



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no: 459/2022

In the matter between:

**LIMPOPO PROVINCIAL COUNCIL OF THE
SOUTH AFRICAN LEGAL PRACTICE COUNCIL**

APPELLANT

and

CHUEU INCORPORATED ATTORNEYS

FIRST RESPONDENT

CHUPJANA LEKOLOANA CHUEU

SECOND RESPONDENT

THABO MILTON CHUEU

THIRD RESPONDENT

BRIAN KINGLY KEABETSOE KOOPEDI

FOURTH RESPONDENT

CHARLES KGOMOTSO TSOKU

FIFTH RESPONDENT

SEKGAPINYE TSETSEWA

SIXTH RESPONDENT

PHELADI RAESIBE GWANGWA

SEVENTH RESPONDENT

PASCALIA NONHLANHLA MATHIBELA

EIGHTH RESPONDENT

TSOKU CHUEU INCORPORATED

ATTORNEYS

NINTH RESPONDENT

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

Coram: SALDULKER, NICHOLLS and CARELSE JJA and NHLANGULELA and MALI AJJA

Heard: 8 May 2023

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Summary: Civil procedure – Legal Practice Act 28 of 2014 – whether financial misconduct of one director of law firm invokes liability of all directors – every director has a fiduciary duty towards the company of which it is a director – ignorance of financial matters when faced with allegations of misappropriation does not absolve other directors.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Naude AJ, sitting as court of first instance):

- 1 The appeal is upheld with no order as to costs.
- 2 The order of the high court is set aside and replaced with the following:
 - ‘1 The third to eighth respondents are suspended from practicing as attorneys for a period of six months pending the finalisation of investigations into their conduct as directors of the first respondent, failing which the suspension will lapse.
 - 2 The third to eighth respondents are ordered to hand over and deliver their certificates of enrolment as legal practitioners to the Registrar of the Limpopo Division of the High Court, Polokwane within 7 days from date of this order.
 - 3 In the event of the third to eighth respondents failing to comply with the terms of the order granted in paragraph 2 above, within 7 days from date of this order, the Sheriff of the district in which the third to eighth respondents’ certificates of enrolment are found, is authorised and directed to take possession of the said certificates and to hand them to the applicant.
 - 4 The Director of the Limpopo Provincial Council of the applicant, Khomotso Matsaung, or any person nominated by her, and/or the Director of the Gauteng Provincial Council of the South African Legal Practice Council, Johan van Staden, or any person nominated by him, is appointed *curator bonis* to administer and control the trust accounts of the third to eighth respondents, including accounts relating to insolvent and deceased estates

and any deceased estate and any estate under curatorship connected with the respondents' practices as legal practitioners, including the separate banking accounts opened and kept by the third to ninth respondents at any bank in the Republic of South Africa in terms of section 86(1) and (2) of the Legal Practice Act 28 of 2014, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said subsections, 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 the third to eighth respondents' accounting records, records, files and, subject to the approval of the Board of Control of the Legal Practitioners Fidelity Fund, to sign all forms and generally operate the trust accounts, but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which the third to eighth respondents were acting at the date of this order.

4.2 subject to the approval and control of the Board of Control of the Legal Practitioners Fidelity 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 persons having lawful claims upon the trust account(s) and/or against the third to ninth respondents in respect of monies held, received and/or invested by the respondents in terms of section 86(1) and (2) and/or section 86(3) and/or section 86(4) of the Legal Practice Act 28 of 2014 (hereinafter referred to as "trust monies"), to take any legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions, if any, in which the third to eighth respondents were

and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);

4.3 to ascertain from the third to eighth respondents' accounting records the names of all persons on whose account the third to eighth respondents appear to hold or to have received trust monies from (hereinafter referred to as "trust creditors") and to call upon the third to eighth respondents to furnish them, within 30 (thirty) days of the date of service of this order or such further period as they 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 they may require, to enable them, acting in consultation with, and subject to the requirements of, the Board of Control of the Legal Practitioners Fidelity Fund, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of the respondents 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 Board of Control of the Legal Practitioners Fidelity Fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;

4.6 having determined the amounts which she 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 Legal Practitioners Fidelity Fund;

4.7 in the event of there being any surplus in the trust account(s) of the third to eighth respondents 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 Legal Practitioners Fidelity Fund in terms of section 86(5) of the Legal Practice Act 28 of 2014 in respect of any interest

therein referred to and, secondly, without prejudice to the rights of the creditors of the respondents, the costs, fees and expenses referred to in paragraph 10 hereunder, or such portion thereof as has not already been separately paid by the third to eighth respondents to the applicant, and, if there is any balance left over after payment in full of such claims, costs, fees and expenses, to pay such balance, subject to the approval of the Board of Control of the Legal Practitioners Fidelity Fund, to the third to eighth respondents, if they are solvent, or, if the third to eighth respondents are insolvent, to the trustee(s) of the third to eighth respondents' insolvent estates;

4.8 in the event of there being insufficient trust monies in the trust banking account(s) of the third to eighth respondents, 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 Legal Practitioners Fidelity Fund;

4.9 subject to the approval of the chairman of the Board of Control of the Legal Practitioners Fidelity Fund, to appoint nominees or representatives and/or consult with and/or engage the services of legal practitioners, counsel, accountants and/or any other persons, where considered necessary, to assist them in carrying out their duties as curators; and

4.10 to render from time to time, as curators, returns to the Board of Control of the Legal Practitioners Fidelity Fund showing how the trust account(s) of the third to eighth respondents has/have been dealt with until such time as the Board of Control of the Legal Practitioners Fidelity Fund notifies them that they may regard their duties as curators terminated.

5 That the third to eighth respondents immediately deliver their accounting records, records, files and documents containing particulars and information relating to:

5.1 any monies received, held or paid by the third to eighth respondents for or on account of any person while practicing as an attorney;

5.2 any monies invested by the third to eighth respondents in terms of section 86(3) and/or section 86(4) of the Legal Practice Act 28 of 2014;

5.3 any interest on monies so invested which was paid over or credited to the third to eighth respondents;

5.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by the third to eighth respondents, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;

5.5 any insolvent estate administered by the third to eighth respondents as trustee or on behalf of the trustee in terms of the Insolvency Act 24 of 1936;

5.6 any trust administered by the third to eighth respondents as trustee or on behalf of the trustee in terms of the Trust Property Control Act 57 of 1988;

5.7 any company liquidated in terms of the Companies Act 61 of 1973 read together with the provisions of the Companies Act 71 of 2008, administered by the third to eighth respondents by or on behalf of the liquidator;

5.8 any close corporation liquidated in terms of the Close Corporations Act 69 of 1984, administered by the third to eighth respondents as or on behalf of the liquidator; and

5.9 the third to eighth respondents' practices as legal practitioners of the Limpopo Division of the High Court, Polokwane, to the curators so

appointed, provided that, as far as such accounting records, records, files and documents are concerned, the third to eighth respondents shall be entitled to have reasonable access to such records, but always subject to the supervision of such curator or their nominee.

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

7 That the curator shall be entitled to:

7.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking had 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 7.1 to provide any such documentation or information which they may consider relevant in respect of a claim or possible or anticipated claim, against them and/or the third to eighth respondents and/or the third to eighth respondents' clients and/or the Legal Practitioners Fidelity Fund in respect of money and/or other property entrusted to the third to eighth respondents. 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 they consider appropriate; and

7.4 wind-up the third to eighth respondents' practices in the event that they consider it appropriate.

8 The third to eighth respondents are hereby removed from office as:

8.1 executor of any estate of which the third to eighth respondents have been appointed in terms of section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965 or the estate of any other person referred to in section 72(1);

8.2 curators or guardians 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 Estates Act 66 of 1965;

8.3 trustees of any insolvent estate in terms of section 59 of the Insolvency Act 24 of 1936;

8.4 liquidators of any company in terms of section 379(2) read with section 379(e) of the Companies Act 61 of 1973 read together with the provisions of the Companies Act 71 of 2008;

8.5 trustees of any trust in terms of section 20(1) of the Trust Property Control Act 57 of 1988;

8.6 liquidators of any close corporation appointed in terms of section 74 of the Close Corporations Act 69 of 1984; and

8.7 administrators appointed in terms of section 74 of the Magistrates' Court Act 32 of 1944.

9 The third to eighth respondents are hereby ordered and directed, jointly and severally, to:

9.1 pay in terms of section 87(2) of the Legal Practice Act 28 of 2014, the reasonable costs of the inspection of the accounting records of the respondents;

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

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

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

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

10 If there are any trust funds available, the third to eighth respondents shall within 6 (six) months after having been requested to do so by the curators, or within such longer period as the curators may agree to in writing, satisfy the curators, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to them (third to eighth respondents) in respect of their (former) legal practices, and should they fail to do so, they shall not be entitled to recover such fees and disbursements from the curators without prejudice, however, to such rights (if any) as they may have against the trust creditor(s) concerned for payment or recovery thereof.

11 A certificate issued by a Director of the Legal Practitioners Fidelity Fund shall constitute *prima facie* proof of the curators' costs and that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curators' costs.

12 The third to eighth respondents shall during the period of suspension comply with the provisions of sections 84(1) and 85 of the Legal Practice Act 28 of 2014.

13 The third to eighth respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.'

JUDGMENT

Nicholls JA (Saldulker and Carelse JJA and Nhlangulela and Mali AJJA concurring):

[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.

[2] At the time, the firm was facing a final liquidation application. The high court, by agreement, granted an order of suspension against the second respondent for a period of 12 months, pending the finalisation of investigations into his conduct and disciplinary proceedings against him. It dismissed the application for the suspension of the other directors. This prompted the Limpopo LPC to bring an application for leave to appeal in respect of the other six directors, the third to eighth respondents. The high court dismissed the application for leave to appeal, and granted a punitive costs order against the Limpopo LPC. Special leave to appeal was sought, and granted, by this Court.

[3] At the heart of this appeal is the question of the liability of all the directors of a law firm, when the financial misconduct has allegedly been committed by only one of the directors.

[4] Legal practitioners are obliged to conduct themselves with the utmost integrity and scrupulous honesty. Public confidence in the legal profession is enhanced by maintaining the highest ethical standards. A lack of trust in the legal profession goes hand in hand with the erosion of the rule of law. The Legal Practice Act 28 of 2014 (the LPA) replaced the Attorneys Act 53 of 1979 and came into operation on 1 November 2018. Like its predecessor, the objects of the LPA are, inter alia, to promote and protect the public interest and to enhance and maintain appropriate standards of professional and ethical conduct of all legal practitioners.¹ As such, the Limpopo LPC is not an ordinary litigant, but generally acts for the public good. Legal proceedings brought by the Limpopo LPC in this regard are *sui generis*,² and the disciplinary powers of the high court over the legal practitioners are founded in its inherent jurisdiction as the ultimate *custos morum* of the legal profession.³

[5] In terms of the LPA, practitioners may establish private companies to conduct their legal practice, subject to certain conditions. Section 34(7) provides: ‘A commercial juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents-

- (a) ...
- (b) ...

¹ Section 3 of the Legal Practice Act.

² *Hepple and Others v Law Society of The Northern Provinces* [2014] ZASCA 75; [2014] 3 All SA 408 (SCA) para 9.

³ 26(4) *Lawsa* 3 ed para 77. See also *General Council of the Bar of South Africa v Matthys* 2002 (5) SA 1 (E) para 4(1).

- (c) all present and past shareholders, partners or members, as the case may be, are liable jointly and severally together with the commercial juristic entity for-
- (i) the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office; and
 - (ii) in respect of any theft committed during their period of office.’

In this regard, the third to eighth respondents do not deny their liability for the debts of the firm, but contend that they should not be subjected to disciplinary measures for the financial misconduct of another director, the second respondent.

[6] The firm, which had been registered as a partnership since 1998, was incorporated in 2014. According to the second respondent, it was handling approximately 6 000 files, with an estimated gross value of R6.2 billion, when the application for suspension was launched. The firm specialised in personal injury matters. It had four offices, in Lephalale, Pretoria, Polokwane and Mahikeng, all of which operated independently of each other. The second respondent was the ‘managing director’ of the firm and in charge of the overall finances of the firm. During the relevant period, the third to eighth respondents were directors of the firm, operating at different locations. The third and fifth respondents worked at the Pretoria office. The fourth, seventh and eighth respondents were stationed at Lephalale, and the sixth respondent at Polokwane.

[7] During 2020/2021, various complaints from members of the public were received by the Limpopo LPC. These were to the effect that the firm had represented them in litigation against the Road Accident Fund (the RAF), collected monies from the RAF, but failed to pay it over; that the firm had failed to account for monies claimed and received from the RAF; and, had failed to respond to communications or deal properly with clients’ instructions in this regard.

[8] The first complaint, by Ms Puleng Jowie Mugwena, was that the client had been awarded R377 522.91 plus costs by the high court, but no account had been rendered and no monies paid to her. The second complaint, by Ms Rebone Evelina Motlhabane and lodged with the Limpopo LPC on 9 October 2020, was by a client of the third respondent in Lephalale who was awarded R1 251 978.25 by the high court. She received a statement that an amount of R938 983.69 was due to her after the deduction of fees. She did not receive any payment. The third complaint, by Mr Pakiso Aron Boye, also emanating from the Lephalale office, was in regard to an award of R857 602 that had been ordered by the high court. The RAF had paid the firm, but no account was rendered to the client and no payment made to him. The fourth and fifth complaints were made by Mr Serole Gift Mapaya and Ms Tumelo Enny Makoti respectively, both clients of the Lephalale office. The former related to monies which had been claimed and paid out by the RAF, but were not accounted for, nor paid over to the clients. Ms Makoti stated that she had instructed the firm to pursue a claim against the RAF for R8 100 000 which they had taken over from another attorney. The firm did not respond to her queries and did not account to her. The claim subsequently became prescribed.

[9] In addition to the above, the Limpopo LPC was informed by the Gauteng LPC about a complaint received from the RAF, that it had erroneously made a duplicate payment to the firm. This resulted in an overpayment to the firm in an amount of R29 043 606.64, which monies, instead of being repaid to the RAF, had been appropriated by the firm.

[10] The matter was referred to the Investigating Committee of the Limpopo LPC, which found evidence of numerous breaches of the code of conduct including, inter alia, failure to account accurately and timeously; failure to respond

to complainants' communications; failure to deal properly with instructions of clients; failure to comply with the directives of the Limpopo LPC; failure to exercise proper control and supervision over staff; failure to report to the LPC; and dishonest and irregular conduct on the part of a trust practitioner in relation to the handling of trust monies.

[11] Charges were then formulated against the directors of the firm, the second to eighth respondents. On the day of the disciplinary hearing, the directors did not arrive, although an advocate was present who purported to act for them. The respondents did not answer the complaints against them, which had grown to 26 in number by the time that the Limpopo LPC instituted action in September 2021.

[12] On receipt of the trust accounts of the firm, the Limpopo LPC's investigation team ascertained that there was an amount in trust of R8 006 186.94 on 15 May 2021. This was reduced to R5 545 013.84 on 1 September 2021. Bearing in mind the duplicate payment of the RAF, and without taking into account the various complaints of non-payment, the Limpopo LPC concluded that there was a substantial trust deficit of at least R25 825 699.89. This pointed, *prima facie*, to a misappropriation of trust funds.

[13] As a result, the Limpopo LPC launched an urgent application for the suspension of all the directors of the firm. It founded its jurisdiction in terms of s 43 and s 44(1) of the LPA. Section 44(1) empowers a high court to adjudicate upon matters concerning the conduct of a legal practitioner, a candidate legal practitioner or a juristic entity.⁴ Section 43 provides for the LPC to institute urgent

⁴ Section 44(1) provides that '[t]he 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'.

legal proceedings in the high court to suspend a legal practitioner from practice, if a disciplinary body is satisfied that the legal practitioner has misappropriated trust monies.⁵

[14] The application was defended. The common thread running through the defences of the third to eighth respondents was that their shareholding, if any, was minor, and as individuals they had nothing to do with the firm's finances. This aspect, they alleged, was entirely within the knowledge and control of the second respondent. They were not provided with financial statements, were not consulted in respect of major decisions and did not receive any distributions of profit. The respondents were aware of the duplicate payment of R29 million by the RAF, but either assumed that it had been satisfactorily attended to, or when they did not receive a proper explanation, resigned from the firm.

[15] The third and fifth respondents stated that during the course of 2014, and without their knowledge, the second respondent unilaterally decided to incorporate the existing partnership into a company. No shareholder agreement was entered into, and they were merely issued with shareholders' certificates. In effect, they were nothing more than 'salaried employees' and were treated as such. When they did not receive a satisfactory explanation from the second respondent, the third and fifth respondents resigned from the firm on 1 February 2021 and immediately founded a new firm, the ninth respondent, which took over all the active files, amounting to 500, which they had been handling for the firm. They assert that they

⁵ Section 43 provides that '[d]espite the provisions of this Chapter, if upon considering a complaint, a disciplinary body is satisfied that a legal practitioner has misappropriated trust monies or is guilty of other serious misconduct, it must inform the Council thereof with the view to the Council instituting urgent legal proceedings in the High Court to suspend the legal practitioner from practice and to obtain alternative interim relief'.

were intentionally kept in the dark about the affairs of the firm and themselves lodged a complaint against the second respondent on 21 May 2021.

[16] The sixth respondent stated that he was appointed as a director on 30 April 2011, with a 4 percent shareholding. He resigned on 1 February 2021 to form his own firm. He was a ‘director and employee’ and was responsible only for litigation.

[17] The seventh respondent stated that she joined the firm on 21 August 2017 as a ‘salaried director’ with the title Director: Core Business. Her role was to ensure that the litigation strategy of the firm was aligned; to manage the performance of the attorneys; and to ensure synergy between the support staff and the professional staff. She remained a director of the firm.

[18] The fourth respondent and eighth respondent claim that they were not directors. In the same breath, they describe themselves as ‘salaried directors’, taking up those positions in May 2015 and October 2016 respectively. They state that they were not practising for their own account and were not allowed to receive trust monies from the public.

[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*.⁶

[21] Since then, the issue of authority has been dealt with in a number of decisions of this Court.⁷ 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.⁸ The original understanding of rule 7(1) was that it only applied to the mandate provided to attorneys.⁹ However, this Court in *Unlawful Occupiers, School Site v City of Johannesburg*¹⁰ (*Unlawful Occupiers*), citing *Eskom v Soweto City Council*¹¹ and *Ganes and Another v Telecom Namibia Ltd*,¹² 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).¹³

⁶ *Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd* [1972] 4 All SA 269 (C); 1972 (4) SA 249 (C) at 252, where it was stated that in the paragraph dealing with a letter, drafted by the managing director and terminating the contract that gave rise to the dispute before the court, no mention was made that the contents of the said letter had been discussed with and approved by the board of directors.

⁷ *Ganes and Another v Telecom Namibia Ltd* [2004] 2 All SA 609 (SCA); 2004 (3) SA 615 (SCA); *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA); [2005] 2 All SA 108 (SCA).

⁸ Rule 7(1) provides that '... the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application'.

⁹ A C Cilliers, C Loots and H C Nel *The Civil Practice of the High Court and Supreme Court in South Africa* Vol 1 at 268.

¹⁰ *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA); [2005] 2 All SA 108 (SCA).

¹¹ *Eskom v Soweto City Council* 1992 (2) SA 703 (W).

¹² *Ganes and Another v Telecom Namibia Ltd* [2004] 2 All SA 609 (SCA).

¹³ *Unlawful Occupiers, School Site* para 14.

[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.

[23] Although the high court upheld the point *in limine*, it went on to deal with the merits of the matter on the basis that the interests of justice dictated that the matter be finalised. Nonetheless, its finding on the question of authority cannot be allowed to stand. It is at odds with the principle set out in *Unlawful Occupiers*.

[24] Regarding the merits, the high court proceeded to set out the three stage inquiry for determining whether a person was ‘fit and proper’. The first leg is to establish whether, on the facts, the offending conduct has been proven on a balance of probabilities; the second is whether the person is a fit and proper person, taking into account the misconduct; and the final leg is whether the person should be suspended from the roll or struck from the roll. The high court found that every complaint related to the second respondent and no complaint was brought directly against the other respondents, whose suspension was sought ‘merely’ because they were directors of the firm at some point. On this basis, the high court found that the threshold for the first factual leg of the inquiry had not been met and thus it was unnecessary to inquire further.

[25] The high court found further that all the allegations related to the second respondent and the ‘extremely general allegations’ of the Limpopo LPC did not refer to the other respondents at all. It held that because the suspension of the third to eighth respondents was sought merely because they were directors at one stage of the firm’s existence, the Limpopo LPC had failed to pass the first factual leg of the inquiry. It was therefore unnecessary to enquire whether they were fit and proper to practise, taking into account their conduct, and, if not, whether they should be suspended from practice.

[26] Every director has a fiduciary duty towards the company of which it is a director. To plead ignorance of financial matters, when faced with allegations of misappropriation, does not absolve a director.¹⁴ It has been emphasised over the years that legal practitioners cannot escape liability by contending that they had no responsibility for the keeping of the books of account or the control and administration of the trust account.¹⁵ As this Court stated in *Hepple v Law Society of the Northern Provinces*,¹⁶ for an attorney to explain trust deficits on the grounds that he or she had no involvement in the financial affairs of the firm ‘is no defence at all’.

[27] Abdication of responsibilities does not absolve legal practitioners of their duties. As far back as *Incorporated Law Society, Transvaal v K and Others*,¹⁷ the court cautioned attorneys who attempted to excuse their conduct on the basis that

¹⁴ *Hepple and Others v Law Society of The Northern Provinces* [2014] ZASCA 75; [2014] 3 All SA 408 (SCA) para 21.

¹⁵ *Hewetson v Law Society of the Free State* [2020] ZASCA 49; [2020] 3 All SA 15 (SCA); 2020 (5) SA 86 (SCA) para 56; *Hepple v and Others Law Society of the Northern Provinces* [2014] ZASCA 75; [2014] 3 All SA 408 (SCA) para 14; *Malan v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); [2009] 1 All SA 133 (SCA) paras 27-28.

¹⁶ *Hepple* para 21.

¹⁷ *Incorporated Law Society, Transvaal v K and Others* [1959] 2 All SA 24 (T); 1959 (2) SA 386 (T) at 391 cited with approval in *Hewetson* para 55.

they were responsible for other work in the firm, and did not concern themselves with the books of account. In that matter, as here, a particular individual in the firm was tasked with handling the books of account. The court stated:

‘Every attorney must realise that it is a fundamental duty on his part, breach of which may easily lead to his being removed from the roll, to ensure that the books of the firm are properly kept, that there are sufficient funds at all times to meet the trust account claims, and that when he makes the declaration required for fidelity fund purposes there is no doubt that that declaration is truly and honestly made.’¹⁸

[28] In addition, the respondents were constrained to concede that the concept of ‘a salaried director’ is not one found in the Companies Act of 2008 or the LPA. Once a legal practitioner is appointed as a director, whatever the factual terms of the arrangement may be, they bear full responsibility for the finances of the firm.

[29] At this stage, the inquiry is not whether the legal practitioner is ‘fit and proper’. This is the inquiry to be undertaken when final relief is sought. If it is found that the legal practitioner is not fit and proper, the court then has a discretion on what sanction to impose. All that is necessary at this stage is that sufficient facts have been shown to justify an interim suspension.

[30] The requirements for an interim interdict are well known and do not bear repetition.¹⁹ On the facts of this case, there can be no doubt that the offending conduct in respect of the financial affairs of the firm has been established. On their own version, the third to eighth respondents, by playing no role whatsoever in respect of the accounting and financial affairs of the firm, were in dereliction of

¹⁸ Ibid.

¹⁹ The requirements for the granting of an interim interdict are: (i) a *prima facie* right, albeit open to some doubt; (ii) irreparable harm if the interdict were not to be granted; (iii) the balance of convenience in favour of granting the interdict; and (iv) that the applicant has no alternative remedy.

their duties as directors. All that is required from the Limpopo LPC is to show a *prima facie* right, even if open to some doubt. Here, it could be argued that the Limpopo LPC established a clear right because there was no refutation of the firm's misdeeds, only a denial of responsibility for those misdeeds, which, in respect of directors, is no defence at all. The balance of convenience favours the regulatory body, which has no alternative means of performing its oversight functions.

[31] The parties proceeded on the premise that the interim order was appealable. In the exercise of its discretion, an appeal court is not bound by the conclusions of the high court in the granting of interim interdicts and may depart from the high court's order on any grounds that it feels are necessary.²⁰ This is self-evidently a matter which requires the intervention of this Court. Such applications are brought by the regulatory body for the protection of the general public against malfeasance of legal practitioners. In many respects, the orders granted are final in effect. The dismissal of the application in respect of the third to eighth respondents prevented the Limpopo LPC from playing its oversight role over legal practitioners.

[32] Interim applications for the suspension of a legal practitioner pending an investigation are generally undesirable if the suspension sought is for a lengthy period. Such applications should be launched only where there is no other means of safeguarding the public from the alleged malfeasance of a legal practitioner. An interim order for suspension has a very grave impact on the professional life of a legal practitioner, who would nonetheless be severely prejudiced if exonerated at the end of an investigation by the LPC.

²⁰ *Hix Networking Technologies CC v System Publishers (Pty) Ltd and Another* [1996] 4 All SA 675 (A); 1997 (1) SA 391 (A) at 402B-C.

[33] The Limpopo LPC seeks an order for a period of suspension of 18 months pending an investigation into the affairs of the third to ninth respondents. The order granted against the second respondent on 25 October 2021, by agreement, was for a period of 12 months. This was almost twenty one months ago. The Limpopo LPC has had ample opportunity in the intervening period to conduct its investigations into the finances of the firm and those of the second respondent who, it is common cause, controlled the finances of the firm. The order granted against the second respondent gave the Limpopo LPC far reaching powers to take control of the trust account of the firm and all the accounting records of the second respondent. This means that the investigative work by the LPC must be largely completed. All that remains is for the LPC to take over and investigate those files which were taken by the respective directors when they left the firm. Six months ought to be more than adequate for this purpose. As far as the ninth respondent is concerned, it is common cause that the active files of the third and fifth respondents were transferred to it upon incorporation. To that extent an order should also be granted against the ninth respondent. The Limpopo LPC should proceed with final relief against the respondents, if indicated, at the earliest opportunity.

[34] What remains is the issue of costs. When the Limpopo LPC applied to the high court for leave to appeal the judgment, its application was dismissed with costs on the attorney and client scale. This, said the high court, was because the Limpopo LPC ‘used a personal and emotional attack in its notice of application for leave to appeal against the respondents and the court’.

[35] This comment was presumably a reference to paragraphs 2.1 and 3.2 of the Limpopo LPC’s notice of appeal, in which the third to eighth respondents were

referred to as ‘thug-like Practitioners, who continue to engage in Subterfuge, whilst obfuscating and detracting everyone’s attention from the fact that they have grossly brought the profession into disrepute through their unlawful thieving conduct’.

[36] The notice of appeal went on:

‘3.2. The Learned Judge should have also recognised the fact that in spite of all the obfuscating resorted to by the Third to the Eighth Respondents, no amount of obfuscating and resorting to subterfuge, could undo the fact that these Respondents had indeed violated the Legal Position, and all such subterfuge and obfuscation, were indicative of the fact that these practitioners were so lacking in insight regarding their duty to the public that they could not, and should not have been allowed to continue to practice law, since to allow them to do so as the Learned Judge has done, constitutes a gross dereliction of duty, which no other reasonable Court will allow to stand.’

Such language ill befits the watchdog of the legal profession and has no place in a notice of appeal.

[37] It is also necessary to mention the manner in which the record in this matter was prepared. This, too, has a bearing on the costs of the appeal. All that was required for the adjudication of the appeal was the notice of motion and founding affidavit, the answering affidavits of the respondents, the replying affidavits and the judgment of the high court on the merits and on the leave to appeal. These documents amount to 386 pages (to which a few annexures referred to in the heads of argument should be added). Instead, the Court was saddled with a record of 1427 pages put together in an entirely haphazard fashion with the notice of motion commencing on page 470.

[38] The LPC is the regulator of the profession. Of all litigants, one would have expected assiduous compliance with the rules of this Court by the Limpopo LPC.

Rule 8(7) of the Supreme Court of Appeal (SCA) Rules directs litigants to prepare a core bundle consisting of the material documents in a case, preferably in a chronological sequence. In terms of SCA rule 8(9), whenever a decision of an appeal is likely to hinge exclusively on a portion of the record, the appellant is obliged to request the respondents consent to omit the unnecessary parts of the record. This was not done. The Court may make a special costs order if no request was made or if either of the parties acted unreasonably.²¹ For this reason, I am of the view that the Limpopo LPC should not be entitled to the costs of the appeal.

[39] In the result, the following order is made:

- 1 The appeal is upheld with no order as to costs.
- 2 The order of the high court is set aside and replaced with the following:
 - ‘1 The third to eighth respondents are suspended from practicing as attorneys for a period of six months pending the finalisation of investigations into their conduct as directors of the first respondent, failing which the suspension will lapse.
 - 2 The third to eighth respondents are ordered to hand over and deliver their certificates of enrolment as legal practitioners to the Registrar of the Limpopo Division of the High Court, Polokwane within 7 days from date of this order.
 - 3 In the event of the third to eighth respondents failing to comply with the terms of the order granted in paragraph 2 above, within 7 days from date of this order, the Sheriff of the district in which the third to eighth respondents’ certificates of enrolment are found, is authorised and directed to take possession of the said certificates and to hand them to the applicant.

²¹ See for example *Siyangena Technologies (Pty) Ltd v PRASA and Others* [2022] ZASCA 149; [2023] 1 All SA 74 (SCA); 2023 (2) SA 51 (SCA) paras 48-51.

4 The Director of the Limpopo Provincial Council of the applicant, Khomotso Matsaung, or any person nominated by her, and/or the Director of the Gauteng Provincial Council of the South African Legal Practice Council, Johan van Staden, or any person nominated by him, is appointed *curator bonis* to administer and control the trust accounts of the third to eighth respondents, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with the respondents' practices as legal practitioners, including the separate banking accounts opened and kept by the third to ninth respondents at any bank in the Republic of South Africa in terms of section 86(1) and (2) of the Legal Practice Act 28 of 2014, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said subsections, 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 the third to eighth respondents' accounting records, records, files and, subject to the approval of the Board of Control of the Legal Practitioners Fidelity Fund, to sign all forms and generally operate the trust accounts, but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which the third to eighth respondents were acting at the date of this order.

4.2 subject to the approval and control of the Board of Control of the Legal Practitioners Fidelity 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 persons having lawful claims upon the trust account(s) and/or against the third to ninth respondents in respect of monies held, received and/or invested by the

respondents in terms of section 86(1) and (2) and/or section 86(3) and/or section 86(4) of the Legal Practice Act 28 of 2014 (hereinafter referred to as “trust monies”), to take any legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions, if any, in which the third to eighth respondents were and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);

4.3 to ascertain from the third to eighth respondents’ accounting records the names of all persons on whose account the third to eighth respondents appear to hold or to have received trust monies from (hereinafter referred to as “trust creditors”) and to call upon the third to eighth respondents to furnish them, within 30 (thirty) days of the date of service of this order or such further period as they 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 they may require, to enable them, acting in consultation with, and subject to the requirements of, the Board of Control of the Legal Practitioners Fidelity Fund, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of the respondents 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 Board of Control of the Legal Practitioners Fidelity Fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor’s or creditors’ right of access to the civil courts;

4.6 having determined the amounts which she 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 Legal Practitioners Fidelity Fund;

4.7 in the event of there being any surplus in the trust account(s) of the third to eighth respondents 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 Legal Practitioners Fidelity Fund in terms of section 86(5) of the Legal Practice Act 28 of 2014 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of the respondents, the costs, fees and expenses referred to in paragraph 10 hereunder, or such portion thereof as has not already been separately paid by the third to eighth respondents to the applicant, and, if there is any balance left over after payment in full of such claims, costs, fees and expenses, to pay such balance, subject to the approval of the Board of Control of the Legal Practitioners Fidelity Fund, to the third to eighth respondents, if they are solvent, or, if the third to eighth respondents are insolvent, to the trustee(s) of the third to eighth respondents' insolvent estates;

4.8 in the event of there being insufficient trust monies in the trust banking account(s) of the third to eighth respondents, 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 Legal Practitioners Fidelity Fund;

4.9 subject to the approval of the chairman of the Board of Control of the Legal Practitioners Fidelity Fund, to appoint nominees or representatives and/or consult with and/or engage the services of legal practitioners, counsel, accountants and/or any other persons, where considered necessary, to assist them in carrying out their duties as curators; and

4.10 to render from time to time, as curators, returns to the Board of Control of the Legal Practitioners Fidelity Fund showing how the trust account(s) of the third to eighth respondents has/have been dealt with until such time as the Board of Control of the Legal Practitioners Fidelity Fund notifies them that they may regard their duties as curators terminated.

5 That the third to eighth respondents immediately deliver their accounting records, records, files and documents containing particulars and information relating to:

5.1 any monies received, held or paid by the third to eighth respondents for or on account of any person while practicing as an attorney;

5.2 any monies invested by the third to eighth respondents in terms of section 86(3) and/or section 86(4) of the Legal Practice Act 28 of 2014;

5.3 any interest on monies so invested which was paid over or credited to the third to eighth respondents;

5.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by the third to eighth respondents, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;

5.5 any insolvent estate administered by the third to eighth respondents as trustee or on behalf of the trustee in terms of the Insolvency Act 24 of 1936;

5.6 any trust administered by the third to eighth respondents as trustee or on behalf of the trustee in terms of the Trust Property Control Act 57 of 1988;

5.7 any company liquidated in terms of the Companies Act 61 of 1973 read together with the provisions of the Companies Act 71 of 2008, administered by the third to eighth respondents by or on behalf of the liquidator;

5.8 any close corporation liquidated in terms of the Close Corporations Act 69 of 1984, administered by the third to eighth respondents as or on behalf of the liquidator; and

5.9 the third to eighth respondents' practices as legal practitioners of the Limpopo Division of the High Court, Polokwane, to the curators so appointed, provided that, as far as such accounting records, records, files and documents are concerned, the third to eighth respondents shall be entitled to have reasonable access to such records, but always subject to the supervision of such curator or their nominee.

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

7 That the curator shall be entitled to:

7.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking had 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 7.1 to provide any such documentation or information which they may consider relevant in respect of a claim or possible or anticipated claim, against them and/or the third to eighth respondents and/or the third to eighth respondents' clients and/or the Legal Practitioners Fidelity Fund in respect of money and/or other

property entrusted to the third to eighth respondents. 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 they consider appropriate; and

7.4 wind-up the third to eighth respondents' practices in the event that they consider it appropriate.

8 The third to eighth respondents are hereby removed from office as:

8.1 executor of any estate of which the third to eighth respondents have been appointed in terms of section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965 or the estate of any other person referred to in section 72(1);

8.2 curators or guardians 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 Estates Act 66 of 1965;

8.3 trustees of any insolvent estate in terms of section 59 of the Insolvency Act 24 of 1936;

8.4 liquidators of any company in terms of section 379(2) read with section 379(e) of the Companies Act 61 of 1973 read together with the provisions of the Companies Act 71 of 2008;

8.5 trustees of any trust in terms of section 20(1) of the Trust Property Control Act 57 of 1988;

8.6 liquidators of any close corporation appointed in terms of section 74 of the Close Corporations Act 69 of 1984; and

8.7 administrators appointed in terms of section 74 of the Magistrates' Court Act 32 of 1944.

9 The third to eighth respondents are hereby ordered and directed, jointly and severally, to:

9.1 pay in terms of section 87(2) of the Legal Practice Act 28 of 2014, the reasonable costs of the inspection of the accounting records of the respondents;

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

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

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

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

10 If there are any trust funds available, the third to eighth respondents shall within 6 (six) months after having been requested to do so by the curators, or within such longer period as the curators may agree to in writing, satisfy the curators, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to them (third to eighth respondents) in respect of their (former) legal practices, and should they fail to do so, they shall not be entitled to recover such fees and disbursements from the curators without prejudice, however, to such rights (if any) as they may have against the trust creditor(s) concerned for payment or recovery thereof.

11 A certificate issued by a Director of the Legal Practitioners Fidelity Fund shall constitute *prima facie* proof of the curators' costs and that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curators' costs.

12 The third to eighth respondents shall during the period of suspension comply with the provisions of sections 84(1) and 85 of the Legal Practice Act 28 of 2014.

13 The third to eighth respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.'

C HEATON NICHOLLS
JUDGE OF APPEAL

Appearances

For the appellant: C Georgiades SC (with P W Makhambeni)
Instructed by: AM Vilakazi Tau Incorporated Attorneys, Polokwane
Lovius Block Incorporated, Bloemfontein

For the third, fifth and
ninth respondents: G N Naudé SC (with G T Kyriazis)
Instructed by: Hansen Incorporated Attorneys, Pretoria
Phatshoane Henney Attorneys, Bloemfontein

For the fourth, sixth and
eight respondents: M R Maphutha (with A Seshoka)
Instructed by: Matotola Tseleng Attorneys, Polokwane

Tsetsewa Incorporated Attorneys, Polokwane
Duba Attorneys, Bloemfontein

For the seventh respondent: C T Malatji

Instructed by: Zikalala Attorneys, Polokwane
Mphahlehle & Makhumbila Attorneys, Bloemfontein