

SOUTH AFRICA / JUDGMENT

South African Legal Practice Council v Mabuse [2023] ZAGPPHC 154; 053185/2022 (1 March 2023)

[2023] ZAGPPHC 154

COURT

North Gauteng High Court, Pretoria

BEFORE

Swanepoel, Greyvenstein

CASE / FILE NUMBER

053185/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

number:

053185/2022

Date

of hearing: 21 February 2023

Date

delivered: 1 March 2023

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

In

the matter between:

SOUTH

AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

NICLAS

MODISE OITSHIPI MABUSE

Respondent

JUDGMENT

SWANEPOEL J:

INTRODUCTION.

[1] Respondent is a legal practitioner who practices from offices situated in Mabopane Garankuwa. The applicant is the Legal, Practice Council ("LPC") which was established by virtue of section 4 of the Legal Practice Act, Act 28 of 2014 ("the Act"). The broad purpose of the LPC is to regulate all members of the legal profession.[1] This is an application for the suspension of the respondent from practice, and for an order that his affairs may be investigated, prior to an envisaged application for his striking as a legal practitioner.

IN LIMINE.

- [2] Respondent took issue with the Court's jurisdiction, alleging that Mabopane, where his office is situated, falls within the jurisdiction of the Northwest Division of the High Court. That is factually incorrect. GaRankuwa, within which Mabopane is situated, falls under the Magisterial District of Madibeng, and save for the GaRankuwa sub-district of Tlokwe, the remaining part of Madibeng falls under the jurisdiction of this Court.[2]
- [3] The second point in limine is that respondent feels that he has been unfairly treated in that the Gauteng LPC should not involve itself in the matter, as he feels bullied, and that the LPC does not have jurisdiction over the respondent. He repeats his contention that he falls under the jurisdiction of the Northwest Legal practice Council. Respondent is a legal practitioner practicing within this Court's jurisdiction, and he falls under the disciplinary purview of the LPC. There is no substance to this point.
- [4] The third and fourth points in limine can be dealt with simultaneously, as they essentially require the determination of the same question of law. The point taken is that the Minister of Justice, and the North West Legal Practice Council should have been joined as parties. The defence of non-joinder has been said to be confined to cases of joint owners, joint contractors or partners.[3] The test is whether the party to be joined has a direct and substantial interest in the subject matter of the case, in other words, a legal interest in the subject matter of the application which may be prejudiced if the particular party is not joined.[4] I debated with counsel what possible interest these parties may have in the suspension of the respondent from practice, but I did not receive any answer of substance, nor do I believe that they have any direct or substantial legal interest in the outcome of the matter.
- [5] The points in limine were dismissed at the hearing of the matter, and I undertook to provide reasons, which I have now done.

MERITS.

- [6] Pursuant to a large number of complaints lodged by members of the public against respondent, the LPC commenced with its investigations into the respondent's professional affairs. The LPC appointed Mr Philasande Nyali ("Nyali") to visit respondent's firm, and to conduct an investigation into his accounting records and practice affairs. Nyali commenced his investigation by telephoning- his- offices to- make an, appointment to see respondent. He was asked by the receptionist to put his request in writing. Nyali wrote to respondent inviting him to a virtual meeting on 1 September 2021. Nyali's email to respondent went unanswered, but on 1 September 2021 he received an email from respondent stating that respondent was waiting for login details so that he could join the meeting. Despite having been sent the login details, respondent did not join the meeting.
- [7] There then followed an exhausting number of attempts by Nyali to meet with respondent, which eventually culminated in a meeting on 8 December 2021,. After that meeting Nyali sent a written- request for the- specific documents that he required to be provided to him. After many attempts to obtain respondent's cooperation, which was not forthcoming, and nearly four months later, Nyali obtained respondent's bank statements from First National Bank directly. Respondent's failure to cooperate with Nyali: is a contravention of the Act.
- [8] Nyali's investigations revealed that the respondent is a sole practitioner. His accounting needs have been outsourced to Madaliso Chartered Accountants. The practice deals predominantly with Road Accident Fund matters, conveyancing, divorce and delictual claims. Upon scrutinizing, the- respondent's trust account, Nyali realized that- there- was a substantial trust deficit. Nyali was unable to validate the trust creditors due to respondent's refusal to provide the requested accounting records, but having regard to amounts that were reportedly due to only three of the complainants, there was a trust deficit of R 803 695.41. Comparison between the reported trust creditors and the bank statements showed that there was only R 5 124.75 in the trust account as opposed to reported trust creditors of R 392 880.91. Nyali concluded that the trust creditor figures had been. manipulated in order to conceal a trust shortfall.
- [9] Respondent's answering affidavit does not explain the trust deficit. In-fact, the- answering affidavit does not deal-at all with- paragraph 12 of the founding affidavit in which these allegations are made. In these circumstances, I must accept what the LPC says to be true.[5] Respondent's only comment is to note laconically "with great concern" that there is a trust deficit. The Court shares respondent's concern, and we- would have- expected respondent to deal with the- minutiae- of the- allegations against him. Instead, respondent hid behind the general statement that his fees had not been considered when the trust deficit was calculated. Respondent did not deal with the details of the averments against him in any convincing manner.

THE COMPLAINTS

- [10] The founding affidavit details 11 complaints against the respondent. The first complaint related to a Road Accident Fund matter in which the Fund paid R 1 250 854.50 to respondent's firm. Of that amount, a total of R 774 763.21 was paid to the client. Respondent professed to the client that he had had difficulties with finalizing the costs. At 5 November 2020 the trust account had a credit balance of R 5 124.75 only, which means that there were no trust monies available to pay the balance of the funds due to the client. Respondent admits only paying the client R 774 763.21. He says he submitted an attorney/client bill to the client, but unfortunately, respondent has not taken the Court into his confidence by attaching the bill. He says that the claim is "incomplete" and that "there is money at RAF". Save for these vague averments, respondent has not answered in substance to the allegations, nor has he explained why there is a trust deficit.
- [11] The second complaint is also related to a Road Accident Fund claim. Respondent received payment of R 850 000.00 from the Fund, and paid R 600 000.00 to the client. He then received a further R 700 000.00 which he evidently did not report to the client, because the client found out from the Fund that the monies had been paid. Perusal of respondent's statement of account shows that he received a total of R 1 817 851.10 from the Fund. Of that amount, R 637 500.00 was paid to the client, and then, on 26 May 2021, some two years later, a further R 553 056.94. However, the trust account bank statements showed that as at 5 November 2020 the funds had been utilized and were no longer available.
- [12] The trust account also revealed that one K Malao, an attorney, had paid R 3 250 000.00 to respondent's trust account. Upon enquiry Malao confirmed that he had repaid a loan extended to him by respondent. Nyali makes the point that the inescapable conclusion is that the loan was repaid to the trust account because they had originally been paid out of the trust account, which would amount to theft of trust monies. Respondent gives no proper explanation regarding the complaint, nor does he explain why a loan was repaid to his trust account. I can only assume that respondent extended the loan from his trust account in the first place. Respondent acknowledges that he made an "error", and he expresses his sincere apologies.
- [13] The third complaint relates to a claim against the RAF in which R 902 496.16 was received from the fund in respect of capital and costs. Respondent's attorney/client bill claims an unspecified amount of R 399 034.71 for attorney/client fees, and unspecified 'disbursements' of R 267 751.20. Of the monies received by respondent, only R 235 710.25 was paid to the client. Respondent's defence is that there is a claim by the client's executor pending against him: in the High Court and that the LPC should "excuse" itself from the case. He also says that the complaint was not lodged in the proper form. Respondent did not answer to the substance of the complaint against him.

- [14] The fourth complaint is very much along the same lines as the first three. It concerned a claim against the Fund on behalf of a minor child. The claim was settled and R 2 934 590.00 was paid to respondent's trust account in respect of capital, and a further R 81 000.00 as interest on the capital. The latter payment respondent failed to disclose to the clients. Respondent paid R 100 000.00 to Ms. Emily Masite (apparently the child's guardian) as an interim payment, and R 2 100 942.50 to a trust created for the child.
- [15] Respondent accounted to Ms Masite, taking 25% of the capital amount as fees, without an agreement that he was entitled to do so. After the aforesaid payments were received on 24 August 2018 and 29 August 2019 respectively, respondent transferred R 3 401 295.00 on 18 September 2018 to an unknown investment account from his trust account. On 25 September 2018 the respondent paid a further R 733 647.50 to his business account. On 27 March 2019 respondent paid R 339 892.04 to the same investment account. On 23 March 2019 respondent paid R 2 071 596.60 from the investment account to his trust account. On 25 March 2019 the respondent effected payment of the same amount to the minor child's trust as referred to above, and on 26 February 2019 a further R 29 354,90 to the minor child's trust. Respondent's answer to the allegation that he paid money out of trust to an investment account is that Nyali did not obtain verification from particular clients as to the reason why the monies were transferred to the investment account. That is off course not an answer. Respondent is in the best position to provide an explanation, and his inability to do so leaves me with the inescapable conclusion that there is no satisfactory explanation.
- [16] Respondent says he received a call from one Mr. Mofomme of the Mofomme Legal Advisory Centre in respect of this claim, which caused him for some unknown reason to fear for his life. Mr Mofomme demanded that the entire amount due to the minor child's trust should be paid to the Mofomme Trust. He met with Mr Mofomme who told him that he was working with the LPC, and unless respondent cooperated with Mr. Mofomme, his internal sources within the LPC would deal with respondent harshly. Respondent discussed the matter with the LPC only to be told that Mr Mofomme was no longer practicing as an attorney. Respondent does not explain why he feared for his life., but at some stage he received a call from "Mr. name is unknown person" that he should deliver a substantial amount of cash to that person, and he did in fact did deliver a substantial amount in cash. Whether the money came from the trust account or not we are not told. Respondent does not provide any further detail on the transaction.
- [17] Respondent was told that his mandate had been terminated in this case and, that one Setshogoe would, take over the matter The latter was apparently working with Mofomme. A month later Setshegoe was killed and respondent's file disappeared from his cost consultant's offices.

[18] In a fifth complaint respondent was charged in a disciplinary hearing by the LPC, and was found guilty on a charge of overreaching on fees, and failing to account to the client within a reasonable time. Respondent's answer does not go to the merits of the matter, but rather he complains. about one of the panel members having to withdraw from the hearing because some mysterious stranger had fetched his son from school. As is the case throughout the answering affidavit,

respondent's answer is fanciful and devoid of any substantive response on the merits.

[19] In the sixth complaint respondent was instructed in March 2019 to transfer a property into the name of Ms Boitumelo Ramorula. Ms Ramorula paid the respondent R 15 000.00 in cash, into respondent's trust account. By 27 September 2021 the transfer of the property had not yet been effected, Ms Ramorula had not been refunded her money, and as we know, there were insufficient funds in the trust account to do so. Respondent's answer is simply to point to a number of impediments to finalizing the transaction. He records that he regards his mandate as being terminated, and that the client may approach another attorney. There is no tender of repayment of any fees.

[20] In the seventh complaint one Mr Maduna instructed respondent in a claim against the Fund. The sum of R 537 718.00 was paid into respondent's trust account on 22 February 2018, and a further R 203 41.11. in respect of taxed costs. Respondent's account to Mr Maduna included disbursements (also unspecified) in the sum of R 109 803.99, and attorney/client costs of R 431 594.46. Mr Maduna only received R 250 000.00 from the proceeds of the claim, and according to respondent, he still owes respondent R 50 269.34. In total, therefore, on a capital claim of R 537 718.00, respondent's fees amount to 82% of the capital. The account is simply outrageous. The LPC submits that respondent is in breach of clause 3.1 of the Code of Conduct, which requires absolute honesty from a legal practitioner, and clause 18.7 which provides that an attorney shall not overreach on fees, or overcharge a client. I agree with the LPC.

[21] One can analyse the other complaints in the same manner. One rerates to non-payment of counsel fees, but the remainder are all in the same vein and are strongly suggestive of dishonesty and overreaching. None have been substantively addressed in respondent's answering affidavit. Three specific contraventions stand out:

[21.1] The trust deficit which has not been explained;

[21.2] The "loan" made by respondent to Malao, which respondent says was a "mistake";

[21.3] The monies transferred inexplicably from the trust account into an investment account.

[22] The above three transactions make it clear that the respondent has not conducted his trust account as is required from an honest and diligent practitioner. The other complaints that relate to overcharging all leave one with the conclusion that respondent has dishonestly overreached, and has taken fees that were not properly due to him. He has also failed in a number of instances to properly and timeously report to his clients.

[23] The LPC is seeking respondent's suspension, together with the necessary ancillary relief relating to investigations. The Court merely has to find that the LPC has made out a prima facie case, though open to some doubt in order to succeed in an interlocutory

interdict. In my view there is little doubt that the relief is warranted. The LPC has prepared the customary draft order which will allow it to conduct a proper investigation, and I intend to make the draft order an order of Court.

[24] In the premises the draft order marked "X" is made an order of Court.

SWANEPOEL J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree:

GREYVENSTEIN AJ

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT Adv. Van der Westhuizen

ATTORNEY FOR APPLICANT:

Dyason Inc

COUNSEL FOR RESPONDENT:

Adv. B Matlhape

ATTORNEY FOR RESPONDENT:

M Mohube

DATE HEARD:

23 February 2023

DATE OF JUDGMENT:

1 Maart 2023

[1] Section 5 (c) of the Act.

[2] Government Notice 1266 published in Government Gazette 39540 dated 21 December 2015

- [3] Morgan v Salisbury Municipality 1935 AD 167 at 171
- [4] Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (0) at 168 -170
- [5] Moosa v Knox-1949 (3) SA 327 (N) at 33-1
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Prepared on 13 October 2026 · Esheria