



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4514/2023

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

PAUL DE LANGE

1st Respondent

SHARON ANN DE LANGE

2nd Respondent

ROUX BARRY CLOETE

3rd Respondent

MATSEPES INCORPORATED

4th Respondent

CORAM: LOUBSER, J et MOLITSOANE, J

HEARD ON: 2 NOVEMBER 2023

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 20 FEBRUARY 2024

- [1] This is an application for the suspension of the 1st and 2nd respondents from the roll and from the practice of legal practitioners of the High Court of South Africa until such time that a valid Fidelity Fund Certificate has been issued to them, alternatively for such period and on such conditions as the Court may deem fit. The application was launched on an urgent basis and it came before the Court on 13 September 2023 for the first time.

- [2] In the Notice of Motion, the usual ancillary relief is also sought against the 1st and 2nd respondents. In addition, an order is sought that the respondents, or any of their employees, be prohibited with immediate effect from operating and dealing with any of the trust banking accounts of De Lange Attorneys and the 4th respondent, the banking accounts of any deceased estates in respect of which the respondents have been appointed as executor/executrix or Master's representative and any banking accounts of any insolvent estates in respect of which he/she has been appointed as a liquidator.
- [3] It transpires from the founding affidavit of the applicant that the 1st and 2nd respondents are both seasoned attorneys of approximately three decades standing in the attorney's profession. They used to practice as partners of De Lange Attorneys until an alleged merger between their firm and the 4th respondent took place as from 1 March 2021. They then purported to become joint proprietors of the 4th respondent, practicing as attorneys for their own account under the name and style of Matsepes Incorporated, that is the 4th respondent. The 3rd respondent is also cited as a joint proprietor of Matsepes and because of his control of the firm.
- [4] It is further evident from the founding affidavit that the application is founded on the fact that all the respondents are presently practicing without Fidelity Fund Certificates in contravention of section 84 of the Legal Practice Act.¹ It is also evident that the respondents were unable to obtain Fidelity Fund Certificates because of complications arising from the purported merger of the two firms in 2021. The first complication was that the merger was not done in proper compliance with the Act and its Rules, more specifically in that the 1st and 2nd respondents failed to give notice to the applicant of the merger in contravention of section 84(5) of the Act. They also failed to comply with the applicant's requirements in relation to the closure of their trust account, the applicant states. These requirements are stipulated in Part XII of the Rules of the applicant, and pertain to elaborate accounting rules and procedures including the proper process for closing firms.² The respondents also failed to comply with these rules.

¹ Act 28 of 2014

² Rule 54.31

- [5] The applicant apparently only became aware of this situation when the 2nd respondent informed the applicant under the letterhead of Matsepes on 17 March 2021 that she, the 1st respondent and the 3rd respondent were now the new directors of Matsepes. In a later letter in March 2023, she informed the applicant that the closing of the De Lange Attorneys banking accounts caused all monies still paid into the old De Lange accounts to be transferred into Matsepes accounts. She further mentioned that the Matsepes accounts were in the process of being audited.
- [6] What emerged from these letters was that the trust accounts of De Lange Attorneys were conflated with the trust accounts of Matsepes without a proper closing audit, the applicant says. In this process the 3rd respondent has been complacent in the unlawful conflation of the audit trail between De Lange Attorneys and Matsepes, it is further pointed out. Meanwhile, the 2nd respondent had applied to the applicant for an extension of time for the lodgement of a final audit by their auditors in order to obtain the required Fidelity Fund Certificate. By 1 August 2023 the final audit was still not ready, while the respondents were still continuing to practice as attorneys without valid Fidelity Fund Certificates for the year 2023.
- [7] In their opposing papers, the respondents say that they take note of the provisions relating to the closure of a practice and the merger of one practice with another, but they say they were not familiar with those provisions. As regards the events after the merger, they state that their bookkeepers informed the auditors in January 2022 that one accounting system was being used but that the erstwhile firms were still operating separate trust accounts. The auditors were satisfied with that explanation and did not raise any queries about the process that was being followed. The respondents say that consequently neither their bookkeepers nor they themselves had any reason to suspect that they were “going about things the wrong way”.
- [8] The respondents further say that in March 2023, their auditors informed them that they were following the wrong process. The auditors then had discussions with the applicant in May 2023 to seek guidance on what should be done. As a

result of these discussions the auditors then requested the Matsepes bookkeepers to redo all transactions from 1 March 2021 until the end of February 2022. The auditors wanted all the transactions of De Lange Attorneys to be separated from the transactions of Matsepes and also wanted a separate De Lange bookkeeping system to be created, so that it can be closed in terms of the applicant's requirements.

- [9] The respondents point out that such process entailed an enormous task of gigantic proportions. During the process certain accounts could not be reconciled, and it took time to do a proper reconciliation. By Friday 29 September 2022 there was still a discrepancy of R41 000.00, which turned out to have been caused by deposits which were not posted in the correct manner. There is no money missing, the respondents say. No trust funds have been misappropriated. The problem is simply a bookkeeping issue, they say.
- [10] The respondents also point out that their bookkeepers have worked more than 250 hours overtime to comply with the instructions of the auditors. The auditor's report is imminent, they state. If the relief sought by the applicant is granted, then the livelihood of thirty-four employees of Matsepes and their families will be endangered.
- [11] In its replying affidavit, the applicant does not dispute the allegations of the respondents that no money had gone missing, and that no trust funds have been misappropriated. However, the applicant points out that the 3rd respondent is complicit and directly responsible for the failure to submit the trust audits of Matsepes for the financial year ending February 2023. Because of this failure, his Fidelity Fund Certificate has been withdrawn by the applicant in accordance with section 84(6) of the Act.
- [12] When the urgent application for suspension first came before Mhlambi, J and Vele, AJ on 13 September 2023, application was made on behalf of the respondents for a postponement to accommodate the completion of the audits by the auditors. The application was granted and the matter was postponed to 5 October 2023 "for the filing of the Fidelity Fund Certificate". The respondents

were ordered to pay the costs of the Legal Practice Council on the attorney and client scale.

- [13] On 5 October 2023 the respondents had still not obtained their Fidelity Fund Certificates, and a further application for a postponement was made on behalf of the respondents. The Court was informed that everything was now reconciled by the bookkeepers and the auditors only need to do their checks. After hearing submissions from both sides on the application for a further postponement, the Court made the following orders: The main application is heard as an urgent application, and it is postponed to 2nd November 2023 for the purposes of finalising the audit process and obtaining Fidelity Fund Certificates. The Court further ordered that it is a final postponement and that no further postponements would be granted on 2 November 2023 for the purposes mentioned. The respondents were ordered to pay the costs occasioned by the postponement on the attorney and client scale.
- [14] On 2nd November 2023 the respondents were still not in possession of any Fidelity Fund Certificate, and this Court proceeded to hear argument on the application for suspension. Having heard argument, the Court reserved its judgement, but also ordered that “if there are any further developments that could have an influence on the judgement, such developments may be brought to the attention of the Court by the filing of affidavits to such effect before the judgement is handed down”. The Court made this order because there appeared to be a reasonable prospect that the respondents could be issued with Fidelity Fund Certificates before judgement is handed down. Such an eventuality would obviously have a direct influence on the judgement in the application.
- [15] Only a few days before the hearing on 2nd November 2023, the long-awaited audit reports became available. Both the reports concerning De Lange Attorneys and Matsepes were qualified reports, however. In terms of Rule 54.29 of the applicant, an audit must be unqualified for acceptance by the applicant. As a consequence, the applicant then directed the respondents on 31 October 2023 to provide it with a full explanation on each point of qualification raised by the auditors. More specifically, the applicant wanted the respondents to provide information on deficits that appeared in their respective trust accounts, and raised

by the auditors as one of the qualifications. These deficits are substantial. In the case of De Langes there was a shortfall of some R61 000.00, and in the case of Matsepes a shortfall of more than R400 000.00.

- [16] In the period that followed, bundles of correspondence and affidavits by the respective parties were filed for the Court's attention. It is not necessary to deal with these papers in detail, save to mention that the respondents indeed went on to provide an explanation on each point of qualification. For instance, in respect of the shortfalls mentioned, the respondents stated that the deficits were immediately corrected when discovered, out of the respondents' own pockets. The deficits were caused by wrong postings of fees and disbursements and the erroneous transfer of fees. The conflation of the trust accounts and the accounting system was the primary cause of the problem, and no trust money of a trust creditor became endangered in the process. As for the other qualifications in the audit reports, the respondents informed that preventative measures were put in place to prevent a recurrence of the problem in future. It also transpired that the 1st and 2nd respondents have meanwhile resigned as directors of Matsepes, and that they are now only practicing for their own account under the name and style of Matsepes.
- [17] On 4 December 2023 the applicant addressed letters to the respondents informing them that the reasons provided for the qualifications cannot be accepted and that the applicant has resolved to appoint independent auditors to conduct an audit on the trust accounts. The explanation provided for the shortfalls was found to be too vague. The applicant has resolved not to issue Fidelity Fund Certificates in the premises, it was stated in the letter. The respondents were further informed that their failure to inform the applicant of the deficits in the trust accounts at a point in time where they were already aware of such, would also be investigated.
- [18] In addition, we were also informed that on 19 January 2024, the respondents launched an urgent application in this Division against the applicant for orders compelling the applicant to issue them with Fidelity Fund Certificates. This urgent application was heard towards the end of last week, and judgement was reserved. Obviously, we are not called upon to comment on this application, save

to say that at the writing of this judgement, the respondents are still not issued with the required certificates and that an investigation has now been launched into, inter alia, the trust accounts of the respondents to determine the cause of the shortfalls. These are the facts on which the present application must be adjudicated.

- [19] Now in the first place, the Act makes it clear that an attorney may not practice without a Fidelity Fund Certificate. The 1st and 2nd respondents therefore stand to be suspended from the roll and from the practice of legal practitioners in the present circumstances until such time that a valid Fidelity Fund Certificate has been issued to them. Prayer 1 of the Notice of Motion must therefore be granted, as amended. It follows that the ancillary relief in prayers 3 up to and including 14 must also be granted against the 1st and 2nd respondents. The applicant does not seek a suspension against the 3rd respondent. However, on the facts before the Court, the 3rd respondent finds himself in the very same boat as the 1st and 2nd respondent. In fact, the shortfall in his trust account was found to be much higher than the shortfall in respect of the 1st and 2nd respondents' trust account.
- [20] It is trite that applications of this nature constitute a disciplinary enquiry by the Court into the conduct of the practitioners concerned. The applicant is *custos morum* of the profession, which only places facts before the Court into the officer's fitness to remain on the roll of attorneys. The Council therefore fulfils the role of an *amicus curiae* in cases like the present.³
- [21] It follows that this Court is not bound by the relief sought in the Notice of Motion. The 3rd respondent should also be suspended on the same terms as the 1st and 2nd respondents, having regard to the circumstances he finds himself in.
- [22] Prayers 3 and 4 seek to prohibit all the respondents from operating and dealing with any of the trust banking accounts of the De Lange Attorneys and Matsepes, and to place the practices in curatorship. As we have seen, the applicant has already resolved to appoint independent auditors to investigate the cause of the

³ South African Legal Practice Council v Dladla [2022] ZAGPPHC 920 par 21.

shortfalls that occurred in the trust accounts. The relief sought in prayers 3 and 4 would serve to accommodate this process, and should therefore be granted.

[23] In the premises, the following order is made:

1. The First, Second and Third Respondents are suspended from the roll and from the practice of legal practitioners of the High Court of South Africa until such time that a valid Fidelity Fund Certificate has been issued to them.
2. The Respondents or any of their employees are prohibited, with immediate effect from operating and dealing with any of the trust banking accounts of De Lange Attorneys' and the Fourth Respondent, the banking accounts of any deceased estates in respect of which the Respondents have been appointed as executor/executrix or Master's representative and any banking accounts of any insolvent estates in respect of which he has been appointed as a liquidator.
 - 2.1 The First, Second and Third Respondents shall immediately surrender and deliver to the Registrar of the Honourable Court their certificates of admission as legal practitioners of the Honourable Court.
 - 2.2 In the event of any of the Respondents failing to comply with paragraph 2.1 of this order within two (2) days from the date of service of this order on him/her, the sheriff is authorised and directed to take possession of the certificate and to hand it to the Registrar of the Honourable Court.
 - 2.3 The First, Second and Third Respondents shall not be entitled to any fee, reward or reimbursement in respect of legal services rendered during their period of suspension in terms of section 93(8)(c) of the Legal Practice Act No. 28 of 2014 ("the Act").
3. Margarette Kwayke and her successor(s) in-title or a Nominee of the Applicant is appointed as *curator bonis* ("the Curator") of the Legal Practice of the First, Second and Third Respondent and to administer and control the

trust account of those Respondents, and any accounts relating to insolvent and deceased estates and any deceased estate and any estate under Curatorship connected with Respondent's practice as an attorney and including the separate banking accounts opened and kept by Respondent at a bank in the Republic of South Africa in terms of section 86(1) of the Act and/or any separate saving or interest-bearing accounts as contemplated by section 86(3) and/or 86(4) of the Act, 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 as set out in paragraph 7 hereunder. The curatorship will terminate upon the issue of an unqualified audit report by the auditors appointed by the Applicant or upon the discharge of the Curator by the applicant, whichever event happens first.

4. The Applicant is exempted from furnishing security of the performance of her obligations as *curator bonis*.
5. The Respondents are ordered to deliver all of the records relating to the legal practice of the Respondents ("First; Second and Fourth"), which for all the purposes of this order, but without limitations, will include all accompanying records, files correspondence and documents which are directly or indirectly relevant to or which contains particulars of information to:
 - (a) Any monies received, held or paid by the First, Second and Third Respondents for or on account of any person;
 - (b) Any monies invested by the First, Second and Third Respondents in terms of any provisions of section 86 of the Act;
 - (c) Any interest on monies so invested in terms of section 86(3) or section 86(4) of the Act;
 - (d) Any estate of a deceased person administered by the First, Second and Third Respondents whether as executor or on behalf of the executor, in terms of the provisions of the Administration of Estate Act, Act 66 of 1965;

- (e) Any estate in which the First, Second and Third Respondents acted as or on behalf of the Curator to administer the property of a minor child or any other person in terms of section 72 of the Administration Estate Act, Act 66 of 1965;
 - (f) Any insolvent estate administered by the First, Second and Third Respondents as trustee of on behalf of the trustee in a trust in terms of the Insolvency Act, Act 24 of 1936;
 - (g) Any trust administered by the First, Second and Third Respondents as trustee, or on behalf of the trustee in terms of the Trust Property Act, Act 57 of 1988;
 - (h) Any company liquidated in terms of the Companies Act, Act 61 of 1973, administered by the First, Second and Third Respondents as Liquidators or on behalf of the liquidator;
 - (i) Any Close Corporation liquidated in terms of the Close Corporation Act, Act 69 of 1984, administered by the First, Second and Third Respondents as liquidators or on behalf of the liquidator;
 - (j) The First, Second and Third Respondents' related files of any Client.
6. Should the Respondents fail to comply with the provisions of the preceding paragraph 5 of this order on service thereof upon them 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. The said Curator shall have the following powers:
- (a) To hand over said records to any person entitled thereto, as soon as she has satisfied herself that the fees and disbursements in connection thereof have been paid or satisfactorily secured, or that same are no longer required

- (b) To accept a written undertaking by a trust creditor to pay such amount as may be due to the Respondent, either on taxation, assessment or by agreement, as satisfactory security for the purpose of paragraph 7(a) above, provided that such written undertaking incorporated a *domicilium citandi et executandi* of such creditor;
- (c) To require that any record so handed over, be delivered back to her if in her sole and absolute opinion, she considers them to be relevant;
- (d) To administer and control all Respondents' trust account which for the purpose of this Order shall include:
 - (i) The accounts relating to any estate, curatorship, trust or company;
 - (ii) Any and all banking accounts opened and kept by the Respondent (or on the Respondent's behalf) in terms of any provision contained in the Act or any Acts.
- (e) Subject to the approval of the Board of Control of the Fund ("the Board"), to sign and endorse cheques, and/or withdrawal forms and generally to operate upon the said trust accounts, but only to such extent and for such purposes as may be necessary to bring completion to current instructions in which the Respondent was acting as at the date of his suspension;
- (f) Subject to the approval of the Board, to recover and receive and, if necessary in the interest of persons having lawful claims upon the said trust accounts and/or invested by the Respondent in respect of monies held, received and/or invested by the Respondent in terms of section 86(2) and 86(3) of the Act ("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 in which the Respondent may have been concerned and which may have been wrongfully and unlawfully paid from the said trust accounts and to receive such monies and to pay same to the credit of the said trust accounts;
- (g) To ascertain from the Respondents' records the names of all persons on whose account the Respondent appears to hold or to have received trust monies ("trust creditors");

- (h) To call upon such trust creditors to furnish proof, information and/or affidavits as she may require to enable her, acting in consultation with and subject to the requirements of the board, to determine whether any such trust creditors have a claim in respect of money in the said accounts, and if so, the amount of such claim;
- (i) Subject to the approval of the Board, to admit or reject in whole or in part, the claims of any such trust creditors without prejudice to such trusts creditor's right to access to the civil courts;
- (j) Subject to the approval of the Board, to pay such claim as she may consider lawfully due;
- (k) In the event of there being any surplus in the said trust accounts after payment of such claims, to utilise such surplus to settle or reduce as the case may be, firstly any claim of the fund in terms of section 86(5) of the Act in respect of any interest therein referred to and, secondly without prejudice to the rights of the Respondents' creditors, the costs, fees and expenses, or such portion thereof as has not already been separately paid by the Respondent to the Applicant and, if there is any balance left after payment in full of all claims, costs fees, and expenses, to pay such balance to the fund;
- (l) In the event of there being insufficient trust monies in the said accounts to pay in full the claims the claims of the trust creditors as reflected in the records of the Respondent:
 - (i) Subject to the approval of the Board, to close the said accounts and to pay the credit balances therein to the Fund and to require such credit balances therein to be placed to the credit of a special suspense account in the name of the Respondent in the Fund's books;
 - (ii) To refer the claims of all trust creditors to the Board to be dealt with in terms of the provisions of the Act;

- (iii) To authorise the Board to credit the credit balances referred to above to its "paid claims account" when the Fund has paid, in terms of Section 55 of the Act, admitted claims of the trust creditors of the Respondent in excess of such credit balances, provided that, notwithstanding the foregoing, the Board in its discretion shall be entitled to transfer to its "*paid claims accounts*" the amounts of any claims as and when admitted and paid by it.
 - (m) Subject to the approval of the chairperson of the Fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any such other person where considered necessary to assist her in carrying out of her duties as curator bonis;
 - (n) To render from time to time returns to the Board showing how the said accounts have been dealt with until such time as the Board notifies her that she may regard her duties as curator bonis as discharged.
8. The Respondents shall within 6 (six) months after having been requested to do so by the Curator, or within such longer period as the Curator may agree to in writing, satisfy the Curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to him (Respondent) in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the Curator without prejudice, however, to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof;
 9. A bill of costs drawn on the High Court scale of attorney and client costs taxed by the Registrar of this Court (who is authorised to do so) *mutatis mutandis* as if the Curator and the responsible officials of the Applicant in discharging their duties as contemplated in this order had acted as attorneys, shall constitute proof of their reasonable fees and disbursements ("the Curatorship fees and disbursements") and that the Registrar be authorised to issue a writ of execution for payment thereof by the First, Second and Third Respondents;

10. The Respondents are hereby directed:

- (a) to pay, in terms of 87(2) of the Act, the reasonable costs of the inspection of the accounting records of the Respondents;
- (b) to pay the Curatorship fees and disbursement;
- (c) to pay the expenses relating to the publication of this order or an abbreviated version thereof.

11. The First, Second and Third Respondents are hereby removed from the office as –

- (a) Executor/executrix of any estate of which they have been appointed in terms of section 14(1) read with section 54(1)(a)(v) of the Administration of Estates Act, No. 66 of 1965 or the estate of any other person referred to in section 72(1) thereof;
- (b) Curator or guardian of any minor or other person's property in terms of Section 72(1) read with section 54(1)(a)(v) and section 85 of the Administration of Estates Act, No. 66 of 1965;
- (c) Trustee of any insolvent estate in terms of section 59 of the Insolvency Act No. 24 of 1936;
- (d) Liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, N0 71 of 2028;
- (e) Trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No. 57 of 1988;
- (f) Administrator appointed in terms of section 74 of the Magistrates' Court Act, No. 32 of 1944.

12. The First, Second, Third and Fourt Respondents are ordered to pay the costs of this application on an attorney and own client scale, including the costs occasioned for the employment of two Counsel, where applicable, the one paying the other to be absolved.



P. J. LOUBSER, J

I agree:



P. MOLITSOANE, J

For the applicant:

Adv. M. S. Mazibuko

Instructed by:

Amade and Company Inc.

Bloemfontein

For the respondents:

Adv. M. D. J. Steenkamp

Instructed by:

E.G. Cooper Majiedt Inc.

Bloemfontein