another (51846/2021) [2021] ZAGPJHC 829 (21 December 2021) [2021] ZAGPJHC 829

COURT

South Gauteng High Court, Johannesburg

BEFORE

Sutherland, Mia

CASE / FILE NUMBER

51846/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 51846/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

21

December 2021

In

the matter between: THE
 SOUTH AFRICAN LEGAL PRACTICE COUNCIL
 Applicant
 And
 LEIGH
 DOROTHY HARPER
 1st
 Respondent
 HARPER
 LEIGH INC
 2nd
 Respondent

Coram: Sutherland
 DJP, Mia J

Heard: 6 December 2021

Delivered: 21
 December 2021
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 to the parties' representatives by email, and by being
 uploaded to
 the CaseLines
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 to be 12:00 on 21 December 2021

JUDGMENT

The Court,

INTRODUCTION

[1] The applicant, the Legal Practice Council (LPC) launched the application on an urgent basis in the week commencing 30 November 2021. The matter was heard on 6 December 2021 after the LPC requested an opportunity to file a replying affidavit so as to bring to the

attention of the court further matters relevant to the application. The respondents are Leigh Harper, (Harper) an attorney and her firm, Harper Leigh Incorporated (HPI) of which she is the sole director. The relief sought by the LPC is that Harper be suspended,

alternatively be struck off from the roll of attorneys and HPI be subjected to a curator to oversee and take control of the accounts.

The application is opposed by the respondents on the basis of urgency as well as the merits.

BACKGROUND FACTS

- [2] Harper was admitted as an attorney of this Court on 20 February 2003. HPI is the incorporated firm which is her alter ego.
- [3] The LPC brought this application upon receipt of a complaint on 2 June 2021 against HPI. The complainant appointed HPI in September 2018 to attend to the transfer of a property Erf [...] Riverside View Ext 20 ("the property") from the sellers, Ken Clucas and Bronwyn Smit to the buyer, Aspen Spirit (Pty) Ltd, a company of which the complainant is the sole director. The complainant made full payment of the purchase price for the property to HPI. The registration costs were paid in November 2018 and the transfer duty was paid to South African Revenue Services ("SARS") on 11 February 2019. The complainant was dissatisfied that the property was not transferred twenty-one (21) months after HPI's appointment. In addition to not having transferred the property as mandated, Harper and HPI refused to provide accounting records of the approximately R9 million that the complainant paid into the trust account of HPI for the property.
- [4] Consequently, the complainant appointed Christo Mulder as her legal representative to assist in finalising and advising on the transfer. Harper was allegedly evasive and continues to withhold financial and accounting records despite the complainant instructing the HPI to do so. Harper has delayed and not delivered any accurate statements of the trust account and financial transactions that have taken place in respect of the transfer. Further, she provided inaccurate information

about the seller to SARS and divulged the seller's personal information to Christo Mulder without consent. The complainant has

been paying occupational rent for the property since February 2019. The rental has been paid from interest earned on the R9 million

deposited into the first respondent's trust account. As from June 2020, the total occupational rent cost amounted to R660 000.00. This cost could have been avoided had the first respondent transferred the property timeously.

- [5] Flowing from the above report the LPC authorised an investigation and appointed an investigator. Upon investigating the Trust account and the investment accounts and the audit reports of HPI for 2019 and 2020 the investigator filed a report. The report revealed these facts and the investigator's opinions in respect thereof:

- 5.1. there was a substantial trust deficit in the Trust account of at least R7 933 577.07;
- 5.2. Harper failed to report the trust deficit to the LPC as she is obliged to do;
- 5.3. Harper acted grossly negligent, alternatively recklessly in her handling of the trust funds;
- 5.4. Harper failed to comply with his requests on behalf of the LPC;
- 5.5. the two respondents failed to keep proper accounting records in respect of the practice;

- 5.6. Harper contravened several provisions of the LPC Rules and the Code of Conduct;
- 5.7. Harper has placed her trust creditors and the Legal Practitioners Fidelity Fund(LPFF) at risk; and
- 5.8. Harper failed to handle the instructions to HPI properly.

[6] Harper, in contesting the LPC's application, contended that the investigation was based on limited information. She also contended that she reported to the LPC as soon as she became aware that there was something amiss with her trust account. Harper alleges that her bookkeeper misappropriated money from the accounts. She alleges that upon discovering there was a problem she laid a criminal charge with the South African Police Services against the bookkeeper. Harper has been in practice for eighteen years and this appears to have been the first complaint against the two respondents. Harper states that she has effected similar transactions on behalf of the complainant previously and no problems were encountered on those occasions.

ISSUES FOR

DETERMINATION

[7] The issues for determination are whether:

- 7.1. the application is urgent; and
- 7.2. the first respondent ought to be suspended and/or removed from the roll of legal practitioners and a curator appointed to oversee the accounts.

LAW

[8] Section 43 of the Legal Practice Act 28 of 2014 provides:

"Despite the provisions of this Chapter, if upon considering a complaint, a disciplinary body is satisfied that a 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."

[9] In the matter of *The Law Society of the Northern Provinces v Morobadi* (1151/2017) [2018] ZASCA 185 (11 December 2018) at paragraph 5, the Court held:

"It is now settled that an application for the removal from the roll, or suspension from practice, of an attorney involves a three-stage enquiry. First, the court has to determine whether the alleged offending conduct has been established on a balance of probabilities. It is a factual enquiry. Second, consideration must be given to the question whether, in the discretion of the court, the person concerned is not 'a fit and proper person to continue to practice as an attorney'. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and is a value judgment. Third, the court is required to consider whether, in light of all the circumstances, the name of the attorney concerned

should be removed from the roll of attorneys or whether an order suspending him or her from practice would suffice.”

[10] The value judgment evident in the second stage of the enquiry was highlighted in *Summerley v Law Society, Northern Provinces* [2006] ZA SCA 59; 2006

(5) SA 613 (SCA) at paragraph 2. The Court held:

“The first enquiry is aimed at determining whether the law society has established the offending conduct upon which it relies, on a balance of probabilities. The second question is whether, in the light of the misconduct thus established, the attorney concerned is not a 'fit and proper person to continue to practise as an attorney'. Although this has not always been the position, s 22(1)(d) now expressly provides that the determination of the second issue requires an exercise of its discretion by the Court (see eg A v Law Society of the Cape of Good Hope 1989

(1) SA 849 (A) at 851C - E). As was pointed out by Scott JA in *Jasat* (at 51E - F), the exercise of the discretion at the second stage 'involves, in reality, a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment' (see also, eg, *Budricks* (supra) at 14A). The third enquiry again requires the Court to exercise a discretion. At this stage the Court must decide, in the exercise of its discretion, whether the person who has been found not to be a fit and proper person to practise as an attorney deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice.”

URGENCY

[11] The applicant has approached this court relying on section 43 of the Legal Practice Act. The issue of urgency was opposed by the respondent on the basis that the applicant resolved in on 6 August 2021, a month after the investigation and report was considered by it to seek relief. The respondents argue that there has been a delay in pursuing the matter and the issue cannot thus be urgent. Furthermore, it was contended on behalf of the respondents that no case was made out for urgency. The first respondent's previous bookkeeper who is alleged by Harper to have committed the theft has resigned and this fact had been communicated to the LPC. The respondents' attitude is that the application is premature.

[12] As section 43 of the Legal Practice Act provides that, [the disciplinary body] ... 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.”; the LPC is not remiss in approaching this court. In *Morobadi* (supra) at para 25 the court expressed this view:

“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.”

Having regard to the above I am satisfied that the applicants are properly before this Court on an urgent basis notwithstanding the delays that occurred from the time the resolution was taken.

THE RELIEF APPROPRIATE IN THE CIRCUMSTANCES

[13] Having regard to the findings of the investigator, Mr Nyali it must be noted that the LPC has not yet commenced disciplinary proceedings against the first and second respondents. Mr Nyali failed to secure Harper’s co-operation in securing the financial statements critical to a full enquiry, in particular, the trust account and investment account bank statements. The LPC was compelled to subpoena the statements from the bank. From the information available, Harper appears to have caused funds of the complainant from the investment account and trust accounts to be paid to other trust beneficiaries as well as for her own benefit without the approval of the complainant. These transfers were plainly unauthorized and reduced the interest yield the complainant earned on the accounts. Harper was instructed to pay the rental from the interest earned on the complainant’s accounts. She was thus compelled to use the complainant’s capital to pay the monthly rental when the interest diminished due to her unauthorised transfers. This was not the complainant’s instruction to HPI. Harper’s failure to report a deficit in her trust account was a contravention of the LPC Rules[1]. When HPI used the complainant’s fund contrary to her instructions this constituted a contravention of the Code of Conduct.[2]

[14] In *Vassen v Law Society of the Cape of Good Hope* [1998] ZASCA 47; 1998

(4) SA 532 (SCA) at page 537F-G the Court noted:

“In this regard 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 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 that attorney is an honourable man who can be trusted to manage his affairs meticulously and honestly. When money is entrusted to an attorney or when money comes to an attorney to be held in trust, the general public is entitled to expect that that money will not be used for any other purpose than that for which it is being held, and that it will be available to be paid to the persons on whose behalf it is held whenever it is required.

[15] What the court is required to determine in light of the above is whether Harper’s conduct is becoming of an attorney. It was argued on her behalf that she has not herself behaved improperly but that the debacle in her accounts is due solely to her being the victim of her dishonest bookkeeper. After the fact, she claims she learnt that the bookkeeper had been previously convicted of fraud. She alludes to personal challenges concerning her mother’s health and untimely death and her own ill health as, at least, contributory factors to explain her unawareness of the course of events. She claims that she reported to the LPC as soon as

she became aware that there was something amiss with her trust accounts.

- [16] Moreover, she laid stress on the fact that the complaint is the first against the respondents in eighteen years of practice. She also says that the complainant had entrusted several other similar transactions to HPI without encountering the same problem. This is the first problem encountered by the complainant. She points to the forensic assessment still being work in progress. She has agreed to subject the practice to a curator until the matter is resolved and the investigation complete.
- [17] The picture which is apparent from the evidence, thus far garnered by the investigator, is plain. It is common cause that a substantial sum of money has been misappropriated. Whether or not the bookkeeper is solely responsible or whether Harper was a knowing participant is not a finding that can be made on affidavit. That issue shall have to be subjected to an enquiry in which Harper and others shall be required to testify. The prospects of her being guilty of, at least, negligence in the management of HPI are strong, but until that enquiry is complete the totality of the relevant circumstances necessary to determine an appropriate sanction remain matters to be assessed. The evidence adduced by the LPC to substantiate its claim that Harper obstructed the investigation is strong but is refuted, albeit inadequately. That too must be subjected to an oral enquiry.
- [18] In my view it is plain that a striking off is not justified at all on these papers. It is further a matter of genuine concern that that suspension may indeed be premature. The evidence does not point to a systematic pattern of defalcations. The appointment of a curator to control the accounts removes the risk of any further mischief and moreover provides the appropriate arrangements to plumb the depths of the history of the accounts. The future of the firm and its employees, although not a factor that can ever be decisive, is nonetheless germane as regards an interim regime pending the disciplinary enquiry.
- [19] The appropriate relief is to allow the practice to continue and appoint a curator to take over the accounts. An order to that effect shall be made.
- [20] As to the costs of the application it is plain that it was appropriate to bring the matter before a court to consider whether a suspension was necessary. In such circumstances the costs should be borne by the respondents jointly and severally.

THE ORDER

For the reasons indicated above:

1. The application is urgent, and the forms and service provided for in the Uniform Rules in terms of Rule 6(12)(a) are dispensed with.
2. Leigh Dorothy Harper (first respondent) and Harper Leigh Incorporated (Second respondent) shall with immediate effect be permitted to practice subject to a curator bonis who shall oversee the practice of the respondents, on the following terms and conditions:

2.1. that Johan van Staden, the Director of the Gauteng Provincial Office of the applicant or any person nominated by him, be appointed as curator bonis (curator) to oversee and administer and control the trust accounts of the second respondent, including accounts relating to insolvent, any deceased estates and any estate under curatorship connected with the first respondent's practice as attorney and including, also, the separate banking accounts opened and kept by the first respondent at a bank in the Republic of South Africa in terms of section 86(1) of the Legal Practice Act 28 of 2014 ("the LPA") and/or any separate savings or interest-bearing accounts as contemplated by section 86(3) and section 86(4) of the LPA, in which monies from such trust bank accounts have been invested by virtue of the provisions of the said sub-sections or in which monies in any manner have been deposited or credited (the said accounts hereafter referred to as "the trust accounts"), with the following powers and duties:

2.1.1. immediately to take possession of the first respondent's accounting records, records, files and documents as referred to in paragraph 2.5 and subject to the approval of the Board of Control of the Legal Practitioner's Fidelity Fund (hereinafter referred to as "the LPFF") to sign all forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which the first respondent was acting at the date of this order;

2.1.2. subject to the approval and control of the Board of Control of the LPFF and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against the first respondent in respect of the monies held, received and/or invested by the first respondent in terms of section 86(3) and section 86(4) of the LPA (hereinafter referred to as "trust monies"), to take any legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions, if any, in which the first respondent was and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);

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

2.1.4. to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of the Board of Control of the LPFF, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of the second respondent and, if so, the amount of such claim;

2.1.5. to admit or reject, in whole or in part, subject to the approval of the Board of Control of the LPFF, the claims of any such trust creditor or creditors, without prejudice to such trust creditors' or creditors' rights of access to the civil courts;

2.1.6. having determined the amounts which, he considers are lawfully due to the trust creditors, to pay such claims in full but subject always to the approval of the Board of Control of the LPFF;

2.1.7. in the event of there being any surplus in the trust account(s) of the second respondent after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce (as the case may be), firstly, any claim of the LPFF in terms of section 86(5) of the LPA, in respect of any interest therein referred to and, secondly, without prejudice to the rights of the trust creditors of the second respondent, the costs, fees and expenses referred to in paragraph 3.3 of Part B of the notice of motion, or such portion thereof which has not already been separately paid by the first respondent to the applicant, and, if

there is any balance after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to approval of the Board of Control of the LPFF, to the first respondent, if she is solvent, or if the first respondent is insolvent, to the trustee(s) of the first respondent's insolvent estate;

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

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

2.1.10. to render from time to time, as curator, returns to the Board of Control of the LPFF showing how the trust account(s) of the second respondent has/have been dealt with, until such time as the Board notifies him that he may regard his duties as curator terminated;

2.2. the first respondent immediately delivers her accounting records, records, files and documents containing particulars and information relating to:

2.2.1. any monies received, held or paid by the first respondent for or on account of any person while practising as an attorney;

2.2.2. any monies invested by the first respondent in terms of section 86(3) and/or section 86(4) of the LPA;

2.2.3. any interest on monies so invested which was paid over or credited to the first respondent;

2.2.4. any estate of a deceased person or an insolvent estate or an estate under curatorship administered by the first respondent, whether as an executor or trustee or curator or on behalf of the executor, trustee or curator;

2.2.5. any insolvent estate administered by the first respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No. 24 of 1936;

2.2.6. any trust administered by the first respondent as trustee or on behalf of the trustee in terms of the Trust Property Control Act, No. 57 of 1988;

2.2.7. any company liquidated in terms of the Companies Act, No. 61 of 1973, administered by the first respondent as or on behalf of the liquidator;

2.2.8. any close corporation liquidated in terms of Close Corporations Act, No. 69 of 1984, administered by the first respondent as or on behalf of the liquidator; and

2.2.9. the first respondent's practice as a legal practitioner of this Honourable Court, to the curator appointed in terms of paragraph 2.1 hereof, provided that, as far as such accounting records, files and documents are concerned, the first respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee;

2.3. should the first respondent fail to comply with the provisions of the preceding paragraphs of this order on service thereof upon her or after a return by the person entrusted with the service thereof, that he has been unable to effect service thereof on the first respondent (as the case may be), the sheriff for the district in which such accounting records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator;

2.4. the curator shall be entitled to:

2.4.1. hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined taxation or by agreement, in respect of fees and disbursements due to the firm;

2.4.2. require from the persons referred to in paragraph 2.5 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or the first respondent and/or the first respondent's clients and/or the LPFF in respect of money and/or other property entrusted to the first respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;

2.4.3. publish this order or an abridged version thereof in any newspaper he considers appropriate;

2.5. if there are any trust funds available, the first respondent shall within 6 (six) months after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, satisfy the curator, by means of the submission of taxed bill of costs or otherwise, of the amount of the fees and disbursements due to her (first respondent) in respect of her former practice, and should she fail to do so, she shall not be entitled to recover such fees and disbursements from the curator

without prejudice, however, to such rights (if any) as she may have against the trust creditor(s) concerned for payment or recovery

thereof;

2.6. a certificate issued by a director of the LPFF shall constitute prima facie proof of the curator's costs that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs;

2.7. the costs of this application be paid by the first respondent on an attorney and client scale;

3. Part B of the notice of motion is postponed sine die.

S. Mia J (with whom Sutherland DJP concurs)

Appearances:

On behalf of the applicant : Adv NS Mteto

Instructed by

: Renqe FY Incorporated

On behalf respondents : Adv S Meyer

Instructed by

: Ulrich Roux & Associates

Date of hearing

: 30 November, 6 December 2021

Date of judgment

: 21 December 2021

[1] Rule 54.14.10 of the Legal Practice Council Rules

[2] section 3.3 of the Code of Conduct.

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