

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 570/2022

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 13 MARCH 2024
SIGNATURE

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

KAGISHO SETATI

Respondent

Summary: *Legal practitioner – attorney – failure to assist in the administration of a deceased estate – allowing investment of estate funds in dubious investments in breach of his mandate – despite this, taking own fees and allowing fees of investment advisors –*

whole of estate funds depleted – minor as sole beneficiary prejudiced – failing to account for these breaches and to keep proper books of account – repeatedly practising without fidelity fund certificates – offending conduct established – respondent no longer fit and proper to practice law – striking off appropriate sanction.

ORDER

1. The respondent, Kagisho Setati is struck from the roll of legal practitioners (attorneys) of this Court.
2. The respondent is ordered to immediately surrender and deliver to the Registrar of Court his certificate of enrolment as an attorney of this Court.
3. In the event of the respondent failing to comply with the terms of paragraph 2 above within two (2) weeks from the date of this order, the sheriff of the relevant district is authorised and directed to take possession of the certificate and hand it to the Registrar.
4. Paragraphs 3 to 10 of the order of Court dated 15 February 2022 shall remain in force.
5. The respondent is hereby further ordered:
 - 5.1. to pay, in terms of section 87(2) of the LPA, the reasonable costs of the inspection of his accounting records;

- 5.2. to pay the reasonable fees and expenses of the curator;
- 5.3. to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator aforesaid;
- 5.4. to pay the expenses relating to the publication of this order;
and
- 5.5. to pay the costs of this application on an attorney and client scale.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] The respondent is a legal practitioner. He was admitted as an attorney on 23 July 2010. Almost twelve years later, on 15 February 2022 this Court suspended the respondent from practice pending finalization of this application for his striking off, launched by the Legal Practice Council (the LPC).

The applicable principles

[2] Although the entire enquiry in a matter such as this depends on the circumstances of the particular case¹ and the particular legal practitioner, certain trite principles have been laid down by our courts.

[3] When a court considers an application of this kind, that is one where the LPC as watchdog of the legal profession applies for the striking off of a legal practitioner from the roll, it follows a three-stage inquiry.²

[4] The first stage involves the determination of whether the offending conduct has been established. This is determined on a preponderance of probabilities and is a factual inquiry.

[5] The second stage of the enquiry involves the determination of whether the practitioner is a fit and proper person to continue to practice law. This involves a value judgment by the court and a weighing-up of the conduct complained of against the conduct expected of a legal practitioner.

[6] The third and last stage involves a determination of whether the practitioner should be removed from the roll or whether any other sanction would be appropriate. The primary concern at this stage is to protect the public, rather than to punish an errant practitioner.³

[7] The approach to the second and third stages of the inquiry is informed by a consideration aimed at prevention of the erosion of professional ethics.⁴

The offending conduct: the complaint

¹ *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401.

² *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); *Malan & Another v Law Society of the Northern Provinces* 2009 (1) SA 216 (SCA) (*Malan*).

³ See *Malan* (above) at par 7.

⁴ *Hewetson v Law Society of the Free State* [2000] All SA 15 (SCA) at par 51.

[8] Before dealing with the contravention of certain sections of the Legal Practice Act 28 of 2014 (the LPA) and the LPC Rules (the Rules), I deem it apposite to deal with the principal complaint against the respondent. It is this: On 28 April 2016 a Ms S[...] was appointed by the Master as the executrix of the estate of her late sister, Ms S[...] (the deceased). The sole beneficiary of the estate was the deceased's minor child. Ms S[...] approached the respondent in March 2019 to assist her with the administration of the deceased estate. The respondent advised Ms S[...] to invest some R300 000.00 of estate funds in an investment, of which he kept the terms confidential. He did however disclose that the estate would earn interest at 27% per annum, receive quarterly payment of interest and a favourable repayment of capital at the end of the investment period. Ms S[...] provided the respondent with a mandate and the total of the estate funds were paid over. Thereafter however, Ms S[...], in her capacity as executrix and as the person who looked after the minor child, did not receive any quarterly payment, had difficulty to maintain the child and could not ascertain from the respondent the whereabouts of the estate funds.

[9] Ms S[...] referred a complaint about the above to the LPC who asked for an explanation from the respondent. His response, contained in a letter of 26 July 2019 is elucidating. It went as follows: “... *the estate was registered in 2016 and no claim for maintains (sic) nor request for same has ever been made by Ms S[...] However I believe that certain facts related to the matter are necessary to disclose to the Society so they have a better comprehension of the facts that are pertinent thereto. The estate had not gained interest since its inception. It was incumbent on myself and my fiduciary obligation to ensure that the funds of the estate grew in value whilst in my care, to avoid their diminishing value and liability to the firm ...*”.

[10] Having provided the above background, the respondent referred to the mandate which Ms S[...] had furnished and attached same to his response. The one-page mandate is not the model of lucidity but the relevant parts thereof read as follows: “*Whereby the client, J[...] S[...] in her capacity as the executor ... has appointed Setati attorneys as their agents in respect of the administration of the estate ... THE PARTIES AGREE THAT THE TERMS OF THE MANDATE AGREEMENT ARE AS FOLLOWS: 1. The client authorize the investment of the fiduciary funds into an investment that increases the value of the fiduciary funds. 2. The client holds Setati attorneys to its various fiduciary obligations, including ensuring that only credible, legal and value increasing investments of the fiduciary funds are conducted. 3. The client is informed of the various market to market investment opportunities in the listed and unlisted markets. 4. The client authorised Setati attorneys to invest the fiduciary funds with listed entities that can furnish with returns in excess of the highest interest rate offered by commercial banks 5. The client and Setati attorneys agree that the client is entitled to a gratuity payment in respect of the disbursements incurred to maintain the minor child 6. The investment firm appointed to facilitate the transaction will invoice Setati attorneys for the fees charged which shall be the sum of twenty percent of the value of the fiduciary funds, which fee is payable over the life of the investment*”.

[11] The respondent’s explanation of what he did in performance of the mandate continued as follows in his letter of 26 July 2019: “*As already alluded to the aforementioned attorneys Tonkin Clacey [the executrix’ subsequent attorneys] the monies are invested in a highly confidential and highly collateralised convertible note. Interest payment for the note are on a quarterly basis rate of 27% p. a with the capital repayment at the end of the investment period being the sum of R420 000.00. In other words the monies are being held in quoted investment on the Johannesburg Stock Exchange ...*”. The respondent

then tendered a copy of the “convertible note” but only against receipt of a confidentiality agreement “... *since the note contains highly sensitive market information ...*”.

[12] The “convertible note” surfaced during the course of this litigation. It was not from a listed company. It was a complex document signed by one Mxolisi Motau as director of Caligraph (Pty) Ltd, referred to in the note as “the Company”. The terms of the “Senior Convertible note” was to the effect that “... *the Company promises to pay to the trust account of Setati Attorneys, acting on behalf of the estate ... the amount as per the Original Principal Amount (as reduced pursuant to the terms hereof pursuant to conversion or otherwise) when due, whether upon the Maturity Date ... and to pay interest, if any, on outstanding Principal amount ...*”.

[13] The “note” provided for an “issuance date” of 28 February 2019, an Original Principal Amount of R200 000,00 and a Maturity Date of 27 February 2020. In the meantime “mandatory prepayments” of R15 000,00 per month would be paid from 31 May 2019. A curious feature was that the client could opt not to receive cash, but payment by way of ordinary shares (apparently in Caligraph (Pty) Ltd). A more disturbing feature, was that Caligraph (Pty) Ltd would also be able to “... *elect to repay in Ordinary Shares ...*”. Payment by way of shares rather than in money, would take place due to a clause providing for the “conversion” of the note at a “conversion rate” at an intricate and undecipherable “mechanics of conversion” clause.

[14] The “security” and “covenants” clauses of the note, apart from also suffering from vagueness, did not give any investor much comfort: “5 *SECURITY As security for the repayment of the Principal amount and interest, the Company shall, at its costs, procure pledge its shares interest in Go Life International, its orders or assigns, on terms and conditions acceptable to the*

Holder. The parties shall enter into a Pledge and Cession Agreement simultaneous with this agreement encapsulating the terms in this clause 6. 6. COVENANTS All payments due these Note shall rank junior to all Indebtedness of the Company and its subsidiaries and as of the issuance date, shall rank pari passu with all other notes and shall rank senior to al indebtedness of the Company ... incurred after the issuance date ...”.

[15] The respondent has never disclosed to the client fully what had happened to the funds of the estate, nor has he informed the LPC and neither has he, on the papers, despite him filing even a supplementary answering affidavit, taken the court into his confidence in this regard.

[16] Attached to the respondent’s supplementary answering affidavit, was an e-mail sent by the respondent to the LPC setting out his “records” of fees paid in respect of the investment of estate funds in the “note”. Therein he mentioned that he would furnish dates of the payments later, but he confirmed having paid himself R70 000,00 as a fee, paid one Vuyo Mpalwane of African Panther (Pty) Ltd R30 000,00 and paid a further R15 000,00 to one Bongo Mvunyiswa, also of African Panther (Pty) Ltd. This meant that of the estate funds of some R315 000.00, R115 000.00 went to the respondent and his privies and R200 000.00 contributed the “Original Principal Amount” of the investment “note”.

[17] How African Panther (Pty) Ltd fits into the picture can be gleaned from the respondent’s response to the complaint as dealt with by him in his answering affidavit: “3.8 *The LPC characterization of this investment choice by client as investment advice is entirely wrong and unfortunate. I did not provide any investment advice to client in contravention of various legislative provisions....* 3.9 *I received a concern that the funds are not generating interest and that it would be prudent to have these funds in a facility generating*

interest. I referred the client to investment specialist African Panther (Pty) Ltd and Caligraph (Pty) Ltd and these companies provided the investment advice to client. 3.10 It cannot be a correct statement of fact that: 3.10.1 I provided investment advice, 3.10.2 The funds in dispute where (sic) in trust”.

[18] At the time that Ms S[...] appointed the respondent to assist with the administration of the deceased estate, they had agreed with each other in the written mandate referred to above, that the funds recorded in the estate account amounted to R315 667,00. This is the amount which the executrix’ attorney demanded to be re paid and which the LPC wanted the respondent to account for.

[19] The auditor appointed by the LPC to investigate the respondent’s books of account (and who as curator in terms of the interim suspension order, furnished the court with a report) Mr Reddy, could find little trace of the R315 667,00. He found a deposit of R30 000,00 received into the respondent’s trust account dated 13 March 2019 and marked “Corporate fee/vy/est” and a payment on the same day and for the same amount, marked “S[...] CP Fee 1.2”. The auditor further found 37 payments from the respondent’s trust bank account in amounts ranging from R1, 000.00 to R10 000,00 on odd dates from 26 June 2019 to 31 October 2020 totaling R136 600.00. It could not be established whether these payments, all marked “S[...]/CP Fee 1.2” were made to the estate account or not.

[20] It appears from these facts that the respondent has grossly failed in his fiduciary duty (which he had accepted) in assisting the executrix of a deceased estate in administering that estate. “On his watch” so to speak, virtually the totality of estate funds had been invested in a dubious investment in respect of which the respondent (and others) had been paid fees for themselves but which investment ultimately led to a devastating loss for the estate and a minor.

[21] The above resulted in a clear breach of the respondent's mandate, not only to assist in the proper administration of the estate but to invest funds in a listed company. These breaches are exacerbated by the respondent's false portrayal to a fellow attorney (who later acted on behalf of the estate) that the funds had indeed been invested in a listed company.

[22] When confronted with these allegations, the respondent's partial admission of liability for what could only be described as a gross dereliction of his duties as a legal practitioner. Contained in heads of argument delivered on his behalf, reads as follows: "*The respondent's decision to direct Ms S[...]s investment may attract delictual liability for the failure to deal with the funds appropriately, however it is doubtful in the context of proceedings directed at the striking off of an attorney for lapse of professional judgment in the handling of client's instructions*".

[23] This attitude, repeated by the respondent in the various affidavits delivered by him, misses the point. When a practitioner receives an application for his suspension or striking off, he should realize that the time for telling the truth has arrived.⁵ A practitioner must then declare the relevant facts fully and raise defences in a manner that evinces complete honesty and integrity.⁶ Where allegations and evidence of misconduct have been presented against a legal practitioner, they should not be brushed aside or side-stepped. The legal practitioner is expected to respond meaningfully to those allegations and to furnish a full and proper explanation.⁷ The bald allegation that the client had been referred to Black Panther and Caligraph without dealing with the respondent's own role, his further administration of the funds and the estate, how he had calculated his fees, his lack of accounting to his client and the ultimate fate of the funds do not satisfy the disclosure obligations of the

⁵ *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 656D.

⁶ *Law Society of the Northern Provinces v Sonntag* 2012 (1) SA 372 (SCA) at 380 C - I.

⁷ *Hepple v Law Society of the Northern Provinces* 2014 JDR 1078 at par 9.

respondent. It demonstrates either a lack of insight in the manner in which the estate entrusted to him had suffered a loss or a deliberate attempt at avoiding to deal with the issue.

Offending conduct: Lack of fidelity fund certificates

[24] The respondent accused the LPC of “recalibrating” its version regarding the respondent’s lack of having fidelity funds certificates in place for various periods. I must say I did not read the LPC’s papers like that, but even so, the respondent had not only delivered an answering affidavit, but a supplementary answering affidavit and even a “submission of further evidentiary documentation affidavit”. He therefore had ample opportunity to address any alleged “recalibration”, more than ordinarily afforded to a respondent.

[25] Quite aside from the above contention, the evidence has established that the respondent had practiced without a fidelity fund certificate for multiple years. Those are 2013, 2014, 2015, 2021 and thereafter until his suspension. In addition, mainly due to the late submission of audit reports or payment of fees, he also practiced without a fidelity fund certificate for the periods of January/February 2012, January/March 20216, January/March 2018 and January 2019.

Offending Conduct: record keeping and trust account administration

[26] The LPA demands that a practitioner keeps proper accounting records in respect of his (or her) practice.⁸ In terms of the LPA further, when requested to do so by an investigating committee of the LPC, a practitioner is obliged to produce his books of account for inspection.⁹

⁸ Section 87 of the LPA.

⁹ Section 37(2) of the LPA.

[27] Despite the above, Mr Reddy, being the chartered accountant and auditor in the employ of the LPC tasked to conduct an inspection of the respondent's affairs and books of account, experienced extreme difficulties in obtaining access to the accounts. After no less than 21 attempts to engage the respondent in order to perform a full investigation, the respondent had still not provided his full accounting records and Mr Reddy had to complete a report from partial records and from bank statements.

[28] The result of the above is that Mr Reddy was forced to conclude (inter alia) as follows:

“11.15 The current trust position of the firm is unknown and the practitioner has failed to submit an auditor's report to the LPC for the year ended 29 February 2020. The practitioner is thereafter not eligible for a fidelity fund certificate since 1 January 2021.

11.16 Considering that the practitioner has failed to pay over monies entrusted to him and has failed to account for said monies, I am of the view that the firm poses a risk to its clients, future clients of the firm as well as the Legal Practitioners Fidelity Fund”.

Conclusion regarding the offending conduct

[29] The respondent made much of the fact that he had been accused of running an investment practice and of providing financial or investment advice contrary to statutory provisions, all of which he denied, but quite apart from these accusations, I find that, on a conspectus of all the evidence, the respondent is guilty of at least the following offending conduct: breach of a clear mandate given to him by a client, failure to account fully, properly and timeously to that client. In doing so, the respondent also breached Rule 3.1 of the Code of

Conduct¹⁰, by failing to maintain the highest standards of honesty and integrity as well as Rule 3.3 of the Code of Conduct by failing to treat the interests of a client as paramount. Various rules of the LPC have also been breached, such as failing to pay annual fees to the LPC timeously (Rule 4); failing to keep proper accounting records (Rule 54.6), failing to retain such records for at least seven years (Rule 54.9), failing to keep a monthly updated record of his practice (Rule 54.10) and failing to submit his audit reports (Rules 54.20 – 54.28). As referred to above, the respondent also breached sections 37 and 87 of the LPA in having failed to keep proper books of account and to produce documents in respect thereof for inspection. The offending conduct has therefore sufficiently been established.

Fit and proper?

[30] Having determined that various instances of offending conduct have been established, I now turn to the question of whether these rendered the respondent no longer to be a fit and proper person. It is trite that when this court admits a practitioner, (whether in terms of the LPA or its predecessor, the Attorneys Act¹¹) to practice as an attorney, he (or she) is put in a position of trust regarding the affairs of his clients. The court is entitled to demand the highest standards of professionalism, honesty and integrity from a legal practitioner who is an attorney, who is also regarded as an officer of the court. In fact, not only the courts, but the law has always demanded the highest standards of good faith from an attorney regarding the affairs of those who place their trust in the practitioner.¹²

[31] The offending conduct in this matter is no mere error of judgment or negligent investment, it constitutes a direct breach of an instruction to assist

¹⁰ Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities, promulgated in terms of the LPA.

¹¹ No 53 of 1979.

¹² See, inter alia *Law Society, Transvaal v Visse and Others*, 1958 (4) SA 115 (T) at 131 A-C.

with the administration of a deceased estate. If funds are to be invested until the finalization of an estate, if it is not done in an interest-bearing trust account¹³, it must at least be done prudently and with strict adherence to the attorney's mandate. In the present matter, the funds were not invested in a listed company as per the respondent's own version of his mandate.

[32] Apart from the clear breach of a mandate, the respondent failed to disclose what steps he took to ensure the prudence or safety of the investment, irrespective of whether the advice was forthcoming from the hitherto unknown company African Panther (Pty) Ltd. The respondent further failed to perform any follow-up of the security and monthly interest payments, the alleged conversion or, in fact, what had ultimately become of the investment. He has therefore, not only breached his mandate, but also the trust placed in him and the remainder of the duties to ensure his client comes to no harm. As if this was not enough, the respondent took care that he and the representatives of the investment company be handsomely rewarded. This he did without explanation or remorse.

[33] The above approach by the respondent to the affairs of his client is exacerbated by thereafter attempting to withhold the truth about his conduct from the client, her subsequent attorneys and even the LPC and its auditor. Having regard to the paucity of explanations furnished in the papers, the respondent has even kept the court in the dark as to what had happened with the estate's funds. This conduct falls woefully short of the honesty and integrity expected from a legal practitioner.

[34] When measuring the respondent's persistent conduct and attitude to the complaints against him against the standard expected of him, I find that the respondent is no longer a fit and proper person to practice law.

¹³ As provided for in Section 86 of the LPA.

Sanction

[35] The final step in the court's enquiry is to determine whether a striking off is warranted or whether a suspension from practice or any other sanction would be more appropriate.

[36] Considering this aspect also involves taking into account that it did not bother the respondent that, for long and numerous times in his practice, he saw fit to practice without a fidelity fund certificate, thereby placing clients and members of the public at financial risk. He has, since the commencement of the investigation against him, not taken any steps to remedy the situation, to have his books brought up to date or to assist the LPC in making a final and accurate determination of what his practices' financial position was up to when he was suspended.

[37] There is every indication that should the respondent be allowed to resume practicing, that this kind of conduct would be repeated. I am fortified in this view by the lack of insight or appreciation of this kind of conduct displayed by the respondent. Rather than seeking to make amends or remedy the position, he still maintains that it was improper for the LPC to proceed with the present application rather than to conduct a disciplinary investigation and hearing as proposed in prior litigation.

[38] In this regard, the correct position is the following: the Supreme Court of Appeal reinforced the viewpoint of the various divisions of the High Court that an application to strike a legal practitioner from the roll may be proceeded with without first conducting or finalizing a disciplinary hearing and confirmed that the provisions of section 44 of the LPA were in line with the section 34 of the Constitution. The test is simply whether the practitioner is at the relevant time no longer considered a fit and proper person in the opinion of the Council

dealing objectively with the facts before it.¹⁴ “... *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*”.

[39] This view has more recently been reiterated in *South African Legal Practice Council v Mphanama*¹⁵ as follows: “*The right of the Legal Practice Council (“the LPC”) to approach the Court for relief as sought in the present application before us does not depend on its prior holding of a disciplinary enquiry against the legal practitioner concerned*”. The present application was therefore validly launched and this “defence” of the respondent must fail.

[40] The respondent’s conduct involved elements of deception and dishonesty and this, coupled with his repeated disregard of how trust funds¹⁶ are to be accounted for, merit his removal from the roll as the most appropriate sanction.

Costs

[41] It is trite that in matters of this nature, which are sui generis, the role of the LPC is not that of a party, but of a custodian of the legal profession and that it should be entitled to its costs.¹⁷

Order

[42] The following order is made:

¹⁴ See: *Law Society of the Northern Provinces v Morobadi* [2018] ZASCA 185; [2019] JOL 40677 (SCA) at paragraph 25

¹⁵ (9875/2022) [2022] ZALMPPHC 70 (13 December 2022) per Makgoba JP at par 5.

¹⁶ See: *Law Society, Transvaal v Visse* (above) at 132 D-G and *General Council of the Bar v Geach and Others* 2013 (2) SA 52 (SCA).

¹⁷ *Law Society of the Northern Provinces v Mogami & Others* 2010 (1) SA 186 (SCA).

1. The respondent, Kagisho Setati is struck from the roll of legal practitioners (attorneys) of this Court.
2. The respondent is ordered to immediately surrender and deliver to the Registrar of his certificate of enrolment as an attorney of this Court.
3. In the event of the respondent failing to comply with the terms of paragraph 2 above within two (2) weeks from the date of this order, the sheriff of the relevant district is authorised and directed to take possession of the certificate and hand it to the Registrar.
4. Paragraphs 3 to 10 of the order of Court dated 15 February 2022 shall remain in force.
5. The respondent is hereby further ordered:
 - 5.1 to pay, in terms of section 87(2) of the LPA, the reasonable costs of the inspection of his accounting records;
 - 5.2 to pay the reasonable fees and expenses of the curator;
 - 5.3 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator aforesaid;
 - 5.4 to pay the expenses relating to the publication of this order;
and
 - 5.5 to pay the costs of this application on an attorney and client scale.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree

J L BHENGU
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 21 November 2023

Judgment delivered: 13 March 2024

APPEARANCES:

For the Applicant: Mr R Stocker
Attorney for the Applicant: Rooth & Wessels Inc., Pretoria

For the Respondent: Adv M R Maphutha
Attorney for the Respondent: GM Tjiane Attorneys Inc., Pretoria