

SOUTH AFRICA / JUDGMENT

South African Legal Practice Council v Mokoana [2023] ZAGPPHC 174; 32103/20 (9 March 2023)

[2023] ZAGPPHC 174

COURT

North Gauteng High Court, Pretoria

BEFORE

Makhoba, WJ du Plessis

CASE / FILE NUMBER

32103/20

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO. 32103/20

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

9/3/23

In the matter between:

THE SOUTH AFRICAN

LEGAL PRACTICE COUNCIL

APPLICANT

AND

MAGOSHI OPANA MOKOANA

(MAMAILA)

FIRST RESPONDENT

JUDGMENT**MAKHOB A J**

- 1) The applicant, in terms of the Notice of Motion, is requesting the court for the suspension of the respondent from practicing as a legal practitioner, and that the respondent's name be removed from the roll of attorneys of this court. During argument only the request for suspension was advanced.
- 2) The applicant is a body established in terms of section 4 of the Legal Practice Act 28 of 2014 ("LPA"), with full legal capacity, and which exercises jurisdiction over all legal practitioners.
- 3) The respondent is Mogoshi Opana Mokoana (Mamaila), hereinafter referred to as the respondent. He was admitted as an attorney on the 30th of October 2006, and his name is still on the roll of practising attorneys. He is practising as a legal practitioner for his own account as a sole practitioner under the name and style of Mokoana (MO) attorneys in Pretoria.
- 4) The grounds for seeking the removal of the respondent's name from the roll arise from a single complaint launched against the respondent by Ms Motseko.
- 5) In short, it is alleged that the respondent failed to account to Ms Motsego, within a reasonable time, for amounts received in a medical negligence claim, which amounts were due and payable to Ms Motseko. There were also trust deficits in the respondent's bookkeeping that he did not report to the Legal Practice Council.
- 6) In doing so, the applicant alleges the respondent contravened the following provisions:
 - 6.1) Section 87(5) of the Legal Practice Act alternatively Rule 37(2)(a) of the Rules for the Attorneys' Profession in that the respondent failed to produce his accounting records for inspection.
 - 6.2) Rule 35.5 of the Rules for the Attorneys' Profession read together with Section 87(1) of the Legal Practice Act in that the respondent failed to keep such accounting records as are necessary to fully and accurately state the affairs and business of the firm.
 - 6.3) Rule 54.13 of the Rules for the Attorneys' Profession in that the respondent did not pay the amount due to the client within a reasonable time.
 - 6.4) Rule 38.18.3 of the Rules for the Attorneys Profession in that the respondent did not ensure that the total amount of money in its trust banking account and trust cash at any date shall not be less than the total amount of credit balances of the trust credits shown in its accounting records.
 - 6.5) Rule 35.13.10 of the Rules for the Attorneys' Profession in that the respondent failed to report the firm's trust deficit to the applicant immediately.

- 7) It is common cause that the respondent pleaded guilty to the charges, and a fine was imposed, which he paid. He has also paid all the outstanding monies to Ms Motseko. It is submitted on behalf of the respondent by his counsel that he is remorseful and that he has enrolled for the practice management course under the auspices of the Law Society of South Africa. It is also his first offence.
- 8) The counsel for the applicant, during argument, suggested that in light of the above, the court suspend the respondent for a period of six months, during which time he should not be allowed to practice for his own account, but only under the supervision of a senior attorney.
- 9) The applicant submitted that by his conduct and behaviour, the respondent has damaged and affected the good standing and reputation

of the profession as a whole, that he should be suspended from practising as a legal practitioner and that his name should be removed from the roll of attorneys.

- 10) The applicant submits that the respondent is no longer a fit and proper person to practice as an attorney. While this carries weight with the court, it is not bound by it.[1] The suspension or striking from the roll lies within the discretion of the court.[2]
- 11) Furthermore, the facts on which the court exercises its discretion are to be established on a balance of probabilities.[3] The court must not consider each issue in isolation.[4]
- 12) It is clear that the respondent failed to keep proper accounting records. This is a serious contravention and courts have in the past struck such practitioners from the practising roll of attorneys [5]
- 13) The issues to be determined by this court are the following:
 - 13.1) Whether the respondent, in the discretion of the court is a fit and proper person to continue to practise as a legal practitioner;
 - 13.2) Whether under all circumstances the respondent is to be removed from the roll of attorneys;
 - 13.3) Whether an order suspending the respondent from practising for a specific period of time will suffice.
- 14) In *Jasat v Natal Law Society* [6] the court held that it must be determined by the court whether there is a likelihood or otherwise of a repetition by the practitioner of the conduct complained of and the need to protect the public.
- 15) In my view, the conduct complained of in respect of the respondent is a single complaint, though serious. He played open cards with the applicant by pleading guilty and paying the fine, and he has also paid the outstanding monies to Ms Motseko.

- 16) Furthermore, he enrolled in the Practice Management Course to correct himself. That, on its own, is a sign of remorse and a commitment to self-correct. In my view, it indicates that he is showing remorse and is prepared to change.
- 17) The nature of the conduct complained of, the fact that he is showing remorse and that it is a single complaint does not warrant the striking off of the respondent's name, but it calls for corrective measures to be imposed on the respondent.
- 18) Therefore, in my view, the respondent should not be struck from the roll of practising attorneys but should be suspended with conditions.

Order:

- 19) I propose the following order:
 1. That Magoshi Opana (Mamaila) is suspended from practicing as an attorney on his own account for 18 months on condition that he serve and is employed by another legal practitioner. That respondent immediately surrenders and delivers to the registrar of this Honourable Court his certificate of enrolment as an attorney and conveyancer of this Honourable Court.
 2. That in the event of the respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the Sheriff of the district in which the certificates are, be authorised and directed to take possession of the certificates and hand them to the registrar of this Honourable Court.
 3. That respondent be prohibited from handling or operating on this trust accounts as detained in paragraph 5 hereof.
 4. That Johan van Staden, the head: legal practitioner's affairs of applicant or any person nominated by him, be appointed as an curator bonis (curator) to administer and control the trust accounts of the respondent, including accounts related to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by the respondent at a bank in the republic of South Africa in terms of section 78(1) of Act no 53 of 1979 and /or any separate savings or interest-bearing accounts as contemplated by Section 78(2) and/or section 78(2A) of Act No: 53 of 1979, in which monies from such Trust banking 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 being hereafter referred to as the trust accounts), with the following powers and duties:

4.1. Immediately to take possession of respondent's accounting records, records, files and documents are referred to in paragraph 6 and subject to the approval of the board of control of the legal practitioner's fidelity fund (hereinafter referred to as the fund) 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 respondent was acting at the date of this order.

4.2. Subject to the approval and control of the board of control of the fund 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 the person having unlawful claims upon the trust account(s) and/or against respondent in respect of monies held, received and/or invested by respondent in terms of section 78(1) and/or section 78(2) and/or section 78(2A) of Act No 53 of 1979 (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 respondent was and may still have been concerned and to receive such monies to pay the same to the credit of the trust account(s);

4.3. To ascertain from respondent's accounting records the names of all persons on whose account respondent appears to hold or have received trust monies (hereinafter

to as trust creditors); to call upon 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 all trust creditors;

4.4. 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 subjects to the requirements of, the board of control of the fund, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of respondent and, if so, the amount of such claim;

4.5. To admit or reject, in whole or in part, subject to the approval of the approval of the board of control of the fund, the claims of any such trust creditors or creditors, without prejudice to such trust creditor's right of access to the civil courts;

4.6. Having determined the amounts which, he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the board of control of the fund;

4.7. In the event of there being any surplus in the trust account(s) of the 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 fund in terms of section 78(3) of Act No 53 of 1979 in respect of any interest therein referred to and, secondly, without, prejudice to the rights of the creditors of respondent, the cost, fees and expenses referred to in paragraph 10 of this order, or such portion thereof as

has not already been separately paid by respondent to applicant, and ,if there is any balance left after payment in full of all such claims, fees and expenses, to pay such balance, subject to the approval of the board of control of the fund, to respondent, if he is solvent, or, if respondent is insolvent, to the trustee(s) of respondent's insolvent estate;

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

4.9. Subject to the approval of the chairman of the board of control of the fund, to appoint nominees or representatives and/or consult with and/or 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

4.10. To render from time to time, as curator, returns to the board of control of the fund showing how trust account(s) of respondent has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.

5. That respondent immediately delivers his accounting records, records, files and documents containing particulars and information relating to:

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

5.2. Any monies invested by respondent in terms of section 78(2) and /or section 78(2A) of Act No 53 of 1979;

5.3. Any interest on monies so invested which was paid or credited to respondent;

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

5.5. Any insolvent estate administered by respondent as trustee or on behalf of the trustee in terms of the insolvency Act, No 24 of 1936;

5.6. Any trust administered by respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;

5.7. Any company liquidated in terms of the Companies Act, no 61 of 1973, administered by respondent as or on behalf of the liquidator;

5.8. Any close corporation liquidated in terms of the Close Corporations Act,69 of 1984, administered by respondent as or on behalf of the liquidator; and

5.9. Respondent's practice as an attorney of this Honourable court, to the curator appointed in terms of paragraph 5 hereof, provided that , as far as such accounting records, records, files and documents are concerned, respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.

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

7. That the curator shall be entitled to:

7.1. hand over to the persons entitle 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 on taxation or by agreement, in respect of fees and disbursements due to the firm;

7.2. require from the persons referred to in paragraph 8.1 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 respondent and/or respondent's clients and/or fund in respect of money and/or other property entrusted to respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;

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

7.4. wind-up of the respondent's practice.

8. That respondent be and is hereby removed from office as-

8.1. executor of any estate of which respondent has been appointed in terms of section 54(1)(a)(v) of the Administration of Estate Act, no 66 of 1965 or the estate of other person referred to in section 72(1);

8.2. curator or guardian of any minor or other person's property in terms of section 72(1) read with section 54(1)(a)(v) and section 85 of the Administration of Estate Act, No 66 of 1965;

8.3. trustee of any insolvent estate in terms of section 59 of the insolvency Act, no 24 of 1936;

8.4. liquidator of any company in terms of section 378(2) read with 379(e) of the companies Act, No 61 of 1973;

8.5. trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;

8.6. liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984; and

8.7. administrator appointed in terms of section 74 of the magistrates Court Act, No 32 of 1944.

9. That respondent be and is hereby directed:

9.1. to pay, in terms of section 78(5) of Act No 53 of 1979, the reasonable costs of the inspection of the accounting records of respondent;

9.2. to pay the reasonable fees of the auditor engaged by applicant;

9.3. to pay the reasonable fees and expenses of the curator, including travelling time;

9.4. to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;

9.5. to pay the expenses relating to the publication of this order or an abbreviated version thereof; and

9.6. to pay the costs of this application on an attorney-and client scale.

10. That if there are any trust funds available the 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, shall satisfy the curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees disbursements due to him (respondent) in respect of his former practice , and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without

prejudice , however, to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof;

11. That a certificate issued by a director of the Legal Practitioner's Fidelity Fund shall constitute Prima facie proof of the curator's costs and the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.

12. That in the event that the respondent intends to continue to practise as a legal practitioner, the Respondent shall make an application to this Court demonstrating that the infractions which brought about his suspension from practice as a legal practitioner has been corrected and further demonstrating that he is a fit and proper person to be allowed to continue to practise as a legal practitioner. This includes attending and passing a Practice Management Course.

D. MAKHOB A

JUDGE OF THE HIGH COURT

I AGREE

WJ DU PLESSIS

ACTING JUDGE OF THE GAUTENG

NORTH DIVISION, PRETORIA

APPEARANCES

For the Plaintiff:

P Moonsamie (Attorney)

Instructed by:

Iqbal Mahomed Attorneys

For the Defendant:

TF Mathibedi SC

Instructed by:

MN Moabi Attorneys

Date heard:

31/01/2023

Date delivered:

09/03/2023

[1] Kaplan v Incorporated Law Society Transvaal 1981 (2) SA762 (T) at page 781H.

[2] Jasat v Natal Law Society 2000 (3) SA 44 (SCA).

[3] Summerley v Law Society Northern Provinces 2006 (5) SA 613 (SCA) at 615B- F.

[4] Malan v The Law Society of the Northern Provinces

[2008] ZASCA 90; [2009] All SA 133 (SCA).

[5] Law Society Transvaal v Behrman 1981

(4) 5A 538 (A) on page 559E-F; Law Society Transvaal v Mathews 1989

(4) SA 389 (T) on 393 I-J.

[6] 2000 (3) SA 44 (SCA).

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