



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 16777/2023

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL **Applicant**

and

ZUKO MACK MICHAEL NONXUBA **First Respondent**

NONXUBA INCORPORATED **Second Respondent**
(Registration number 2003/008873/21)

Coram: Henney J et Francis J

Matter heard on 2 August 2024.

Judgment delivered on 4 December 2024

JUDGMENT: 4 December 2024

FRANCIS, J:

- [1] The South African Legal Practice Council ('the LPC') applies for the striking off of the name of Zuko Mack Michael Nonxuba ('the first respondent' or 'Mr Nonxuba') from the roll of attorneys of this Court, and for the usual ancillary relief relating to the appointment of a curator to administer and control his trust accounts and/or that of his firm, Nonxuba Incorporated ('the second respondent' or 'Nonxuba Inc').
- [2] The LPC was established in terms of the the Legal Practice Act 28 of 2014 ('the LPC Act') and is statutorily enjoined to regulate all legal practitioners, maintain the integrity of the legal profession, and promote and protect the public interest.
- [3] Mr Nonxuba was admitted as an attorney on 7 September 2000 and commenced practicing as such with Mpambaniso Attorneys. In February 2003, he started practicing for his own account, and he established Nonxuba Inc in April 2003 with himself as the sole director. He remains the only director of the firm and, in this judgement, reference to 'Mr Nonxuba', includes, where applicable, Nonxuba Inc.
- [4] Mr Nonxuba specialises in personal injury and medical negligence cases in various provinces in South Africa, including the Western Cape. These cases overwhelmingly involve plaintiffs who are the parents/guardians of minor children who sustained birth injuries because of negligence on the part of medical personnel during the birth process, resulting in hypoxic ischaemic encephalopathy, foetal distress and, ultimately, cerebral palsy.
- [5] This application for the striking off of Mr Nonxuba has had an unusual progression from its inception. It started off as an urgent application brought by the LPC on 21 June 2021 for an order interdicting him from practicing as a legal practitioner pending the final determination of disciplinary proceedings ('the interdict application').

- [6] Several applications were subsequently launched which included applications to intervene, joinder applications, a conditional application, an application to interdict Mr Nonxuba from operating upon the firm's trust account and the appointment of a curator to manage the trust account ('the conditional application'), and an application to suspend him from practicing as an attorney pending this strike-off application ('the suspension application').
- [7] While the interdict application process was underway, it was alleged that Mr Nonxuba had successfully prosecuted five medical negligence claims but had not complied with the relevant court orders in that he *inter alia* did not pay over the monies due to the claimants *via* the trusts that he should have established on their behalf ('the five medical negligence claims').
- [8] Mr Nonxuba failed to provide an adequate explanation for this allegation, and this prompted the LPC to lodge the conditional application and the subsequent suspension application as more allegations of misconduct surfaced.
- [9] During the course of the litigation preceding the hearing of the suspension application, Mr Nonxuba delivered various affidavits and accounting documents (over 2000 pages) including documents such as the client letters in all five medical negligence claims, billing disbursement reports in four of the matters, a final accounting summary and proof of payment in one matter, and a redacted copy of the trust bank account statement of Nonxuba Inc. These documents, according to Mr Nonxuba, proved that the monies paid in the five medical negligence claims were still in trust and could be properly accounted for.
- [10] The LPC filed a response in the suspension application in which the accounting records referred to in the previous paragraph were scrutinized. The LPC contended that the trust reconciliation and client ledger accounts were fabricated. In addition, the LPC submitted that these documents revealed several irregularities which amounted to a breach of the rules of the profession made

under the LPC Act and promulgated on 20 July 2018 in Government Gazette number 41781 ('the LPC Rules'). These irregularities included several round or composite transfers from Nonxuba Inc's trust bank account to its business bank account over an extended period.

- [11] According to the LPC, the fabrication of Mr Nonxuba's trust account reconciliation, the delay in paying the damages awards to the respective trusts, and the round transfers, created a suspicion that Mr Nonxuba had stolen trust monies and had fabricated accounting records to hide his malfeasance.
- [12] Given all the inter-related applications, this matter had to be case managed. Eventually, after the passage of a fairly lengthy period, Mr Nonxuba was suspended from practicing as an attorney pursuant to an order granted by Nuku J on 18 April 2022, who found that the accounting records had indeed been fabricated. According to Nuku J, notwithstanding the many patent irregularities identified by the LPC, the fabrication of accounting records was sufficient reason for suspending Mr Nonxuba from practice.
- [13] In terms of the suspension order, the LPC was directed to bring the strike-off application within four months of the Order being granted. However, it was filed some seventeen months later. Mr Nonxuba utilized all available appeal mechanisms in a bid to challenge his suspension, including a reconsideration application to the President of the Supreme Court of Appeal ('SCA') and an appeal to the Constitutional Court. All his appeals were unsuccessful, but the inevitable result was that the application before this Court was considerably delayed.
- [14] During the course of the manifold applications, many thousands of pages were added to an ever-burgeoning record and at least seventeen judges were involved in adjudicating the various procedural and substantive legal skirmishes.

[15] The mountain of paper filed and the considerable amount of judicial attention expended on this matter was devoted to one primary issue: did Mr Nonxuba fulfill his duties as a legal practitioner by implementing the court orders granted in his clients' favour and properly accounting to them for the monies received on their behalf? The LPC is of the view that Mr Nonxuba did not do so; hence, this strike-off application.

[16] In this application, apart from the complaint filed by Mr Godfrey Howes on behalf of the Eastern Cape Provincial Treasury, the LPC relies on the offending conduct identified, and evidential material presented, during the preceding court applications against Mr Nonxuba. In essence, the LPC's complaint is that:

[16.1] Mr Nonxuba and his firm failed to comply with court orders obtained on behalf of several minors and could not account for the substantial damages awards that he had received on their behalf;

[16.2] Accounting records were fabricated in an attempt to deceive the LPC and this Court into concluding that Mr Nonxuba and his firm held the trust funds in question;

[16.3] Mr Nonxuba plundered the trust funds under his control by making transfers from the firm's trust banking account to its business banking account, in perfectly round amounts, without being lawfully entitled to transfer such funds, thereby committing the theft of trust funds;

[16.4] In managing and operating his trust account in the manner that he did, Mr Nonxuba failed to keep proper accounting records and, consequently, contravened various provisions of the LPC Rules; and

- [16.5] Given his serious misconduct, Nonxuba is not a fit and proper person to practice as an attorney.
- [17] Mr Noxuba denied any allegation of having knowingly fabricated ledger accounts or of having stolen or misappropriated trust monies but (grudgingly) admitted that he may not have strictly complied with the LPC Rules relating to the operation of his trust account and the keeping of accounting records.
- [18] The determination of whether a person is a fit and proper person to continue practicing involves the exercise of a discretion by a court by virtue of its role as the ultimate repository of disciplinary jurisdiction over legal practitioners (see, ***Law Society, Cape of Good Hope v Berrange 2005 (5) SA 160 (C)***). A court's discretionary powers to strike-off or suspend an errant practitioner from practice derives from the common law and is buttressed by section 44 of the LPC Act which recognizes the power of the High Court "*to adjudicate and make orders in respect of matters concerning the conduct*" of legal practitioners.
- [19] The practical manner in which the court exercises these discretionary powers is by way of a threefold inquiry (see, ***Jasat v Natal Law Society 2000 (3) SA 44 (SCA)***, and ***Law Society of the Cape of Good Hope v Budricks 2003 (2) SA 11 (SCA)***). First, the court must decide on the evidence before it whether the alleged misconduct has been established on a preponderance of probabilities. If the answer is in the affirmative, the court must thereafter decide whether the person concerned is a fit and proper person to continue practicing. Finally, the court must decide whether in all the circumstances of that particular case, the person in question is to be removed from the roll or merely suspended from practice. The first inquiry is a factual one while the other two are value judgments exercised by the court having regards to all the evidence at its disposal.
- [20] In considering the evidence before it, the court is not bound by the views of the LPC. However, the LPC is not an ordinary litigant. It brings the matter to court in

its capacity as both the statutory *custos morum* over the legal profession and protector of the public in their dealings with the legal profession. Its views should be accorded due weight (see, ***Law Society, Cape v Koch 1985 (4) SA 379 (C)*** at 386 G).

[21] I now turn to consider the offending conduct as alleged by the LPC.

Non-compliance with court orders relating to medical negligence claims

[22] It is not disputed that Mr Nonxuba was the attorney of record for the plaintiffs in the five medical negligence claims: Jiba, Mininye, Sandi, Sihlobo, and Ncapai.

[23] In each of the five medical negligence claims, Mr Nonxuba represented children who were found to have suffered debilitating mental and physical harm because of the negligence of personnel of the Eastern Cape Provincial Department of Health. In all five claims, the Member of the Executive Committee for Health, Eastern Cape ('MEC for Health, EC') was ordered to pay substantial damages awards to Nonxuba Inc which, in turn, had to establish, within 6 months of the court orders, trusts to administer the monies for the benefit of the disabled children.

[24] Despite the fact that the court orders in all five medical negligence claims were made during 2018 and 2019, Nonxuba, as of July 2021, had not established all the trusts, and where the trusts had been established, he failed to pay over the monies due to these trusts. These facts were common cause in the suspension proceedings, as they are in this strike-off application.

[25] Apart from the five medical negligence claims, the LPC also received a complaint, dated 28 April 2022, from Mr Godfrey Howes on behalf of the Eastern Cape Provincial Treasury. He identified a further five trusts which Mr Nonxuba had failed to establish timeously or at all ("the Howes complaint"). These trusts

were supposed to be established by court order for the minors, Simnikiwe Picani, Mbasu Qhubu, Ibenam Koli, Luniko Mdeni, and Thandolwethu Balikhulu between six and nine months of the court orders being handed down, and the monies paid into them. According to Mr Howes, none of the trusts had been established when he made his enquiries at the relevant Masters Office more than three years after the court orders were obtained.

Fabricated ledger accounts and trust account reconciliations

- [26] Mr Nonxuba is required by Rule 54.15.1 of the LPC Rules to extract a list of all his trust creditors every month. The total amount he holds on behalf of his trust creditors must be compared to his trust account balance and both amounts should reconcile.
- [27] The trust reconciliation for the period ending July 2021 was provided by Mr Nonxuba under oath in the suspension application. This trust reconciliation lists twelve trust creditors, and the amounts so held, R101 721 310.63, purports to reconcile exactly with the amount reflected in the trust account bank statement for July 2021. He also provided eleven ledger accounts which purport to relate to eleven of the twelve trust creditors identified in the reconciliation.
- [28] One of the twelve trust creditors included in Mr Nonxuba's trust reconciliation is Nonxuba Inc itself. No ledger account was furnished for this trust creditor, but the reconciliation shows a credit balance in trust in an amount of R6 925 887.03. It is unclear why the trust reconciliation reflects these funds as being held on behalf of Nonxuba Inc as it is impermissible to keep business and trust monies together. Rule 54.11 provides that trust money must be separately held from business money and that, "*money other than trust money found in the trust banking account at any time shall be transferred to a business banking account without undue delay*".

[29] The authenticity of the remaining eleven ledger accounts reflected in the trust reconciliation was tested by the LPC by comparing the transactions recorded therein with Mr Nonxuba's trust bank account statements. If the trust reconciliation was authentic, each payment recorded in the trust ledger accounts furnished by Mr Nonxuba would be reflected in the trust bank account statements. After having conducted a detailed analysis of every ledger account, the LPC concluded that the accounts were not authentic and had been fabricated; a conclusion similar to that reached by Nuku J in the suspension application.

[30] The LPC's exhaustive analysis of each of the eleven ledger accounts is reproduced in its founding affidavit filed in support of this strike-off application. It is not necessary for the purposes of this judgement to repeat what is stated in the founding affidavit in respect of each ledger account. Suffice to say, the analysis of each ledger account revealed a similar pattern.

[31] In so far as the five medical negligence claims are concerned, the ledger account of Jiba illustrates the sort of evidence uncovered, and analysis conducted, by the LPC. The Jiba ledger account and the accompanying disbursement report were provided by Mr Nonxuba in an attempt to satisfy the LPC that the funds paid in respect of this client by the MEC for Health, EC were properly accounted for and held by Nonxuba Inc. The total amount payable by the MEC, EC in this matter was R16 102 500 plus costs of suit. According to the Jiba ledger, the amount received by Nonxuba Inc on 20 July 2018 was R16 337 640.61. The difference appears to be attributable to interest paid by the MEC for Health, EC due to the late payment in terms of the relevant court order. The LPC identified the following discrepancies between the Jiba ledger account and the trust bank account statements:

[31.1] The ledger records four payments having been made on 31 July 2018, 28 February 2019, 29 February 2020, and 28 February 2021.

None of these payments appear in the trust bank account statement.

- [31.2] The ledger records a payment of R300 000 to 'client' which is not dated. The LPC located a payment in this amount with the narration 'Jiba travelling' on 31 October 2019.
- [31.3] The trust bank statement reflects a payment of R345 250 with a narration 'Jiba' on 24 July 2019. This is not reflected in the ledger.
- [31.4] In addition, the disbursement report listed the disbursements incurred by Mr Nonxuba during the course of this matter. The ledger does not reflect each of the disbursements contained in the disbursement report as a separate entry. Instead, the ledger records aggregate debit entries which occurred over a lengthy period.
- [31.5] In addition to the fees debited in the ledger, the disbursement report also lists a fee (for the drafting of correspondence) and not only disbursements. The aggregate of this fee is R80.
- [31.6] The disbursement report records that Mr Nonxuba debited interest on disbursements to the client after he had received payment of the capital award from the MEC, EC. In all, R236 639.81 was debited in respect of interest allegedly due by the client on disbursements which Mr Nonxuba was able to pay since there was sufficient funds in his trust bank account to make the payment.
- [31.7] Mr Nonxuba provided no source documentation to enable the LPC to assess whether the fees he purported to debit in the ledger were lawful. No account for fees was found amongst the voluminous

documentation he furnished. According to the LPC, the lack of documentation meant that it was not possible for it to ascertain whether the provisions of the Contingency Fees Act 66 of 1977 ('the Contingency Fees Act') were complied with.

- [32] In so far as the remaining six trust ledger accounts provided by Mr Nonxuba are concerned (Sopazi, Feni, Malose, Mnyibashe, Mdeni, and Zangwe), the LPC's analysis of these trust accounts also revealed a similar pattern. A comparison of the ledger accounts and the trust bank account statements showed that none of the receipts or debits recorded in the ledger were reflected in the bank statements. Accordingly, so the LPC submitted, all these ledgers were fabricated.
- [33] As noted earlier, Mr Nonxuba failed to establish the five trusts falling under the Howes' complaint. According to the LPC, in at least one of these matters - Qhubu - Nonxuba had been paid the damages award and ought to have held these funds in the trust bank account as at July 2021. However, the trust reconciliation provided by Mr Nonxuba in his answering affidavit in the suspension application did not reflect this. In the Qhubu matter, a court order was obtained on 11 September 2018 in terms of which the MEC for Health, EC was ordered to pay a total amount of R26 292 236.52. This amount was reflected in Nonxuba Inc's trust bank account statement on 8 November 2018. These funds should have been held in Nonxuba Inc's trust bank account until the Qhubu trust was registered which, in terms of the relevant court order, ought to have been done within six months of the date of the order (that is, by 11 March 2019). According to the LPC, the Qhubu ledger account suggested that Mr Nonxuba sought to conceal the existence of this matter because, as at July 2021, he had misappropriated the funds and could not account for them. At the very least, it indicates that the trust reconciliation was incomplete and that the trust bank statement produced in support of all trust creditors was fabricated.

Round transfers from trust to business

[34] Rule 54.14.14 of the LPC Rules provides that:

“Withdrawals from a firm’s trust banking account shall be made only:

54.14.14.1 to or for a trust creditor; or

54.14.14.2 as transfers to the firm’s business banking account, provided that such transfer shall only be made in respect of money due to the firm; and provided that no transfer from its trust banking account to its business banking account is made in respect of any disbursement (including counsel’s fees) or fees of the firm unless:

54.14.14.2.1 the disbursements have been actually made and debited by the firm; or

54.14.14.2.2 a contractual obligation has arisen on the part of the firm to pay the disbursements; or

54.14.14.2.3 fees and disbursements have been correctly debited in its accounting records.”

[35] Rule 54.11.2.1 provides that any amount transferred from trust to business must be *“identifiable with, and ... not exceed the amount due to the firm”*, and Rule 54.11.2.2 provides that the *“trust creditor from whose account the transfer is made ... [must be] identified”*.

[36] The relevant LPC rules in force prior to July 2018 contained materially similar provisions to the LPC Rules.

- [37] In summary, then, it is required that every transfer from a firm's trust bank account to its business bank account must clearly specify the amount due to the firm and to which trust ledger account the payment is debited. Transfers of this nature may only be made when an attorney is actually entitled to the funds.
- [38] Copies of the trust bank account statements from January 2017 to July 2021 were provided by Mr Nonxuba and form part of the record. There are, in total, 759 perfectly round amount transfers from trust to business recorded in these bank statements. The amount involved is, in total, R348 845 000.
- [39] In the months of June and July 2021 no fewer than 16 round amount transfers were made from the trust funds held by Mr Nonxuba to his business account. The total amount involved for those months was R15 500 000.
- [40] In order to justify these transfers, Mr Nonxuba supplied a 'payment summary' document in the suspension application which purported to itemize the individual payments which make up the round payments he made from trust to business during June and July 2021. If the transactions reflected in the payment summary were genuine, they would be corroborated by corresponding entries in the ledger accounts and the trust bank statements.
- [41] The LPC submitted in its supplementary replying affidavit in this application that there are serious problems evident in the payment summary when compared with the other accounting documents Mr Nonxuba provided. Thus, for example, in respect of the first four matters listed under the month of July 2020 (Feni, Mdeni, Malose, and Mnyibashe), none of the transactions referred to in these ledgers are corroborated by entries in the bank statements. The same applies in respect of the four matters listed under the month of June 2021 (Feni, Mnyibashe, Mdeni, and Zangwe).

[42] The LPC further established that the ledger accounts in respect of every payment made from the trust account listed on the payment summary for July 2021 show that the debits were passed in each instance on 31 July 2021. All the round payments were made before that date. This, according to the LPC, means that every round payment was made before an entitlement to funds had arisen.

[43] Similarly, the ledger accounts in respect of every payment made from the trust bank account listed on the payment summary for June 2021 shows that the debits were passed in each instance on 30 June 2021. By that time, R2 500 000 had already been transferred from trust to business. This, the LPC submitted, again demonstrates that Mr Nonxuba made round payments to himself from trust funds before an entitlement to the funds had arisen.

[44] Based on its analysis, the LPC submitted that the trust bank account statements indicate that Mr Nonxuba made unlawful transfers from trust to business; it is inconceivable that he was entitled to trust funds amounting to R348 845 000 which he transferred in perfectly round amounts on 759 occasions since January 2017. The LPC concluded, therefore, that Mr Nonxuba siphoned off an astonishingly large amount of money from his clients over an extended period.

[45] The LPC identified other irregularities that amounted to a breach of the LPC Rules, including the following:

[45.1] By wrongly debiting interest on disbursements allegedly made long after the funds had been received on behalf of his clients, the ledger accounts were inaccurate in respect of the amounts held in trust by Mr Nonxuba on behalf of the relevant clients.

[45.2] In the Sandi claim, Mr Nonxuba acted in contravention of the court order by transferring the funds held in trust to attorneys instead of paying the funds into a trust as the court had ordered and, in both

the Sandi and Miniye claims, Mr Nonxuba charged fees in excess of 25% of the capital awards, thereby contravening the Contingency Fees Act.

Mr Nonxuba's response

[46] Mr Nonxuba filed an answering affidavit in which he, for all intents and purposes, glossed over the serious allegations made by the LPC in respect of the trust fund and accounting irregularities. He, instead, stated that his accountant, Ms Wapenaar, would file a supporting affidavit which would address the substantive allegations made by the LPC. Ms Wapenaar was appointed in December 2023 to examine all trust account records and supporting documentation, including all transactions involving the trust bank account, and to prepare a report on her findings.

[47] Nonxuba's answer to the application to have his name struck off the roll of attorneys is, in broad summary, the following:

[47.1] Whilst conceding that he did not act in accordance with the court orders in respect of the five medical negligence claims, Mr Nonxuba's explanation is that he was in a legal dispute with Absa Bank and, by extension, the Absa Trust Limited which was appointed to establish all the trusts. In mitigation, he submitted that he made loans to the mothers of the minors to pay for their medical treatment and daily expenses. These loans were treated as disbursements against the money received on their behalf.

[47.2] He stated that he did not conduct the business of his practice in the usual manner. He explained that payments from the trust account were made to the business account. Thereafter, all payments to creditors, disbursements, and other business-related expenses

were paid from the business account. Given the volume of work and accounts payable, he believed that it would be excessively time-consuming to manage each payment individually from the trust account. The 'estimates' of the fees and disbursements due to the firm were transferred out of his trust account and he would produce the final accounting reconciliation at a later stage.

[47.3] He conceded that there were 'errors' in the trust ledgers and reconciliation supplied to the LPC and admitted that he did not 'strictly adhere' to the LPC Rules relating to the operation of his trust account. He stated that Ms Wapenaar would explain these errors and show that the transfers from the trust account to his business account were for a legitimate purpose and that no theft of trust funds had occurred. In any event, so he submitted, the trust account was audited by an independent auditor who would have scrutinized all accounts, ledgers, and supporting documentation. Each year, his firm received an unqualified audit opinion in respect of the trust account. In his view, the unqualified opinions were significant as it demonstrated that all funds in the trust account and transfers from the trust account were legitimately supported and substantiated.

[47.4] In so far as the issue of the fabricated accounting records in the suspension application are concerned, he explained that the trust ledger entries were not aligned with the trust bank account because the individual transfer transactions were reflected in the business account of Nonxubo Inc. Thus, the discord between the trust ledgers and trust bank account, according to Mr Nonxuba, did not give rise to an inference that the trust accounting records were fabricated. Based on the available information, he believed that the trust reconciliation and trust ledgers for the trust creditors as

prepared and presented in his answering affidavit in the suspension application, were correct.

[47.5] In so far as the round number transfers are concerned, he submitted that these transfers reflected how he managed and operated his practice and his trust bank account. He denied that the round number transfers from the trust account to the business account supported the contention that these funds were misappropriated; Ms Wapenaar's would exonerate him and confirm that no theft had occurred.

[47.6] He denied that there was any misappropriation of funds and that any of the ledgers had debit balances. According to him, the two ledgers that did reflect negative balances were subsequently corrected.

[47.7] The Howes complaint was also addressed, *albeit* somewhat perfunctorily. Mr Nonxuba submitted that the preparation of the trust account books was mainly done by his staff together with the firm's bookkeeper. The books of account were then endorsed by the auditor. He stated that Ms Wapenaar had taken cognizance of all the awards granted in favour of the trust creditors, all transfers into and out of the trust account, and all disbursements and related payments. She would deal with these issues in her supporting affidavit and report.

[47.8] In so far as the calculation of interest on disbursements was concerned, Mr Nonxuba said that this was a manual process and Ms Wapenaar would explain this issue which she had rectified in the updated trust ledgers.

[47.9] Mr Nonxuba's response was a bare denial in respect of the allegation that he had contravened the Contingency Fees Act in the Sandi and Mniyane matters by charging fees in excess of 25% of the capital awards. He submitted that he prepared bills of costs years ago which had been settled. His view was that the appropriate manner to deal with any issues arising in relation to his fees or bills of costs was through the taxation process before a taxing master.

[48] Ms Wapenaar delivered a supporting affidavit and a voluminous accounting report which together exceeded over 450 pages (referred to hereinafter as 'the Wapenaar report'). She noted that a substantial number of supporting documents could not be traced and were not available. Ms Wapenaar indicated that her review of Nonxuba Inc's accounting records and entries revealed that they were not of the expected standard. This complicated the task of analysing the disbursements that were allocated. Mr Nonxuba did not follow the norm and he operated the practice from the trust and business account as opposed to the trust account only. Indeed, the round amount transfers between the trust and business accounts of Nonxuba Inc exacerbated the difficulties in allocating payments to specific trust ledgers. She stated that based on the information at her disposal, the majority of the funds transferred to the business account were utilized within the business and constitute normal business expenses, including payments of experts and certain service providers. She concluded by stating that she cannot give an opinion on theft or misappropriation as she was not required to conduct such a review.

Has the offending conduct been established

[49] Against the factual background and submissions of the parties set out above, I now consider whether the offending conduct has been established.

[50] Mr Nonxuba conceded that he had committed certain transgressions in relation to the manner in which he kept and maintained his accounting records. On the evidence before this Court, and in light of his concessions, it is apparent that Mr Nonxuba has contravened at least the following LPC Rules:

[50.1] Rule 54.6 and 54.14 – keeping proper accounting records;

[50.2] Rule 54.10 – the duty to keep up to date accounting records;

[50.3] Rule 54.11 – the duty to keep trust money separate from other funds;

[50.4] Rule 54.13 – the duty to make payments to clients within a reasonable time;

[50.5] Rule 54.14.14 – withdrawals from the trust bank account; and

[50.6] Rule 54.15 – the duty to prepare monthly trust reconciliations.

[51] Furthermore, it is common cause that Mr Nonxuba failed to comply with at least ten court orders requiring him to establish trusts and to pay over the funds held by him into these trusts.

[52] The remaining allegations relating to the misappropriation of trust funds and the fabrication of accounting records were met by a bare denial and a promise by Mr Nonxuba that the Wapenaar report would exculpate him.

[53] Unfortunately, for Mr Nonxuba, far from assisting in exonerating him, the Wapenaar report tendered to support the LPC's contentions. Indeed, the Wapenaar report underscored the severity and extent of Mr Nonxuba's transgressions. The LPC conducted an analysis of the Wapenaar report and its

comments in this regard were furnished in a supplementary replying affidavit; Mr Nonxuba did not contest the observations made, and the conclusions sought to be drawn, by the LPC. It is evident from a close scrutiny of the Wapenaar report that:

[53.1] For the most part, a comparison of the eleven July 2021 trust ledger accounts initially prepared by Mr Nonxuba and the ledger accounts referred to in the Wapenaar report are not reconcilable. It is equally apparent that the discrepancies between each of the ledgers cannot be attributed to good faith errors or described as accounting anomalies. If there were errors, what they are, and how they came to be made, is not dealt with in the Wapenaar report.

[53.2] The trial balance in the Wapenaar report identifies 84 clients on whose behalf Mr Nonxuba held, or ought to have held, trust funds. This is 74 more than what is reflected in the July 2021 trust reconciliation Mr Nonxuba prepared. As the LPC pointed out, to exclude 74 trust creditors from the reconciliation cannot be described as a mere error.

[53.3] One of the missing trust creditors identified by the LPC's was the trust creditor, Qhubu. According to the Wapenaar report, the LPC is quite correct that Mr Nonxuba's July 2021 trust reconciliation should indeed have included this trust creditor. The Wapenaar report shows that Nonxuba Inc held R17 483 407.07 on behalf of Ms Qhubu as at July 2021.

[53.4] None of the specific fees and disbursements recorded in the payment summary document appear in the trust ledger account prepared by Ms Wapenaar. It follows that Mr Nonxuba made them up when he fabricated the payment summaries.

- [53.5] In answer to the allegations regarding the round transfers from the trust to the business account, the Wapenaar report does not demonstrate, as Mr Nonxuba stated it would, that these transfers were for a legitimate purpose and were authenticated by proper supporting documentation. The Wapenaar report states that the round amounts were transferred from the trust account to Nonxuba Inc's business account "*which could not be matched to specific trust ledgers based on the available information*" and that the "*round number transfers between the trust account and business account of Nonxuba Inc exacerbate the difficulties in allocating payments for specific trust ledgers.*"
- [53.6] Most concerning is the analysis of the trust fund shortfall by the LPC which it based on the Wapenaar report; this analysis was not challenged by Mr Nonxuba and must be accepted by this Court.
- [53.7] The Wapenaar report states that as at June 2024, Nonxuba Inc should have held R273 945 112.23 on behalf of its trust creditors. This is the total of the clients with trust total balances, less the entries for 'rounding', 'unknown transactions', and the 'opening balance'. This also does not include those trust ledgers with debit balances.
- [53.8] The trust bank account closing balance as at 31 January 2024 was R80 506 661.34. To this amount must be added R24 774 918, the amount that was wrongly taken from the trust account by the South African Reserve Bank for alleged exchange control irregularities on 14 December 2023 and which apparently is in the process of being recovered by the LPC. Nonxuba Inc's trust funds accounted for as at the end of January 2024 was therefore R105 281 579.34.

- [53.9] Based on the evidence of Mr Nonxuba himself, presented through the Wapenaar report, it is apparent that a trust deficit in excess of R168 million exists. This trust account shortage is in addition to the trust deficit reflected in the Wapenaar report calculated as being R20 828 136.87 in respect of the 20 trust creditors where there were debit balances (as at June 2024).
- [54] In terms of Rule 54.14.9, the firm must ensure that no account of any trust creditor is in debit. Furthermore, Rule 54.14.14 provides that withdrawals from a firm's trust banking account shall be made only to or for a trust creditor or as transfers to a firm's business banking account in respect of money due to the firm. It follows, therefore, that where a practitioner withdraws money from a trust banking account in contravention of its provisions, this will inexorably lead to a trust deficit and the practitioner's conduct may constitute theft of trust funds. From the evidence before this Court, it cannot be seriously disputed that there is a considerable deficit in the trust funds entrusted to Mr Nonxuba.
- [55] Money in a trust account is not the attorney's property and any deposit must be dealt with in accordance with the trust creditor's instruction. When trust monies are paid to an attorney, it is his duty to keep it in his possession and to use it for no other purpose than that authorized by his client. It is imperative that trust monies in the possession of the attorney should be available to his client the instant it becomes payable, and it must be kept in trust if it is not yet payable (**Incorporated Law Society, Transvaal v Behrman 1977 (1) SA 907 (T)**). Given the uncontroverted evidence of the LPC on the trust deficit in Nonxuba Inc's trust account, it is difficult not to conclude that Mr Nonxuba engaged in the theft of trust funds on an industrial scale. That Mr Nonxuba's own accountant has found that there are twenty trust creditors to whom over R20 million is owing, is damning.

[56] It was argued by Mr Nonxuba's counsel, Ms Killian SC, that he could not be guilty of theft or misappropriation because the LPC failed to prove any loss. I do not agree. What is simply required to be proved is that the funds in the trust account have been used without the authority of the persons on whose behalf the funds were being held and for purposes which did not benefit them. In ***Law Society of the Cape of Good Hope v Budricks*** [2002] 4 ALL SA 441 (SCA), after surveying the relevant case law, the SCA quoted with approval the decision of King JP (with Foxcroft J) in ***Cape Law Society v Parker*** 2000 (1) SA 582 (C) at 587 G-H that "*the principle as it emerges from the cases, is that the utilization of funds in a trust account without the authority of the person on whose behalf the funds are held for purposes which do not benefit him and in circumstances where he has not authorized such use, amounts to misappropriation of trust monies, which in turn is a form of theft.*" The decision of the court in ***Parker*** was itself based on precedent of considerable pedigree.

[57] As early as the 19th century, the courts recognized that the misappropriation of trust money amounts to theft. As Innes CJ concluded in ***Rex v Rorke*** 1915 AD 145 at 157, if an attorney deliberately misappropriated monies entrusted to him for his own use "*the jury was fully justified in concluding that such misappropriation was fraudulent, and that he had committed the crime of theft*" (see also the comments of Chesiwe J in ***Macheka v S*** [2019] JOL 458 22 (FB)). In ***Budricks***, the SCA, reflecting on the interplay between misappropriation and theft, confirmed the proposition that misappropriation and theft in the context of the unauthorized use of trust funds by a legal practitioner amounts to the same thing.

[58] The admission that he transferred estimates of his fees is a strong indictment of Mr Nonxuba's breach of the LPC Rules. If he had prepared a proper invoice based on the contingency fee agreement with his clients (as he was obliged to), there would be no need to estimate his fees. In addition, the estimate of fees appears to be exceedingly generous given the rand value of the round figure

transfers. In the circumstances, it is not difficult to conclude that Mr Nonxuba passed fees to which he was not entitled. This is clearly evident in the Sandi matter. Mr Nonxuba has not challenged the LPC's contention that he charged a fee in excess of the permissible fees in terms of the Contingency Fees Act. This, if nothing else, is a clear instance of theft; he has taken what he is not entitled to.

[59] On a conspectus of the evidence before this Court, I am satisfied that the LPC has properly established on a balance of probabilities that Mr Nonxuba has failed to comply with various court orders, fabricated accounting records, breached a number of LPC Rules relating to the management and operation of his firm's trust account, and engaged in the widespread theft of funds held in trust on behalf of his clients.

Whether Mr Nonxuba is a fit and proper person to practice as an attorney

[60] The success of our legal system depends not only upon the public having full confidence in the integrity of the members of the legal profession but also on our courts being able to depend on the *ipse dixit* of its practitioners. As observed by Hefer JA in ***Kekana v Society of Advocates of South Africa 1998 (4) SA 649 (SCA)*** at 655I-656B:

“Legal practitioners occupy a unique position. On the one hand they serve in the interests of their clients, which require a case to be presented fearlessly and vigorously. On the other hand, as officers of the court, they serve the interests of justice itself by acting as a bulwark against the admission of fabricated evidence ... The preservation of a high standard of professional ethics having thus being left almost entirely in the hands of individual practitioners, it stands to reason, firstly that absolute personal integrity and scrupulous honesty are demanded of each of them and, secondly, that a practitioner who lacks these qualities cannot be expected to play his part”.

- [61] From the evidence placed before this Court, it appears that Mr Nonxuba has not met the requisite standard to practice as so eloquently stated by Hefer JA in **Kekana**. Mr Nonxuba is not guilty of a mere moral lapse, but his conduct is suggestive of a character defect that has severely compromised his integrity. In his answering affidavit, for example, he prevaricated on whether he breached the rules of the profession as alleged by the LPC. He initially denied breaching any of the LPC's Rules but then in the same affidavit states that he had not acted strictly in accordance with certain of these rules. His prevarication speaks volumes about his integrity, or lack thereof. In my view, his lack of candor and his prevarications are an indication of his dishonesty and lack of integrity.
- [62] The accounting records placed before Nuku J were clearly fabricated, yet this was consistently denied by Mr Nonxuba even in the face of strong evidence to the contrary. It was only in this application that he conceded that the accounting exercise placed before Nuku J was inadequate but offers the explanation that he had limited time to prepare, and he was hampered by a lack of information. This begs the question: if Mr Nonxuba knew that there were deficiencies in what he placed before Nuku J, why was he prepared to present this information as fact under oath, thus signifying that the information provided was accurate?
- [63] The failure to keep proper accounting records in relation to the trust account is a serious offence. The keeping of proper records underpins the legislature's endeavors to protect the interests of the public. As succinctly stated by Van Winsen J in **Cape Law Society v Mda 1971 (2) SA 201 (C)** at 204H:

“It is not sufficient that trust monies should be misappropriated. It is equally necessary that an attorney's dealings with such monies should be properly recorded... failing that, much of the machinery provided by the Legislature... for the protection of clients, and, indeed, of the (Legal Practitioners Fidelity Fund) is rendered nugatory.”

- [64] Mr Nonxuba, in argument before this Court, for the first time suggested that his ignorance of his accounting duties was a mitigating factor. I cannot agree. Mr Nonxuba has been practicing as an attorney since September 2002 and has practiced for his own account since February 2003. His ignorance cannot be excused. In addition, given the sacrosanct nature of trust funds, removing money from a client's trust fund is, and should always be, a memorable, conscious, and deliberate act that a practitioner carefully considers before carrying out. Mr Nonxuba's mishandling and misappropriation of trust funds, in conjunction with the attempt to deceive the LPC and this Court, cannot but cast grievous doubt about his fitness to continue to practice.
- [65] In his answering affidavit in this application, Mr Nonxuba again refers to the fact that he obtained clean audit reports for the relevant periods. This submission was also made before Nuku J and in all Mr Nonxuba's unsuccessful applications for leave to appeal. That he can again make this allegation, and at the same time concede that he did not comply with the LPC Rules, must count against him. The fact that a legal practitioner obtains a clean audit report can never preclude him from answering issues raised by the LPC.
- [66] Mr Nonxuba tried to downplay the seriousness of his actions by blaming his auditor, his staff, and his bookkeeper. However, he remained accountable for any misappropriation of trust funds or the trust deficit as the owner of the firm. In any event, he, by his own admission, was the only person who managed and operated the trust account of Nonxuba Inc. In my view, he has not only administered his clients' trust funds in a reckless and cavalier manner, but he has demonstrated a disdain for the LPC Rules relating to the keeping of books of account for his practice. He has also, through his deception of his clients, the LPC, and this Court, shown himself not to be a fit and proper person to continue to be in practice.

What sanction is to be imposed

- [67] In deciding on an appropriate sanction, the court is called upon to decide not what constitutes an appropriate punishment for past transgressions but rather what is required for the protection of the public (see, ***Law Society of Good Hope v Peter* 2009 (2) SA 18 (SCA)** at para [18]).
- [68] It is appropriate to observe that criminal law sentencing and professional discipline are quite different matters. The fundamental purpose of criminal law sentencing is the maintenance of a just, peaceful, and safe society through the imposition of appropriate sanctions. For the legal profession, the principal purpose of professional discipline is to support proper client representation, promote the administration of justice and the legal system, foster public confidence in the legal profession, and regulate the profession through the imposition of appropriate rules of conduct. Liberty is at issue in sentencing but not in professional discipline. While removal from the roll or suspension are certainly serious matters, criminal law sentences are of a fundamentally different nature. Thus, in my view, lessons learnt from criminal law sentencing may be useful, but it serves no use to conflate sentencing for criminal offences with discipline for professional misconduct.
- [69] The relevant factors that a court should take into account will depend on the nature of the conduct complained of, the extent to which it reflects upon a person's character or shows him/her to be unworthy to remain in the ranks of the profession, the likelihood or otherwise of a repetition of such conduct, and the need to protect the public.
- [70] The legal profession is an important component of the legal system and attorneys play a valuable role in the administration of justice. As the court observed in ***S v Vorster* 2007 (2) SACR 283 (E)**, the attorneys profession forms a vital link between members of the public and the courts. The profession of

attorney is an honorable one and, as such, demands complete honesty, reliability, and integrity from its members (***Vassen v Law Society of the Cape of Good Hope 1998 (4) SA 532 (SCA)***). Practitioners are, therefore, obliged to be honest in their dealings with their clients, the court, colleagues, and members of the public in general.

[71] An attorney plays a unique role, as observed by Boshoff J (as he then was), in that he is “... *put in a position to conduct matters of trust with the public. He occupies a position of great confidence and power and the Court is entitled to demand a very high standard of honour from him in the profession. The law exacts from him uberrima fides where he acts as agents for others: that is the highest possible degree of good faith. It is therefore essential that the public should be able to rely implicitly on the integrity and good faith of any attorney they may wish to employ*” (***Incorporated Law Society, Transvaal v Visse and Others (1); Incorporated Law Society, Transvaal v Viljoen (2) 1958 (4) SA 115 (T)*** at 131). As the custodians of the integrity of the profession, the courts must condemn any deviation from the exacting standard required of legal practitioners.

[72] Misappropriation of trust monies is amongst the most serious offences which an attorney may make him or herself guilty of since it undermines the very core of the relationship between an attorney and client. As aptly stated by Hefer AP in ***Law Society of the Cape of Good Hope v Budricks*** at 17I-H, the misappropriation of trust funds is “*about the worst professional sin that an attorney can commit*”.

[73] Theft of trust funds by practitioners does not only result in untold hardship for the victims, but it also brings the legal profession into disrepute. Those legal practitioners who violate the rules and ethics of the profession by failing to uphold the highest standards of honesty, reliability and integrity must suffer the consequences of their nefarious actions.

[74] In this regard, I respectfully agree with the comments of Trollip J (as he then was) in **Law Society, Cape v Marock 1974 (2) SA 204 (C)** (at 206H-207A) that:

“(i)t cannot be sufficiently stressed that the careful adherence to the requirements of the law as to the keeping of clients’ trust accounts and the proper operation of a trust banking account number amongst the most important of the attorney’s duties to his clients. The lack of strict compliance with these rules cannot fail to undermine the confidence of the public in the profession, a situation which, I hardly need stress, enures to the detriment of all the members of the profession.”

[75] By practicing as an attorney, Mr Nonxuba proclaimed to the public that he possessed the expertise and trustworthiness to deal with trust money reasonably and responsibly. His clients could legitimately have expected that the money entrusted to him would be safe in his trust account, until instructed otherwise. On the facts of this matter, it is beyond question that the trust account of Nonxuba Inc had a shortage and Mr Nonxuba could not provide a proper explanation how the deficit and trust shortfall arose. He has in all likelihood caused untold hardship to his clients by not only failing to timeously pay over the funds due to them but also misappropriating a substantial portion of their funds.

[76] In mitigation, Ms Killian argued on behalf of Mr Nonxuba that he did not engage in wholesale misappropriation as alleged by the LPC since the Wapenaar report indicated that the majority of the funds transferred to the business account was utilized within the business and constitute normal business expenses, including payments to experts and similar service providers. However, far from being exculpatory of Mr Nonxuba, what the Wapenaar report does, is to confirm that at least some of the funds transferred to the business account were not utilized within the business to constitute normal business expenses. The irresistible inference is that, even on Mr Nonxuba’s own version, at least some of the funds

were misappropriated as the payments had not been authorized. In any event, the Wapenaar report was an imperfect exercise at best given the lack of documentation, the difficulty of uncoupling trust and business payments, and the paucity of supporting documentation relating to the fees and disbursements debited by Mr Nonxuba. Nonetheless, this report identified a trust deficit in excess of R20 million; hardly small change. The true scale of the theft was considerably more.

[77] Mr Nonxuba has implored this Court to consider his conduct as being less severe and suggested that he be permitted to remain practicing under supervision, subject to necessary safeguards being put in place to protect members of the public and trust creditors. I do not agree with this suggestion. In my view, an officer of the court whose integrity is severely compromised has no place in the legal profession. Mr Nonxuba insisted all along that he had only committed an error or that there were accounting anomalies in his accounting records. The nature of his conduct and his continued protestations of innocence renders a repetition a distinct possibility.

[78] In passing, there was a suggestion by Ms Killian that the LPC ought to have conducted its own disciplinary inquiry and audit before launching an application for the strike-off of Mr Nonxuba. I do not agree. Ordinarily, the LPC will investigate a complaint, launch the application, and make representations in Court. However, it is not preemptory for the LPC to have pursued formal charges before a disciplinary inquiry is convened if, in its opinion, having regard to the nature of the allegations of misconduct, a practitioner is no longer fit and proper to remain on the roll of attorneys (see, ***Legal Practice Council v Motlhabani (UM 14818) [2020] ZANWHC 76***).

[79] Indeed, in matters such as the one before this Court, the LPC would have failed in its duty if it did not act on the information at its disposal which was obviously material to the question of Mr Nonxuba's fitness to continue to act as a legal

practitioner. Mr Nonxuba is an officer of the court, and it is the court that is enjoined to take action against him in the face of any serious transgressions.

[80] On a conspectus of the facts before this Court, I am of the view that Mr Nonxuba is clearly not a fit and proper person to continue practicing as an attorney. His name should, accordingly, be struck from the roll of legal practitioners and a curator bonis be appointed to manage the files and affairs of the public that were entrusted to him.

[81] The general rule in matters of this sort is that if unsuccessful, the legal practitioner should pay the LPC's costs on an attorney-and-client scale. There is no *lis* between the LPC and the errant practitioner. The LPC is merely performing its statutory function of placing facts before the court to exercise its disciplinary powers and should, therefore, not have to bear the costs when acting in the public interest. I see no reason to depart from the usual practice.

[82] In the circumstances, I would grant the following order:

ORDER

1. The name of Zuko Mack Michael Nonxuba ('the first respondent') or Nonxuba Inc ('the second respondent') is struck off the roll of legal practitioners of this Honourable Court;
2. The first respondent shall surrender and deliver to the Registrar of this Honourable Court his certificate of enrolment as an attorney;
3. Should the first respondent fail to comply with the provisions of the preceding paragraph of this order within 1 (one) week from date hereof, the Sheriff for the District in which such certificate of enrolment is, is empowered and directed to

take possession of and deliver the same to the Registrar of this Honourable Court;

4. The first and/or second respondents shall deliver all books of account, records, files and documents containing particulars and information relevant to:

4.1. any moneys received, held or paid by the first and/or second respondents for or on account of any person;

4.2. any moneys invested by the first respondent and/or second respondents in terms of section 86 (3) of the Legal Practice Act 28 of 2014 ("the LPA);

4.3. any interest or moneys so invested which was paid over or credited to the first and/or second respondents;

4.4. any estate of a deceased person, or any insolvent estate, or any estate placed under curatorship of which the first respondent is the executor, trustee or curator or which the first respondent is administering on behalf of the executor, trustee or curator of such estate; and

4.5. the first and/or second respondents' practice as an attorney;

to the curator appointed in terms of this order, provided that as far as such books of account, records, files and documents are concerned, the first and/or second respondents shall be entitled to have access to them, but always subject to the supervision of such curator or a nominee of such curator;

5. Should the first and/or second respondents fail to comply with the provisions of the preceding paragraph of this order within 1 (one) week from the date of this

order the Sheriff for the district in which such books of account, records, files and documents are, is empowered and directed to take possession of and deliver them to such curator;

6. The curator is entitled to:

6.1. hand over to the persons entitled thereto all such records, files and documents; and

6.2. hand over all such records, files and documents over which the first and/or second respondents exercised a lien to the persons entitled thereto as soon as the curator has satisfied himself or herself that the fees and disbursements in connection therewith, if any, have been paid or secured, or in the event of any dispute as to the provision of security, in his or her discretion;

7. A written undertaking by a person to whom the records, files and documents referred to in paragraph 6 above are handed to pay such amount as may be due to the first and/or second respondents, either on taxation or by agreement, shall be deemed to be satisfactory security for the purposes of the preceding paragraph hereof provided that such written undertaking incorporates a *domicilium citandi et executandi* of such person;

8. Such curator be empowered to require that any such file, the contents of which he or she may consider to be relevant to a claim, or possible or anticipated claim, against the curator and/or the first and/or second respondents and/or the first and/or second respondent's clients and/or the Legal Practitioners Fidelity Fund (hereinafter referred to as "the Fund") in respect of money and/or other property entrusted to the first and/or second respondents, be re-delivered to such curator;

9. The first respondent and any other person who was authorised to operate upon the trust account(s) be interdicted and prohibited from operating on the trust account(s), as defined in clause 10 below;
10. That the Director for the time being of the Gauteng office of the applicant, be appointed as curator to administer and control the trust account of the first and/or second respondents comprising the separate banking accounts opened and kept by the first and/or second respondents at a bank in terms of section 86(2) of the LPA and/or any separate savings or interest-bearing accounts as contemplated by section 86(3) and/or 86(4) of the LPA, in which money from such trust banking accounts have been invested by virtue of the provisions of the said subsection/s or in which moneys in any manner have been deposited or credited (the said account(s)) being herein referred to as “the trust account(s)”) with the following powers and duties:
 - 10.1. subject to the approval of the Legal Practitioners’ Fidelity Fund Board (hereinafter referred to as “the Board”), to sign and endorse cheques and/or withdrawal forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which the first and/or second respondents were acting at the date of this order;
 - 10.2. subject to the approval and control of the Board, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against the first and/or second respondents in respect of money held, received and/or invested by the first and/or second respondents in terms of section 86(3) and/or 86(4) of the LPA (hereinafter referred to as “trust moneys”), to take 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 first and/or second respondents may have been concerned and which may have been wrongfully and unlawfully paid from the trust account(s) and to receive such moneys and to pay the same to the credit of the trust account(s);

- 10.3. to ascertain from the first and/or second respondent's books of account the names of all persons on whose account the first and/or second respondents appear to hold or to have received trust moneys (hereinafter referred to as "trust creditors") and to call upon the first and/or second respondents to furnish him, within 30 (thirty) days of the date of this order or such further period as he or she may agree to in writing, with the names, addresses of and amounts due to all trust creditors;
- 10.4. to call upon such trust creditors to furnish such proof, information and affidavits as the curator may require to enable him or her, acting in consultation with, and subject to the requirements of the Board of Control of the Fund, to determine whether any such trust creditor has a claim in respect of money in the trust account(s) and, if so, the amount of such claim;
- 10.5. to admit or reject, in whole or in part, subject to the approval of the Board of Control of the Fund, the claims of any such trust creditor, without prejudice to such trust creditor's right to access to the civil courts;
- 10.6. having determined the amounts which he or she considers are lawfully due to trust creditors, pay such claims in full, but

subject always to the approval of the Board of Control of the Fund;

- 10.7. in the event of there being any surplus in the trust account(s) after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce, as the case may be, firstly, any claim of the Fund in terms of section 86(5)(a) of the LPA in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of the first and/or second respondents, the costs, fees and expenses referred to in paragraph 11 of this order, or such portion thereof as has not already been separately paid by the first and/or second respondents to the applicant, and, if there is any balance left after payment in full of such claims, costs, fees and expenses, to pay such balance, subject to the approval of the Board, to the first and/or second respondents, if they are solvent, or, if the first and/or second respondents are insolvent, to the trustee(s) or liquidator(s), as the case may be, of the first and/or second respondent's insolvent estate(s);
- 10.8. in the event of there being insufficient moneys in the trust banking account(s) opened by the first and/or second respondents in terms of section 86(2) of the LPA from which to pay the claims of trust creditors in full and after taking reasonable steps to ascertain the identities of such creditors and the amounts due to them to distribute *pro rata* amongst creditors whose claims have been proved or admitted, the amount(s) reflected by the credit balance(s) in said account(s) provided that the curator shall pay to trust creditors whose funds are held in separate accounts in terms of section 86(3)

and/or 86(4) of the LPA who satisfy the curator that they are entitled to such funds, the amounts due to such creditors;

- 10.9. subject to the approval of the Board, to close the trust account(s) and pay the credit balance(s) to the Fund and to require the credit balance(s) to be placed to the credit of a special trust suspense account in the name of the first and/or second respondent in the Fund's books;
- 10.10. to refer the claims of all trust creditors to the Board to be dealt with in terms of the provisions of the LPA;
- 10.11. to authorise the Board to credit the credit balance(s) referred to above to its "Paid Claims Account" when the Fund has paid, in terms of section 55 of the LPA, admitted claims of the trust creditors in excess of such credit balance(s), provided that, notwithstanding the foregoing, the said Board shall be entitled, in its discretion, to transfer to its "Paid Claims Account" the amount of moneys of any claim or claims as and when admitted and paid by it;
- 10.12. subject to the approval of the Chairman of the Board, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys and/or counsel, and/or accountants and/or other persons, where considered necessary, to assist such curator in carrying out the duties of curator; and to render from time to time, as curator, returns to the Board showing how the trust account(s) has (have) been dealt with, until such time as the said Board notifies the curator that he or she may regard his or her duties as terminated;

11. The first and/or second respondent are directed:
- 11.1. to pay the fees and expenses of the curator, such fees to be assessed at the rate of R1 552.00 per hour, including travelling time;
 - 11.2. to pay the reasonable fees and expenses charged by any person(s) consulted and/or engaged by the curator as aforesaid;
 - 11.3. to pay the costs of and incidental to this application on a scale as between an attorney and client; and
 - 11.4. within 1 (one) year of having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, to 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 the first and/or second respondents, in respect of their former practice, and should the first and/or second respondents fail to do so, he/it shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights, if any, as he/it may have against the trust creditor(s) concerned for payment or recovery thereof.

FRANCIS, J
Judge of the High Court, Cape Town

I agree, and it is so ordered.

HENNEY, J

Judge of the High Court, Cape Town

APPEARANCES

Counsel for the Applicant

Mr S J Koen

skoen@bissets.com

Instructed by:

Bisset Boehmke McBlain Attorneys

Counsel for the Respondents

Adv Estelle Kilian SC & Adv C McKelvey

advestelle@gmail.com/cthmckelvey@mweb.co.za

Instructed by:

Enzo Meyers Attorneys

Heard: 2 August 2024

Judgment delivered. 4 December 2024