



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1138/2022

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

APPELLANT

and

LEBOHANG MICHAEL MOKHELE

RESPONDENT

Neutral citation: *South African Legal Practice Council v Mokhele* (1138/2022)
[2023] ZASCA 177 (14 December 2023)

Coram: NICHOLLS, MABINDLA-BOQWANA and GOOSEN JJA and
MASIPA and TOKOTA AJJA

Heard: 22 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be at 10h00 on 14 December 2023.

Summary: Legal Practice – s 43 of the Legal Practice Act 28 of 2014 – whether the court may hear a matter that has become moot – the issues for determination may engage the interests of other parties who are not before this Court – declaratory relief sought on appeal not set out in the notice of motion – appeal struck from the roll.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mthimunye AJ and Mathebula J, sitting as court of appeal):

The matter is struck from the roll with no order as to costs.

JUDGMENT

Nicholls JA (Mabindla-Boqwana and Goosen JJA and Masipa and Tokota AJJA concurring):

[1] This is an appeal by the South African Legal Practice Council (the LPC), a regulatory body with oversight function over all legal practitioners and candidate legal practitioners in the country. The LPC brought an urgent application in the Free State Division of the High Court, Bloemfontein (the high court), against Lebohang Michael Mokhele (Mr Mokhele), the respondent, for his suspension from the roll of legal practitioners pending the finalisation of a disciplinary inquiry. This was a result of the LPC's investigation team having discovered *prima facie* evidence of trust shortages, pursuant to complaints from the public.

[2] The high court (per Mthimunye AJ with Mathebula J concurring) dismissed the application and ordered the LPC to finalise its disciplinary hearing against Mr Mokhele. It held that the difficulty for the LPC was that the relief was sought on

an interim basis for the purposes of conducting further investigations. Leave to appeal was granted to this Court.

[3] The application was brought by the LPC in terms of s 43 of the Legal Practice Act 28 of 2014 (the Act) which provides:

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

[4] The LPC acknowledged that it was obliged to investigate the complaints received against Mr Mokhele before launching the application. This is because such an application is conditional upon a ‘disciplinary body’ being satisfied that there has been misappropriation of trust funds. The Act defines a disciplinary body as ‘an investigating committee; a disciplinary committee; or an appeal tribunal . . .’. The investigations established serious misconduct¹ and evidence of a trust shortage in at least two matters.² On conclusion of the investigations, the LPC brought the current application on an urgent basis.

[5] The high court held that ‘the irresistible conclusion was that there was such a trust shortfall.’³ Despite this, it found that it was only on finalisation of the disciplinary process that the LPC could approach the court for an order for

¹ Mr Mokhele was subjected to a disciplinary committee in the case of Mr Mokoena. In the case of Mr Thulo he entered into a settlement agreement to pay back R42 000 to Mr Thulo on condition that he withdrew his complaint to the LPC.

²The complaints of Ms Radebe and Mr Yawa.

³ Paragraph 19 of the high court judgment.

suspending Mr Mokhele from practice. The wording of s 43 may not necessarily support such a conclusion.

[6] In the intervening period, the LPC has been granted an order by the high court, suspending Mr Mokhele from the roll of legal practitioners, pending an application for his name to be struck from the roll. The striking off application has been heard and judgment is awaited.

[7] There is thus no longer a live controversy between the parties. This appeal will have no practical effect. Nevertheless, the LPC has requested that we proceed with the appeal, since there is no clarity as to the test for the suspension of a legal practitioner, in proceedings brought in terms of s 43, not as a penalty for misconduct, but rather as a precautionary measure pending the finalisation of disciplinary hearings. In addition, the different divisions of the high court are not applying s 43 of the Act uniformly. The LPC calls upon this Court to determine and settle the interpretation of s 43. In other words, the LPC wants this Court to grant a declaratory order.

[8] Mootness is not an absolute bar to the justiciability of an issue, and a court may entertain a matter even where no live dispute exists, if the interests of justice so dictate. The Constitutional Court in various matters⁴ has set out the factors to be considered when deciding whether or not to hear the matter. These are:

‘(a) whether any order which it may make will have some practical effect either on the parties or on others;

⁴ *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) para 50; *Agribee Beef Fund (Pty) Ltd and Another v Eastern Cape Development Agency and Another* [2023] ZACC 6 para 24; 2023 (5) BCLR 489 (CC); *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) para 32.

- (b) the nature and extent of the practical effect that any possible order might have;
- (c) the importance of the issue;
- (d) the complexity of the issue;
- (e) the fullness or otherwise of the arguments advanced; and
- (f) resolving the disputes between different courts.’

[9] There may well be conflicting judgments on the interpretation of s 43 of the Act. Undoubtedly, this is a matter of importance for the LPC, and the public at large. However, the issues for determination have the potential to engage the interests of other parties who are not before this Court. For example, parties in the legal profession, and even the Minister of Justice, may want to express views on s 43. They are entitled to be cited in any matter on the interpretation of s 43, particularly given that the notice of motion did not formulate the declaratory order sought by the LPC. Accordingly, this Court would be a court of first instance in respect of the declaratory relief which was not foreshadowed in the application. This is clearly undesirable. The correct procedure would be for the LPC to bring an application in the high court for the appropriate relief, with all interested parties cited.

[10] Unfortunately, mention must be made of Mr Mokhele’s conduct and that of his legal representative. Mr Mokhele did not file any heads of argument prior to the hearing of the matter in terms of the Rules of this Court. At the commencement of the hearing before this Court, counsel for the LPC informed the Court that heads of argument, together with an application for condonation, were served on behalf of Mr Mokhele the day before. Mr Mokhele, however, did not make an appearance. About 30 minutes after the proceedings before this Court had started, a legal practitioner purporting to act for Mr Mokhele arrived at Court. He had no explanation for his lateness and the failure to file heads of argument, and clearly had no appreciation of

the issues in the matter. He sought to make incomprehensible submissions and to make matters worse, proceeded to request that a costs order be granted against the LPC because the appeal was an abuse of the process of the court. Another serious allegation against Mr Mokhele was that the high court, in its judgment, referred to death threats that the complainants had received from Mr Mokhele. It also noted that he had been less than candid with the court. This conduct ill befits an officer of court and must be strongly deprecated.

[11] In the circumstances, the following order is made:

The matter is struck from the roll with no order as to costs.

C E HEATON NICHOLLS
JUDGE OF APPEAL

Appearances

For the appellant: M S Mazibuko

Instructed by: Amade Company Inc, Bloemfontein

For the respondent: T O Dlabantu

Instructed by: Dlabantu & Associates Inc, Bloemfontein