IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 017076/2023

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED. □

SIGNATURE

16/01/2024
DATE

In the matter between

LEGAL PRACTICE COUNCIL OF SOUTH AFRICA **Applicant**

And

BOUWER, JOHAN NICOLAAS **Respondent**

Coram: Thobane AJ *et* Francis-Subbiah J

***Heard on*:** 17 October 2023

This judgment was handed down electronically by circulation to the parties' representatives by mail, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time of hand down is deemed to be **16 January 2024.**

JUDGMENT

THOBANE AJ,

Introduction

[1] The Applicant, the Legal Practice Council of South Africa, (***"the Council"***) established in terms of section 4 of the Legal Practice Act No. 28 of 2014[1], (hereinafter referred to as ***"the Act"***) launched an application in this Court in which it sought, the urgent suspension of the Respondent (Part A). The Applicant further sought the usual ancillary relief, namely and in summary form;

1.1. Delivery of the Applicant's certificate of enrolment as an attorney to the registrar of this Court within two weeks, failing which the sheriff be authorised to take possession thereof;

1.2. That the Respondent be prohibited from handling or operating his trust account, subject to the appointment of a *curator bonis,* whose powers are set out in detail in paragraph 6 of the Notice of Motion;

1.3. That the Respondent deliver his accounting records, records, files and documents with details of receipts, payments, investments, interest on investments,

[1] "Establishment of Council
4. The South African Legal Practice Council is hereby established as a body corporate with full legal capacity, and exercises jurisdiction over all legal practitioners and candidate legal practitioners as contemplated in this Act."

deceased and insolvent estates details and further that should he fail to comply, the sheriff be authorised or empowered to search for and take possession thereof;

1.4. That the Respondent be removed from the office of;

1.4.1. Executor of any estate;

1.4.2. Curator or guardian of any minor;

1.4.3. Trustee of any insolvent estate;

1.4.4. Liquidator of any company;

1.4.5. Trustee of any trust and

1.4.6. Liquidator of any Close Corporation.

1.5. That the curator be given powers to deal with records, files and documents for the determination of taxation, inspection fees and disbursements due to the firm including publication of the orders of this Court in newspapers and the eventual winding up.

[2] The Applicant further seeks, (Part B), the final suspension of the Respondent on such terms as the Court may deem appropriate alternatively, that his name be struck from the roll of Legal Practitioners. Finally, the Applicant seeks, while the suspension stays in place, payment of;

2.1. Reasonable costs of inspection of the Respondent's accounting records;

2.2. Reasonable fees and expenses of the curator;

2.3. Reasonable fees and expenses of any person engaged and/or consulted by the curator

2.4. Costs of publication of any order in this matter including any abbreviated version thereof;

2.5. Costs of the application on an attorney and client scale.

[3] The matter served before the Urgent Court on 30 March 2023, whereupon judgment was reserved by Minaar AJ. On 03 April 2023 judgment dismissing the application for want of urgency was handed down. The Court declined a request by the Applicant to award costs on attorney and client scale against the Respondent and also declined a similar request by the Respondent that punitive costs be awarded against the Applicant, which would include the costs of senior counsel. Instead the Court directed that each party pay its own costs.

The complaint

[4] On 08 August 2020 the Applicant received a written complaint from Ms. Renate Louw ***("the Complainant"),*** daughter of the late Erica Steenberg and William Adriaan Steenberg. Erica Steenberg passed away on 08 June 2013 and the complainant's father was appointed the executor of her estate. In turn the Respondent was appointed the administrator of the deceased estate.

[5] On 05 March 2018, three months' shy of five years, the complainant and her brother consulted the Respondent with the view to getting progress on the estate matter. They were informed by the Respondent that;

5.1. He had opened an estate bank account with Mercantile Bank, to which account funds pertaining to the estate were deposited;

5.2. Before distribution of the funds could take place, there were issues that were to be canvassed with the Master of the High Court. The Respondent did not disclose what those were;

5.3. He had been instructed by the executor that pending further information from the Master of the High Court, the funds were to be invested in an interest bearing account;

5.4. He had ceased to practice and that his trust account was closed on 20 February 2018;

5.5. During 2018 the Respondent failed to communicate with the complainant to appraise them of developments in the matter;

5.6. Obviously aggrieved, the complainant approached the firm Snyman Incorporated for their assistance and importantly for the Respondent to prove that the funds were still invested. The Respondent failed to satisfactorily deal with the queries directed at him by that law firm;

5.7. The Respondent repeatedly stated that he was unable to pay because he was not in possession of a fidelity fund certificate, from his previous firm, blaming the Applicant for his inability to get one.

[6] When the complaint was at first referred to the Respondent, he failed to co-operate with the Legal Practice Council. Council instructed Mr. Philasande Nyali (***"Nyali"***), a Chartered Accountant, to inspect the Respondent's accounting records. Nyali conducted an investigation and filed a report dated 23 September 2022. Before the report could be filed however, the Applicant went through the following hoops;

6.1. On 20 January 2022 the Respondent was informed by the Applicant that they would like to schedule an appointment. In turn the Respondent asked for the details of the complaint to be sent to him;

6.2. The parties agreed to meet on 7 February 2022. Indeed, a meeting took place at the offices of the Applicant. The mandate of the inspection was explained to the Respondent and he confirmed that he understood it;

6.3. On 08 February 2022 Nyali requested certain information from the Respondent, however the Respondent supplied such information more than a month later and in

addition, such information was incomplete. The Respondent gave essentially three reasons why he was not prepared to provide such information;

6.3.1. he needed a Fidelity Fund Certificate to access the trust investment account (this is not true);

6.3.2. he was not prepared to disclose his business account information to the applicant (the rules of the Applicant oblige him to);

6.3.3. he needed the executor in the deceased estate to consent to the disclosure of information to the Applicant; (also not true in that the Applicant is statutorily permitted to obtain such information directly from the bank without the consent of the executor).

6.4. The Respondent failed to provide Nyali with bank account details in respect of the account of the Estate Late Erica Steenberg. Consequently, Nyali made direct contact with the bank and requested such information in terms of section 91(4) of the Legal Practice Act, and as a consequence, the inspection was confined to the limited information available. It is on the basis of that limited information that this matter will be assessed together with any explanations proffered by the Respondent. It is perhaps worth noting that the Respondent could have provided more and better information but chose not to.

[7] When the meeting between Nyali and the Respondent eventually took place, the Respondent disclosed the following facts;

7.1. that he reported the estate as per instructions and that unbeknown to him the executor disposed of immovable property, proof in respect of which is awaited;

7.2. he needed to do a redistribution agreement between the executor on the one hand and the complainant and his brother on the other;

7.3. the complainant and his brother needed a cash advance in 2018 and that money is still available in an investment account plus interest;

7.4. he was going to make contact with the complainant to resolve the matter and to distribute the funds.

[8] Despite the Respondent's lack of co-operation, Nyali was able to ascertain certain facts and also obtain information directly from the bank that held the estate late account, Mercantile Bank, statements which revealed that,

8.1. R809 720-14 in total had been received from various policies into the estate account;

8.2. R776 000-00 was paid to a call account and R30 000-00 to a different account. Before payment was made into the call account it had a balance of R995-00.

8.3. between 13 June 2014 and 28 January 2015 the Respondent transferred the money out of the call account to various accounts, namely; to his firm's trust account R90 937,12; to BW Lubbe Bowens Inc. R439 000,00; to BCJ Nonyane Bouwer R 101 116-57 and to FJ van der Merwe R30 780-00.

8.4. after all the above payments were made, the balance in the call account was R996-77 as at the 28 February 2015

8.5. the call account was closed on 12 April 2018.

It is clear from the above transactions that the estate money was no longer in the call account.

[9] Nyali was able to also ascertain that the estate late Erica Steenberg bank account had a debit balance of R1 201-32 as at 31 August 2022. This means the estate funds were neither in the call account nor in the estate account. Nyali also inspected the trust account of the respondent and was able to ascertain that the funds were not there either as at 28

February 2018. The appellant's firm was closed on 11 June 2018 with the funds unaccounted for.

[10] The Applicant, in light of the Respondent's admissions, which I will get to shortly, is of the view that the following is common cause;

10.1. that the estate received R 809 720-14;

10.2. that of that amount R 806 000-00 was withdrawn;

10.3. that the estate money was utilized for the benefit of the Respondent's other clients' needs;

10.4. that since the launching of the application he has been trying to make payment to the Applicant/Complainant, without success.

Respondent's case

[11] The Respondent raised a number of preliminary points which I will not repeat in detail, suffice to say they are technical in nature and barely go to the merits of the complaint against him. The first of such points was urgency of the suspension application, which point was decided in the Respondent's favour by Minaar AJ. The preliminary points were argued along the merits of the main issue and no ruling was made at the time. I deal below with the ruling on these points as well as provide reasons for the ruling. Other than urgency the other points are the following;

11.1. The Respondent attacks the resolution of 21 November 2022 which according to extracts of minutes, authorises the attorneys of the Gauteng Provincial Office of the Legal Practice Council, to apply for the Respondent's urgent suspension as a legal practitioner and that someone be authorised to sign the necessary documents to facilitate such suspension. He says the resolution is defective and cites two reasons;

11.1.1. Firstly, that his reading of the resolution suggests that attorneys of the Gauteng Provincial Office of the Legal Practice Council seem to be instructing the South African Legal Practice Council and in his view that is the entity that brought the application, which it cannot be the case;

11.1.2. Secondly, that he cannot get around how the Gauteng Provincial Council Office can give an instruction to the Legal Practice Council, as it is clear that the South African Legal Practice Council is the one that brought the application;

[12] The Respondent however is reading into the resolution what the resolution does not say, possibly so as to be able to advance the argument of defectiveness of the resolution, while knowing very well that such a posture is inconsistent with established protocols but moreover, while knowing very well that he held a meeting with Nyali and even wrote a letter on 30 March 2022 to the Legal Practice Council Gauteng Office. The extract from the minutes, to which the Respondent refers, which is on the letterhead of the Legal Practice Council is couched in very simple and plain language, it says;

"***IT WAS RESOLVED BY THE COUNCIL THAT:***

1. *the attorneys of the Gauteng Provincial Office of the Legal Practice Council, be instructed to apply to Court for the urgent suspension of attorney Mr Johan Nicolaas Bouwer in his practices a legal practitioner AND THAT;*
2. *the Chairperson and/or any other member of the Executive Committee be and they are hereby authorised to sigh all documents necessary to give effect to this resolution on behalf of theCouncil.*

CERTIFIED TO BE A TRUE COPY."

It is clear from the extract of the minutes that the resolution comes from a meeting of the Gauteng Provincial Office of the Legal Practice Council which was held on 21 November 2022. Equally clear is that the attorneys of the Gauteng Provincial Office of the Legal Practice Council, are, through the resolution, instructed to apply to Court for the urgent suspension of the Respondent. Lastly, it is clear that the Chairperson and/or any member of the Executive Committee is authorised to sign documents. Nowhere is an instruction given to the South African Legal Practice Council, as the Respondent postulates and/or argued, by attorneys. There is no merit to this preliminary point and accordingly it must fail, also for reasons that are linked to the next point which I deal with immediately below.

[13] The Respondent challenges the authority of the Chairperson of the Gauteng Provincial Council, Ms. Puleng Magdeline Keetse (Keetse), on the basis that she is not authorised to launch an application on behalf of the South African Legal Practice Council. On that basis and for this reasons it is said the application is defective and should be dismissed with costs on a punitive scale. This argument is also without merit for at least two reasons;

13.1. in the Respondent's heads of argument[2], the Respondent makes a concession that Keetse as per paragraph 2 of the resolution, is authorised thereby, to sign all necessary documents to give effect to the resolution. I am mindful of the fact that in supplementary heads the Respondent makes a complete turn around and asserts total lack of authority on the part of Keetse;

13.2. his assertion is nevertheless defeated by circumstances that are peculiar to his counsel Mr. Georgiades SC, who represents the Respondent in these proceedings. A brief historical perspective is apposite;

13.2.1. Mr. Georgiades represented the South African Legal Practice Council in the Supreme Court of Appeal in a matter involving the South

[2] CaseLines 02-21 paragraph 6.

African Legal Practice Council, the Limpopo Provincial Council and practitioners who were facing various infractions of the Legal Practice Act[3];

13.2.2. the opening paragraph of the judgment which was handed down and in our view is very apposite reads as follows;

> *"[1] On 25 October 2021, the Limpopo Division of the High Court, Polokwane (the high court) dismissed an urgent application for the suspension of various legal practitioners, brought by the statutory regulator, the Limpopo Provincial Council of the South African Legal Practice Council (the Limpopo LPC), the appellant before us. The first respondent is Chueu Incorporated Attorneys (the firm), the law firm of which the second to eighth respondents were directors. The Limpopo LPC sought to suspend the second to eighth respondents from practising as attorneys for a period of 18 months pending the finalisation of a disciplinary enquiry into the alleged misconduct of the respondents, and certain interim relief related thereto."*

13.2.3. it is appropriate to explain what all this means by way of drawing parallels with this matter, which in my view will bring things into better perspective. The Limpopo Provincial Council represented by Mr. Georgiades SC, counsel for Respondent in this matter, took a resolution to suspend legal practitioners on 25 October 2021, for a period of 18 months pending its applications for striking them off from the roll of legal practitioners. In drawing parallels, the Gauteng Provincial Council as evidenced by 'A1' in this matter, took a similar resolution to suspend the Respondent on an urgent basis pending an application for a striking from the roll. It is worth noting that the resolution was by the Limpopo Provincial

[3] Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others (459/22) [2023] ZASCA 112 (26 July 2023)

Office and in this case it was by the Gauteng Provincial Office. In both instances the SALCP was the Applicant. There were other orders but the Limpopo Provincial Office was *inter alia* hit with a punitive costs order by the Limpopo High Court and the High Court gave an order that a suspension order was not warranted.

13.2.4. the South African Legal Practice Council was not happy with the outcome and took the matter to the Supreme Court of Appeal (the SCA). The SCA made an observation, similar to one that we make in this case, that;

> *"[19] The respondents did not deal with the merits of the application, although some raised points of a technical nature. It was argued that the requirements of an interim interdict had not been met and that the chairperson of the Limpopo LPC had no authority to launch the proceedings.*
>
> *[20] This last point in limine was upheld by the high court, which found that the resolution to launch the proceedings was fatally defective, in that it was signed only by the chairperson of the Limpopo LPC. It held that the issue was not whether the chairperson had the necessary authority to act, but whether the institution of proceedings was authorised by the Council. The high court found that the Limpopo LPC had failed to produce any evidence that the other members of the Council had authorised the institution of proceedings, in that no attendance register was attached, nor were confirmatory affidavits filed. In concluding that there was no authorisation, the high court placed reliance on Corbett J's judgment in Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd."*

13.2.5. The SCA having heard the parties, which included Counsel for the Respondent in this matter, who would have argued, *inter alia,* in the SCA matter, that technical defences are, as *in casu,* unsustainable, concluded that challenges to authority ought to be done through Rule (7)(1) of the Uniform Rules of this Court. The challenge to the authority of Keetse is therefore without merit. What is astonishing though is why would counsel having defeated that argument in the SCA, raise the same argument in this matter knowing very well that the SCA has decisively pronounced itself. The SCA said the following on the issue;

> *"[21] Since then, the issue of authority has been dealt with in a number of decisions of this Court. The position is now established that the manner to challenge the authority of a litigant is to utilise rule 7(1) of the Uniform Rules of Court. The original understanding of rule 7(1) was that it only applied to the mandate provided to attorneys. However, this Court in Unlawful Occupiers, School Site v City of Johannesburg [(Unlawful Occupiers), citing Eskom v Soweto City Council and Ganes and Another v Telecom Namibia Ltd, held that the remedy for a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in rule 7(1).*
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> *[22] In Unlawful Occupiers, the founding affidavit of the deponent was confined to stating that he was '. . . duly authorised by delegated power to bring this application . . .'. This purported authorisation was challenged by the respondent. In reply, the deponent produced a resolution of the municipal council, in consultation with the director for legal services, authorising him to launch the proceedings. This Court found that there was rarely any motivation for deliberately launching an unauthorised application. In any event, once a resolution, or other*

document proving authority, had been produced that is where the challenge ends."

[14] The Respondent further asserts that he does not have a trust account, and does not possess accounting records of Bouwer Malherbe Inc. in addition, he argues, the records sought are not specified and it appears to him that the Applicant simply used "cut and paste" methods to seek information or accounting records, consequently, he is unable to respond or comply. The Respondent knows very well and precisely what information is sought from him, for he knows as a senior practitioner, of the many obligations that have been placed on his shoulders. Instead of providing information he obfuscates and diverts attention. Nothing stopped the Respondent from providing a detailed exposition of the estate account. But most importantly the investment account complete with a schedule of interest and profit from loaning the money out. Among other things the Respondent asserted that the Applicant was not entitled to records of the estate account. Again being obstructionist. He is an attorney, an officer of this Court who, due to the office he occupies, was granted authority, through the power of attorney, to administer a deceased estate as is common case in this matter.

[15] In the answering affidavit, the Respondent made no effort whatsoever to proffer any explanation to Nyali's findings that the estate money, once moved to the call account, payments were made in tranches to various accounts including his trust account. He simply admitted the contents of the paragraphs. It was only in the supplementary answering affidavit, filed after the Respondent's Notice in terms of Rule 35(1), of the Uniform Rules, that he explained some of the transactions. To Nyali's finding that he transferred moneys to two law firms he explained that it was not true that he effected a transfer. He explained that at the time he would have had to physically visit the branch to complete a transfer slip, which he did. That he had transferred the money was not an issue he challenged. Nyali had found, among others, that money was paid to BW Lubbe Bouwer Inc. The Respondent explained

that he could to a certain extent recall the file of Lubbe. Lubbe sold his house, and the purchaser (a Smith), deposited a "certain amount" into the trust account of the firm as a deposit. As he had in addition been given a guarantee for the balance, he advanced in total R439 000-00 for the benefit of Lubbe. When the property was registered, he simply held on to the proceeds, together with unspecified interest. I pause to mention that Mr. Hlalethoa had argued before us that the Respondent was linked to the law firm and that it bore his name. He did not deal with that issue before us.

[16] Again in the matter of BCJ Nonyane Bouwer, a firm which bore his name and to which he had a connection as Mr Hlalethoa argued, which point he failed to explain before us, the Respondent paid a sum of R 101 116-00. On that payment he explained that Miss Nonyane was a friend or family member of one of the employees at his law firm. The firm attended to the transfer of property and Miss Nonyane had supplied the firm with a trust deposit or a bank guarantee for the purchase price. Money was advanced for her to obtain a clearance certificate and as soon as transfer took place money was recovered with interest. We make the observation that the Respondent has simply been not forthcoming with information and the Court gets the impression that even in instances where circumstances beg for an explanation from him, he fails to rise to the occasion of taking the Court into his confidence. In this instance if Miss Monyane was a friend or family member of one of the employees of the firm, and the firm bore Miss Monyane's name, more information's was required from the Respondent but sadly he was not for forthcoming.

[17] The Respondent did not deal with payments to his trust account which had in any event different figures and therefore contradictory. He also never dealt with those JF Van Der Merwe, or the pressing fact that the estate account was sitting with a debit balance. Or even the current location of the estate funds and what has since accrued to it in the form of profit

or interest, after so many years seeing that the call account no longer had the money and the trust account had since been closed.

[18] The Respondent's version is that he received instructions to handle an estate during 2013 after the deceased, Erica Steenberg, had died on 8 June 2013. The deceased had two children. He accepted the instruction and was handed all relevant documents. There was a will but the person appointed therein as an executor was predeceased and another person had to be appointed. The Master eventually appointed the Respondent's client as an executor. On his part, the Respondent obtained a power of attorney and opened an estate bank account with Mercantile Bank.

[19] He did the necessary and reported to his client, who in turn reported to him that his relationship with the children between him and the deceased, (the complainant and her brother), was strained. He did all that was necessary and in the process advised his client that he might need to approach the High Court for an order directing the Master of the High Court to accept a duplicate Will for purposes of administering the estate. He drafted the application, he says and client delayed considerably on that issue. They discussed the "child share" principle with client which in the end meant the client was supposed to make a contribution to the estate.

[20] He prepared a redistribution account but in the interim the client had sold immovable property belonging to the estate, which was at Weltenvredenpark, without his involvement. He prepared a First and Final Liquidation and Distribution Account and filed same with the Master. Using his experience in the administration of estate space, as he put it, he used the money to *"assist other parties financially on short-term basis and in most instances, estate money was utilised to assist clients financially with sale and purchase of immovable*

property". As soon as money came into the estate account he had a discussion with the executor and they agreed that he may divert the funds to either an investment account or to advance it to other parties on a short term basis thereby generating interest for the estate. It would seem that there was agreement, on the version of the Respondent that this was the correct path to take.

[21] The Respondent identifies the following transactions as having been assisted by the proceeds from the estate account, at a time when the estate, on his estimation, was valued at R2.5 million;

21.1. in one instance, a gentleman sold immovable property, and immediately bought another immovable property which he immediately sold and thereafter acquired another property. He was aware of the profit that would accrue to the estate on the one hand and was aware of the lack of risk associated with the transition on the other hand. The Respondent does not specify the amount invested as well as the profit and interest that would accrue or that did in fact accrue to the estate;

21.2. in another instance and in what the Respondent refers to as the Nonyane file, an unspecified amount was payable by a seller to the City of Johannesburg so as to obtain a clearance certificate. No amount is specified and no details are given about how the deceased estate benefitted from the transaction. It is nevertheless asserted by the Respondent that estate moneys were paid back to the estate.

21.3. the Respondent performed many other such transactions, on his version, they are however not listed and no details are provided about the benefit to the estate. The client was at all times provided with details of each and every transaction entered into he says.

[22] Somewhere in November-December 2019 his computer system was hacked and all computer information was lost. Some information could be recovered but all the information pertaining to the estate was lost. In addition, the client changed his mobile phone number and his Telkom number was discontinued, he therefore struggled to contact the client. He also could not obtain consent from the Applicant for purposes of contacting the complainant. Besides, he owed allegiance to the client and had no obligation to speak to the complainant. When the client terminated his mandate and instructed him to hand the file over to Snymans Incorporated, he in turn deemed his instruction terminated and wanted to pay the estate proceeds into the trust account of Snymans Inc. but was denied of that opportunity.

[23] The Respondent admits that he appropriated at least R 30 000-00 for himself as professional fees for services rendered in respect of the High Court application, which I surmise, was for an order to direct the Master of the High Court to accept the duplicate Will for purposes of administering the estate. The client however, never got around to signing the founding affidavit and the application never materialised. The Respondent nevertheless asserts that his trust account was never a call account. He confirms nevertheless that he transferred R 806 000-00 out of the account. What stands out however is that elsewhere, money that was transferred into the Respondents's trust account is recorded differently.

[24] Another challenge that the Respondent mounts is directed or aimed at the process of his referral to Court and has sections 38, 39, 40, 41, 43 and 44 of the Legal Practice Act, as its backdrop. The challenge is multifaceted and is equally multi-pronged. Firstly, it is that the implication of the striking from the roll of the urgent application to suspend him by Minaar AJ, is that the section 43 process has been exhausted which means it is the end of the matter. Secondly, it is that he has not been given *audi alteram partem* by the Applicant or by the process. Thirdly, it is that there is no indication that there was compliance with section

38(4)[4] in that it has not been specified who the members of the Investigating Committee were. Fourthly, it is that Nyali being a Chartered Accounted, was simply not qualified to be part of the Investigating Committee. Lastly, that the Investigating Committee, did not gather *prima facie* evidence, did not require anything from him, and that its referral of him to the Council for alleged misconduct was presumptuous and without any legal substance. The application, he concludes, is therefore defective and ought to be dismissed. He also persists with his argument raised earlier on but also in supplementation, that Keetse is not authorised by any resolution of the Applicant and in fact argues that no one is authorised by the Applicant to depose to the affidavit on behalf of the Applicant. The Respondent's supplementary answering affidavit is 80 pages long, (a few pages' shy of being twice longer than his answering affidavit). It is repetitive on issued already raised in the answering affidavit and offers very little new perspective or material.

The section 43 lapse argument

[25] It is well established that a striking from the roll of an urgent application does not bring finality to the issues between the parties. The applicant may still set down the matter on the normal roll for the court to hear the matter.

> *"**43. Urgent legal proceedings.** —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*

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[4] Procedure for dealing with complaints of misconduct and procedure to be followed in disciplinary hearing.
38. (4) (a) The proceedings of all disciplinary hearings are open to the public, unless the chairperson of a disciplinary committee directs otherwise, on good cause shown, on application by a person having an interest in the matter, where after the provisions of 5 section 154(1) to (5) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), apply with the necessary changes required by the context.
(b) The complainant in the matter is entitled to be present during all proceedings in a disciplinary hearing relating to his or her complaint in the same manner as a complainant in criminal proceedings.

the High Court to suspend the legal practitioner from practice and to obtain alternative interim relief.

44. Powers of High Court.—*(1) The provisions of this Act do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity.*

(2) Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or juristic entity or in connection with any decision of a disciplinary body, the Ombud or the Council in connection with such complaint or charge."

It is clear from the two sections above that section 43 provides for an urgent suspension of a legal practitioner and other alternative interim relief and that section 44 clothes the Court with wide powers. Section 44 in particular provides that this Court is not precluded from adjudicating over matters which are about a legal practitioner's conduct. Counsel for the Respondent argued before us that a Disciplinary Committee was not held and that the Respondent was denied of an opportunity to attend a hearing. The Court took up with him whether this Court cannot on the facts placed before it, discipline its officer, he replied in the negative and stated that it was the job for the Disciplinary Committee. He offered no authority for such a proposition and of course he was wrong on the law. The law is clear though, all that the Legal Practice Council has to do is to place facts before this Court for it to discipline one of its members[5]. The argument that this Court cannot discipline one of its officers directly

[5] Solomon v The Law Society of the Cape of Good Hope 1934 AD 401 at 407; Cirota and Another v Law Society, Transvaal 1979 (1) SA 172 (A) at 187H; Prokureursorde van Transvaal v Kleynhans 1995 (1) SA 839 (T) at 851G-H. [3] Law Society of the Northern Provinces v Le Roux 2012 (4) SA 500 (GNP) at 502 E - F.

is without merit and must fail. So must the argument that the striking from the roll of the urgent application brought an end to the matter.

Audi alteram partem

[26] The claim of denial of *audi alteram partem* coming from the Respondent is nothing but a ruse when one considers that the *sui generis* nature of these proceedings are flexible enough to permit a complainant to even approach the Court directly with any complaint, without the holding of a disciplinary hearing (this is permitted by section 44), for appropriate relief. Why? Because these proceedings themselves are *sui generis* disciplinary in nature and when referred to this Court for an infraction, this Court is empowered to exercise discipline over one of its officers. The Respondent therefore is duty bound to defend himself, in this Court, for it is in this Court that *audi alteram partem* is extended to him. The Respondent deliberately ignored this fact and asserted denial of *audi alteram partem,* to him. Such a posture is fatal. The point therefore, that he was denied *audi alteram partem* lacks merit and is accordingly rejected[6].

The investigating committee

[27] The Respondent raises a plethora of issues, and/or points of opposition he has against the Investigating Committee. He says it was not properly constituted. It was not made up of attorneys as required by the Act. In fact, he even submits it did not sit at all and that it simply rubber stamped a report by Nyali whose powers are not akin to those of a disciplinary process, counsel argued. None of the arguments are actually sustainable. The Respondent does not even mention section 37 of the Act, which reads thus;

> "***Establishment of disciplinary bodies***

[6] Hepple v Law Society of the Northern Provinces 2014 JOA 1078 at par 9.

37. (1) The Council must, when necessary, establish investigating committees, consisting of a person or persons appointed by the Council to conduct investigations of all complaints of misconduct against legal practitioners, candidate legal practitioners or juristic entities.

(2) (a) An investigating committee may, for the purposes of conducting an investigation contemplated in subsection (1), direct any legal practitioner or an employee of that legal practitioner to produce for inspection any book, document or article which is in the possession, custody or under the control of that legal practitioner or employee which relates to the complaint in question: Provided that the investigating committee may make copies of such book, document or article and remove the copies from the premises of that legal practitioner.

(b) The legal practitioner referred to in paragraph (a) or employee in question may not, subject to the provisions of any other law, refuse to produce the book, document or article, even though he or she is of the opinion that it contains confidential information belonging to or concerning his or her client."

The Respondent in response to a request from Nyali, acting on behalf of the Applicant, to provide information or documents, blatantly refused and fell afoul of the provisions of this section. He refused to provide details from his bank account and also indicated that he will seek his client's consent to provide information about the estate account, thus implying and asserting that the information sought was subject to confidentiality, which this section specifically prohibits him to.

[28] The process unfolded thus;

28.1. the Applicant received a complaint and referred it to the Respondent for his comments as required. This is common cause;

28.2. the Respondent did not engage with the merits of the complaint, instead he challenged the authority and the legal standing of the applicant. This is also common cause;

28.3. the Applicant using its powers obtained all the necessary information and Nyali compiled a report. Yes, Nyali is a Chartered Accountant but that is immaterial and irrelevant;

28.4. the report was presented to the Investigating Committee who met on 04 November 2022 and took a decision to refer the matter to the Council for a decision. The Investigating Committee recommended to Council the urgent suspension of the Respondent. The Respondent submits that the Investigating Committee did not apply its mind to the report and asserts that they simply rubber-stamped it. Such accusations are not supported by any evidence whatsoever;

28.5. the matter came before the Council which resolved to launch an application for the urgent suspension of the Respondent.

[29] The Respondent further alleges that the Investigating Committee did not have *prima facie* evidence. That is also incorrect. The committee had Nyali's report which showed among others the following;

29.1. that the Respondent received instructions in an estate matter;

29.2 that the Respondent opened an estate account into which a sum of R809 720-14 was received;

29.3. that the money was paid out of the estate account into various persons and into the Respondent's trust account;

29.4. that the Respondent closed his practice and his trust account and the estate account he opened had a debit balance;

29.5. that the estate still remained not finalised eight years later and that the estate funds are unaccounted for.

[30] Mr Hlaletoa submitted, correctly, that these proceedings do not constitute ordinary civil proceedings, but are s*ui generis* in nature. The hearing before this Court is an enquiry conducted by the Court into its officer's fitness to remain on the roll of attorneys. The question whether a legal practitioner is a fit and proper person to practice as such lies in the discretion of the Court. The Court's discretion is not exclusively derived from the Legal Practice Act, but is inherent in nature, over and above the provisions of the Act. The appropriate sanction, namely a suspension from practice or striking from the roll, lies within the discretion of the Court. In exercising its discretion it is trite that the Court is faced with a three-stage inquiry[7]:

i) The first inquiry is for the Court to decide whether or not the alleged offending conduct has been established on a preponderance of probabilities. This is a factual enquiry.

ii) Once the Court is satisfied that the offending conduct has been established, the second inquiry is whether the practitioner concerned is a fit and proper person to continue to practise. This inquiry entails a value judgment, which involves the weighing up of the conduct complained of against the conduct expected of an attorney.

iii) If the Court is of the view that the practitioner is not a fit and proper person to practise as an attorney, the third inquiry is whether in all the circumstances the practitioner in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice. This is a question of degree and will depend on the facts of the case. In deciding whether an attorney ought to be removed from the roll or suspended from practice, the court is not first

[7] Jasat v Natal Law Society (supra); Law Society of the Cape of Good Hope v Budricks 2003 (2) SA 11 (SCA) at 13H-14; Malan v The Law Society of the Northern Provinces [2008] ZASCA 90; 2009 (1) SA 216 (SCA) at p 219, par 7.

and foremost imposing a penalty. The main consideration is the protection of the public.

[31] The conduct of the Respondent is not in accordance with what is expected of an officer of this Court. The Respondent was placed in a position of trust as a legal practitioner, and was made to be in control of estate funds. He moved those funds and used them for other purposes, such as lending money to his other clients to purchase immovable property and pay for clearance certificates. He explains that he did not believe there was any risk in doing so but states that did numerous such transactions but fails to provide details. That, in our view, was a classic case of misappropriation of such funds. The Respondent has offered to pay these funds but has failed to even explain the source of such funds or even give a breakdown thereof. He has failed to take the Court into his confidence. The offending conduct has been established on a preponderance of probabilities.

[32] An attorney's duty in regard to the preservation of trust money is a fundamental, positive and unqualified duty. The Respondent made the point that the funds were not necessarily trust funds. Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. The same principle nevertheless applies when it comes to estate funds. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. It is a requirement that trust money in the possession of an attorney should be available to his client the instant it becomes payable. Utmost good faith is expected of all legal practitioners. Where a legal practitioner falls short, this Court is at liberty to intervene.

[33] With the offending conduct having been established the next issue to consider is whether the legal practitioner is fit and proper to continue to practice. Among other things

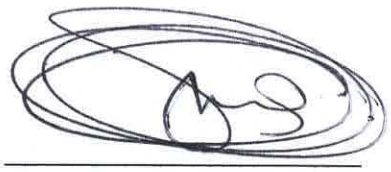
this entails considering the seriousness of the conduct complained of as well as what is expected of a legal practitioner. The conduct is serious enough, in our view, because it involves an element of dishonesty. The Respondent's conduct fell short of what is expected of a legal practitioner. While we find that he is no longer fit and proper to continue to practice, we are also of the view that a striking from the roll is not warranted. This is because he in now a consultant and does not handle trust funds at his current firm, therefore the need to protect the public is lessened.

[34] It is generally accepted that the Applicant should not be saddled with costs and that it should be awarded costs on attorney and client scale.

Order

[35] I make the following order:

1. The Respondent is suspended from practising as a Legal Practitioner for a period of 18 months, from the date of this order;
2. The Respondent is directed to provide the Applicant within 30 days of this order, a detailed breakdown of the estate funds in the matter of Estate Late Erica Steenberg, detailing where the funds were invested, where the funds are now since the Respondent does not have a trust account, the interest earned to date as well as profit made from the loans that were made;
3. In the event of the Respondent failing to comply with order in 2 above, the Applicant is granted leave to approach this Court on the same papers, suitably supplemented, for appropriate relief;
4. The Respondent is ordered to pay the costs of the application on an attorney and client scale.



S. A. THOBANE

ACTING JUDGE OF THE HIGH COURT

I agree.

R. FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT

APPEARANCES:

On behalf of the Applicant	: Adv. I Hlalethoa
INSTRUCTED BY	: Mphokane Attorneys
On behalf of the Respondent	: Adv. C Georgiades SC
INSTRUCTED BY	: Bouwer Malherbe Attorneys
DATE OF HEARING	: 17 October 2023
DATE OF JUDGMENT	: 16 January 2024