



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 No: **309/2024**

In the matter between:

PAUL DE LANGE

First applicant

SHARON ANN DE LANGE

Second applicant

ROUX BARRY CLOETE

Third applicant

and

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Respondent

CORAM: MGUDLWA, AJ

HEARD ON: 8 FEBRUARY 2024

DELIVERED ON: 27 MARCH 2024

FACTUAL BACKGROUND

- [1] This is an urgent application wherein the applicants seek an order to compel (*Mandamus*) the respondent to issue them with fidelity fund certificates for the period 1 January 2023 to 31 December 2023 and 1 January 2024 to 31 December 2024. The applicants impugn the decision of the South African Legal Practice Council (the LPC) refusal to issue them with the Fidelity Fund certificate after having purportedly complied with chapter 7 of the Legal Practice Act, 28 of

Act, 28 of 2014 (the Act) and request the court to review this administrative action by way of indirect review.

- [2] The respondent opposes the application on two grounds. Firstly, it raises the defence of *lis pendens*; secondly, it contends that the refusal to issue a Fidelity Fund Certificate by the respondent amounts to an administrative action and consequently, the applicants ought to have instituted a review application in terms of Uniform Rule 53.

THE PARTIES

- [3] The three applicants, Paul De Lange (First applicant), Sharon Ann De Lange (Second Applicant) and Roux Barry Cloete (Second Applicant) are practicing attorneys duly admitted by the High Court.
- [4] The respondent is the South African Legal Practice Council (the LPC), duly established as a Body Corporate with full capacity in terms of section 4 of the Legal Practice Act (the Act) with the offices in the jurisdiction of this court.

FACTUAL BACKGROUND

- [5] The first and second applicants have been practicing as attorneys in various legal firms, however later became partners at De Lange Attorneys in Bloemfontein.
- [6] Gleaned from the founding affidavit of the first applicant, after some negotiations between the first and second applicants together with Mr. Cloete (Director of Matsepes Inc.), an agreement was reached in terms of which De Lange Attorneys would merge with Matsepe Inc. with effect from 1 March 2021.
- [7] After the merger in 2021, there was a commixture between the trust accounts of De Lange Attorneys and Matsepes Inc. Newtons Auditors were instructed by the applicants to conduct auditing of their respective trust accounts.

Through the auditor's representative they were informed in March 2023 that a wrong process was followed as a result of which the Newtons auditors sought guidance from the LPC. The meeting between Newtons and LPC took place in May 2023. They were subsequently advised by the LPC to redo all transactions dating from 1 March 2021 until the end of February 2023, in order to split transactions of De Lange Attorneys from those of Matsepe Inc. Subsequent to a meeting with the LPC, Newtons auditors required that all transactions of the erstwhile De Lange Attorneys be separated entirely from the transactions of Matsepes Inc. and required that a separate De Lange attorneys bookkeeping system be created so that it can be closed.

[9] On 28 August 2023 an urgent application was lodged by the LPC seeking suspension of the applicants from practice, the effective cessation in the interim of any access they had to the trust banking accounts of De Lange Attorneys and Matsepes Inc; the surrender of their admission certificates as legal practitioners; the appointment of a curator to administer and control their trust accounts and an order obligating disclosure of whatever is necessary for the successful operation of what was to be investigated.

[10] It is further evident from the first applicant's founding affidavit¹ in this matter and on notice of motion in case number 4514/2023, that the application against the applicants is pivoted on the following:

10.1 Failure to comply with Section 84 and 85 of the Act.

10.2 Conflation of trust accounts

10.3 That both first and second applicant appeared before investigations committee on 16 May 2023 for failure to comply with auditing of their trust account and submission of the audited statements.

¹ Paul De Lange Founding Affidavit, page 10 of 25. Page 14 of the bundle.

- 10.4 On 2 June 2023 the investigating committee recommended that the LPC should institute an urgent application for the suspension of the applicants because of their failure to comply with the rules dealing with the closure of De Lange Attorneys practice.
- [11] The applicants opposed the matter that was heard by Loubser, J and Molitsoane, J under case number 4514/2023 in this court. I interpose to mention that at the time of the hearing of this application, the aforementioned court had already reserved judgment.
- [12] While the application by the LPC was already due for hearing on 2 November 2023, on 27 October 2023 the separated audit reports² in respect of both De Lange Attorneys and Matsepes Inc. were issued by the Newtons auditors.
- [13] These reports were qualified in that the legal practitioners trust accounts were not maintained in compliance with the Act and the Rules³ on the following basis:
- 13.1 De Lange Attorneys audit report:
- 13.1.1 As instructed by the LPC in July 2023 they commenced posting the accounting records as a separate entity as from 01 March 2021.
- 13.1.2 The firm did not ensure that adequate internal controls were implemented to ensure compliance with the rules due to the fact that all the transaction were included in Matsepe Inc. and only separately accounted for after the LPC instructions.
- 13.1.3 During the period 01 March 2021 to 28 February 2023, a negative difference of R61 592, 97 between the bank

² Attached as PL1 (pages 30 to 35) and PL2 (pages 36 to 41 of the bundle).

³ De Lange audit report found non-compliance with rule 54.6; 54.10; 54.14.7.1; 54.14.8; 54.14.12; 54.14.13 and 54.24. Matsepe Inc. audit report found non-compliance with rule 54.6; 54.10; 54.14.7.1; 54.14.8; 54.14.12; 54.14.13 and 54.24.

balances and the accounting records occurred. The amount of R89 288, 56 was paid on 30 August 2023 to correct the trust shortage. This amount was paid on the advice of their bookkeeper as soon as the possibility of a discrepancy was identified.

13.1.4 Due to combining of the accounting records amounts were received in Matsepes Inc. and transfers of fees were transferred from De Lange Attorneys Standard Bank which resulted in a difference between the actual Standard Bank account records of R61 592,97.

13.1.5 The audit was not finalized within 6 months after the annual closing of the accounting records for the financial year ended in September 2022.

13.2 Matsepes Inc. audit report:

13.2.1 Matsepes Inc. only started maintaining separate accounting records from September 2023, before this date the ABSA Bank was accounted for in Matsepe Inc. and no accounting records were maintained for Standard Bank.

13.2.3 The firm did not ensure that adequate internal control was implemented to ensure compliance with the rules due to the fact that all the transactions were included in Matsepe Inc. and only separately accounted for after the LPC insisted on this.

13.2.3 As at 30 September 2022, there was a negative difference of R403,139,63 between the ABSA bank balance and the accounting records, R406,139,10 being paid on 31 August 2023 to correct the trust shortage. It is recorded on the report

that the amount was paid on the advice of their bookkeepers as soon as the discrepancy was identified.

13.2.4 It was found that transfers were made to the business banking account which were not due to the firm and that fees had not been debited in its accounting records to a trust creditor, this resulted in a difference between the actual ABSA bank account and the accounting records of R403,139,63 as mentioned above.

13.2.5 The audit was not finalized within 6 months after the annual closing of the accounting records for the financial years ended 28 February 2022 and 28 February 2023.

- [14] Subsequent to the issuing of the qualified reports by the Newtons, on 8 November 2023 the applicants submitted reasons to the LPC as envisaged by rule 54.30 explicating the qualified reports and setting out the steps they had taken to rectify the deficiency that was in the Matsepes Inc. going forward.
- [15] On the 4 December 2023 the LPC wrote them a letter in response to the qualified audit reports and their correspondence dated 8 November 2023. This letter recorded that the reasons for the qualifications as they had provided could not be accepted by the council and that the council had resolved that an independent auditor be appointed to conduct an audit of the applicants trust accounts. Furthermore, council had also resolved not to issue them with a Fidelity Fund certificate.
- [16] After the refusal to issue the Fidelity Fund Certificate the LPC instructed Kotie Kruger as an independent auditor to carry out the envisaged investigations.
- [17] As a result of the administrative decision taken by the LPC on 4 December 2023, the applicants alleged that they complied with the provisions of rule 47.5 and 54.29 and 30. According to them, the LPC failed to afford them an opportunity of addressing any shortcomings in the explanation that had been

proffered to it concerning the qualification reasons. Had the LPC requested them in writing to favor clarity, they would have done so. According to them the LPC's decision in this regard was taken in a procedurally unfair manner, it is arbitrary and capricious, unlawful and motivated by an ulterior motive and purpose. Furthermore, the applicants seek indirect review of the administrative action.

- [18] The respondent resists the relief sought on the basis of two preliminary and dispositive points. Firstly, that a mandamus application is entirely incompetent in the present matter where the LPC's refusal to issue Fidelity fund certificate to applicants amounts to administrative action. Secondly, there are pending proceedings between the parties involving substantially the same issue which give rise to a special plea of *lis pendens*.
- [19] The facts of this case are largely common cause and the better part thereof is not in dispute. It is common cause that LPC has taken an administration action against the three applicants not to issue them with a fidelity fund certificate and that the audit reports submitted on 27 October 2023 by Newtons were qualified. Lastly, there is a pending application for the suspension of the first and second applicants under case number 4514/2023.

ISSUE FOR DETERMINATION

- [20] The issues for determination in this regard can simply be identified as follows:

20.1 Special plea of *lis pendens*.

20.2 The LPC's refusal to issue Fidelity Fund Certificate to the applicants firstly, "for Reasons as yet wholly undisclosed" and secondly that it has done so "unlawfully". Whether this administrative action can be reviewed by way of indirect review.

20.3 Mandamus application.

LEGAL POSITION

Special plea of *lis alibi pendens*

[21] The LPC resist this application on the basis that there are pending proceedings before this court in case number 4514/2023, which concerns the same parties, where the same dispute of applicants practicing without Fidelity Fund Certificates is at issue and concerns the same subject matter.

[22] It is trite law that a party wishing to raise a *lis alibi pendens* defence bears the onus of alleging and proving the following:

- “(a) a pending litigation.⁴
- (b) between the same parties or their privies,⁵
- (c) based on the same cause of action (the requirement of the same cause of action is satisfied if the other proceedings involved determination of a question that is necessary for the determination of the present case and substantially determinative of its outcome),⁶and
- (d) in respect of the same subject matter. (This does not mean that the form of relief claimed must be identical.)”⁷

[23] The onus of proving the requisites rests on the party raising the defence.⁸ Once they have been established, a factual presumption arises that the second proceedings must satisfy the court that despite all the elements being present, the balance of convenience and equity require the case to proceed. A court has an overriding discretion to order a stay even if all the elements are present.⁹

[24] The proceedings under case number 4514/2023 were brought on an urgent basis by the LPC in terms of section 43 of the Act seeking an order for the suspension¹⁰ of the first and second applicants for practicing without Fidelity

⁴ *RSA Faktor Bpk v Bloemfontein Township Developers (Edms) Bpk* 1981 SA 141(O).

⁵ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* [2013] 4 All SA 509 SCA, 2013 (6) SA 499 (SCA).

⁶ *Nestle (SA) (Pty) Ltd v Mars Inc* [2001] 4 All SA 315 (A), 2001 (4) SA 542 (SCA).

⁷ *Marks & Kantor v Van Diggelen* 1935 TPD 29.

⁸ *Dreyer v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (1) SA 1219 (T) p.1231.

⁹ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 200 CC and others* [2013] 4 All SA 509 (SCA), 2013 (6) SA 499 (SCA).

¹⁰ See. Section 84 act 28 of 2014.

Fund Certificates, whereas in the instant matter the applicants seek this court to review and set aside the decision of the LPC to refuse to issue them with the Fidelity Fund Certificate and compel it to issue same.

[25] I deem it apposite to mention that the application by the LPC in case number 4514/2023 was lodged purely on the basis that the first and second applicants were practicing without the Fidelity Fund Certificate and non-compliance with section 84 of the Act.

[26] Section 84 of the Act provides as follows:

"Obligations of legal practitioner relating to handling of trust monies

- (1) Every attorney or any advocate referred to in section 34(2)(b), other than a legal practitioner in the full-time employ of the South African Human Rights Commission or the State as a state attorney or state advocate and who practices or is deemed to practice-
 - (a) for his or her own account either alone or in partnership; or
 - (b) as a director of a practice which is a juristic entity, must be in possession of a Fidelity Fund certificate.
- (2) No legal practitioner referred to in subsection (1) or person employed or supervised by that legal practitioner may receive or hold funds or property belonging to any person unless the legal practitioner concerned is in possession of a Fidelity Fund certificate.
- (3) The provisions of subsections (1) and (2) apply to a deposit taken on account of fees or disbursements in respect of legal services to be rendered.
- (4) A Fidelity Fund certificate must indicate that the legal practitioner concerned is obliged to practice subject to the provisions of this Act, and the fact that such a legal practitioner holds such a certificate must be endorsed against his or her enrolment by the Council.
- (5) A legal practitioner referred to in subsection (1) who-
 - (a) transfers from one practice to another; or

- (b) ceases to practice, must give notice of this fact to the Council and comply with the Council's relevant requirements in relation to the closure of that legal practitioner's trust account and in the case of paragraph (b) return his or her certificate to the Council.
- (6) The Council may withdraw a Fidelity Fund certificate and, where necessary, obtain an interdict against the legal practitioner concerned if he or she fails to comply with the provisions of this Act or in any way acts unlawfully or unethically.
- (7) The provisions of this section do not apply to a legal practitioner who practices in the full time employ of Legal Aid South Africa on a permanent basis.
- (8) An advocate, other than an advocate referred to in section 34(2)(b), may not receive or hold money or property belonging to any person in the course of that advocate's practice or in respect of any instruction issued to the advocate by an attorney or a member of the public.
- (9) No legal practitioner in the full-time employ of the South African Human Rights Commission or the State as a state attorney, state advocate, state law adviser or in any other professional capacity may receive or keep money or property belonging to any person, except during the course of employment of such legal practitioner with the State or the South African Human Rights Commission and in such case only on behalf of the South African Human Rights Commission or the State and for no other purpose."

[27] Having assessed the application before me, the applicants firstly submitted qualified audit reports to the LPC¹¹ and complied with Rule 54.30 by augmenting the said reports with three affidavits explaining the qualified finding.

[28] Rule 54.30 provide as follows:

"Where the audit or inspector's report in respect of the trust account of the firm is qualified by the auditor or inspector, as the case may be, the firm shall provide the Council with such information as the Council may require to satisfy itself that the firm's trust account is in good order, that the trust account practitioner remains fit and proper to continue to practice and that Fidelity Fund certificates may be issued to the members of the firm."

¹¹ See. *Supra*, paragraph 12.

- [29] In my view the applicants' case is pivoted purely on the basis that, notwithstanding their compliance with the legal frame work regulating issuing of Fidelity Fund Certificate, the LPC's administrative action is unlawful thus seeks indirect review (by way of mandamus) of the LPC decision.
- [30] As can be gleaned from above, I find both matters to be distinctly different legal proceedings. Thus the special plea of *lis pendens* should be dismissed.

INDIRECT REVIEW

- [31] Section 33 of the Constitution, 1996 grants everyone the right to just administrative action.¹² The right is protected by administrative law and is given effect by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Administrative law's primary diagnostic and corrective mechanism is judicial review. This is a procedure through which administrative action may be scrutinized and invalidated by a court.¹³
- [32] These two remedies are mentioned in the much cited dictum of Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*¹⁴.
- [33] A court can review administrative action directly or indirectly.¹⁵ In direct review proceedings, the validity of administrative action is the court's main subject of the adjudication. These proceedings are initiated by a litigant whose purpose in approaching the court is to impugn the administrative action in question. In indirect-review, dissimilarly, the validity of administrative action is incidental to the court's main subject of adjudication.
- [34] Pertinent to the procedure of indirect review, in his body of work, JR de Ville¹⁶ says:
 "Before the enactment of PAJA, direct review of administrative action occurred in terms Rule 53 of the Uniform Rules of the Court Although appears to have been some uncertainty in this

¹² See. *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 2 SA 23 CC. (para.18 -19 & 27).

¹³ C Hoexter *Administrative Law* 2 ed (2012) 113.

¹⁴ 1903 TS 111.

¹⁵ See note 14 *supra*. Pages 518 – 519.

¹⁶ *Judicial Review of Administrative Action in South Africa*-revised 1st ed. Page 297.

regard in the past, the procedure prescribed in Rule 53 need not be followed in instances of indirect review. In these instances, (for example where an interdict, declaration of rights or spoliation is sought), the applicant (plaintiff) can proceed either by way of application or by way of summons, depending on the presence or absence of dispute of fact.”

[34] In this matter the main issue for determination brought by the applicants is an order to compel LPC to issue them with the Fidelity Fund certificate but the decision taken by the LPC stands in the way of the relief sought and is incidental to the court’s main subject of adjudication. By seeking to compel the LPC to issue the Fidelity Fund Certificate, the applicants indirectly impugn the administrative action of the LPC.

ARGUMENTS AND ANALYSIS

[35] I now turn to scrutinize the administrative action taken by the LPC on 4 December 2023. In an attempt to avoid prolixity, I will briefly refer to the most contentious issues. Firstly, Adv. Steenkamp in his arguments¹⁷ with regards to discretion refers to Section 84(6) of the Act as the only provision which grants the LPC authority to withdraw Fidelity Fund Certificate and consequently allows them to apply for an interdict against a practitioner concerned for non-compliance with the Act. According to him, the applicants submitted qualified reports to the LPC and complied with rule 54.30. Therefore, Section 85(6) becomes applicable and it imposes upon the LPC a positive obligation to issue the Fidelity Fund Certificate **“if it is satisfied”**. The “if it is satisfied” requirement is only fenced off to the four considerations contained in the provision which are the following:

“Upon receipt of an application in terms of subsection (1) the Council must, **“if it is satisfied”** that the applicant has:

- (a) complied with the provisions of this Chapter;
- (b) paid the required contribution to the Fund;
- (c) discharged all liabilities in respect of enrolment fees; and
- (d) completed the application form as determined in the rules in every respect, immediately issue to the applicant a Fidelity Fund certificate that is determined in the rules.”

¹⁷ See. Page 2-3 of Heads of argument.

- [36] I deem it apposite at this stage to deal with the contextual meaning of “if it is satisfied” and what could be the meaning of “must” contained in the letter of section 85(6). I hasten to mention that the literal meaning¹⁸ of “satisfied” is to make somebody pleased by doing or giving what they want. Whereas, Hoexter¹⁹ with reference to “is satisfied” refers to a case of *Kabinet van die Tussentydse Regering vir Suiwes-Afrika v Katofa*²⁰, where Rabie CJ took the view that the words “is satisfied” appearing in delegated legislation conferred a subjective discretion on the Administrator.
- [37] In *Bertie Van Zyl (Pty)(LTD) v Minister for Safety and Security*²¹, Mokgoro, J held that our Constitution requires a purposive approach to statutory interpretation. In my view the words “must issue...if it is satisfied” must be interpreted in the light of their context. Additionally, a contextual and purposive reading of a statute must of course remain faithful to the actual wording of the statute. In my considered view the meaning that can be attached to “must” is that the obligation to issue Fidelity Fund Certificate only follows after LPC is satisfied that the applicants have met all four considerations listed in section 85(6) of the Act. In exercising its subjective discretion, the LPC must consider whether the applicants surmounted the threshold of section 85(6) (a) to (d). The broader consideration is section 85(6)(a) which requires compliance with chapter 7 of the Act²². These provisions clearly circumscribe the LPC’s role to be satisfied that the application complied with the relevant lawful requirements. It is also axiomatic from the letter of section 85(6) that the LPC has a subjective discretion to issue the Fidelity Fund Certificate and if not satisfied, they can withhold or decline issuing thereof. I interpose to mention that the administrative action to be taken must have regards to the ambit and purpose of the Act²³ and most importantly be in accordance with the principles of administrative law. Similarly, with rule 54.30 being a supplementary subordinate regulation, it behoves the LPC to exercise its judgment on whether the firm’s trust account is in good order and that the trust account

¹⁸ Collins English Dictionary.

¹⁹ Cora Hoexter *Administrative Law in SA*, Second Edition, page 299.

²⁰ 1987 (1) SA 695 (A).

²¹ Case number: CCT 77/08 [2009] ZACC 11, Paragraph 21.

²² Legal Practice Act 28 of 2014.

²³ Act 28 of 2014.

practitioners remain fit and proper to continue to practice. In this case, the three affidavits submitted by the applicants which purport to explicate the qualified findings must "satisfy" the LPC of the aforementioned two considerations listed in rule 53.30. Mere submission of the affidavits or even still, an explanation by the applicants per se is not enough, such submission and or explanation must still pass the threshold of satisfying the LPC.

- [38] Having found that the LPC has a discretion in both section 85(6) and rule 54.30, this brings me to a question of whether the administrative decision taken on 4 December 2023 is procedurally unfair, unlawful, arbitrary and capricious and or is motivated by ulterior motives and purpose. The applicants further attack the LPC for not affording them an opportunity of addressing any shortcomings in the explanation that had been proffered to it concerning the qualification.
- [39] Adv. Steenkamp has argued that qualified reports were submitted and that section 85(6) and rule 54.30 have been complied with in that the affidavits were filed by the applicants in an attempt to explain and clarify the qualified finding. There is no evidence of misappropriation because the deficits are corrected and the money has been paid back. Further, measures were taken to rectify the deficiency in their accounting department. Furthermore, in as far as chapter 7 of the Act and rule 54.30 are concerned, the applicants were in compliance and the LPC failed to give them audience by seeking further explanation. Despite compliance, LPC took a decision not to issue them with the Fidelity Fund Certificate. They were not informed as to how this decision was taken and an independent auditor was appointed for investigations into their trust accounts.
- [40] Adv. Mohapi in his arguments controverted the allegation by the applicants to the effect that the letter falls short of giving reasons as to why the decision was taken and why the Fidelity Fund Certificate was not issued. According to him, the letter does not only inform the applicants that their explanation cannot be accepted. It also informs them that LPC wants further investigation. Furthermore, the last paragraph of the letter informs them that due to the fact

that they failed to inform the court²⁴ of the deficit in their trust account while being aware of the same. According to him LPC could not have been clear as to why the administrative action was taken. Furthermore, Applicants are well aware of the significant amounts that are in deficit and most certainly cannot be attributed to “incorrect posting” or “accounting errors”.²⁵

[41] In my view, the latter argument is correct more especially when one considers the fact that Newtons auditors advised the applicants about a commixture and or a wrong process that was followed by the De Lange attorneys and Matsepe Inc in March 2023. The LPC then gave the applicants a lifeline by advising them to split transactions dating back from 1 March 2021 until the end of February 2023.²⁶ Subsequently on 2 June 2023 a resolution was passed by the investigation committee that the LPC institutes urgent application for the suspension of both first and second applicants. This resolution was taken notwithstanding the fact that the applicants wrote a letter²⁷ to the LPC explaining transgressions and requesting that any further disciplinary steps be put on hold until end of June 2023. On August 2023, an urgent application was lodged, calling for both first and second applicants to be suspended. I interpose to mention that deduced from the conduct of the LPC in proceeding with the application for suspension, the only ineluctable inference is that the explanation proffered by the applicants fell short of “satisfying” the LPC.

[42] Furthermore, gleaned from the letter²⁸ applicants attribute further complications to the bookkeepers who left the employment of Matsepe Inc. during 2022. I deem it apposite to mention that chapter 7 of the Act significantly places an obligation on the legal practitioner in as far as compliance is concerned. I could not glean any provision from the Act suggesting that a bookkeeper also has such an obligation. Thus, I find the explanation about bookkeepers leaving employment to be unfathomable and inexplicable in as far as transgressions are concerned.

²⁴ The other pending matter- Case number: 4514/2023.

²⁵ De Lange affidavit page 3, para.7.

²⁶ See. Para 11.9, page 9 of FA.

²⁷ Page 70-75 of the trial bundle, Letter dated 18 May 2023 in case number 4514/2023.

²⁸ See. Paragraph 11 of the letter referred to in footnote 27.

[43] On top of all that, on 31 October 2023 the Newtons submitted a qualified reports for period 1 March 2021 and 28 February 2023 and identified five instances in which the applicants did not comply with the provisions of the Act and the rules on each report. Attached to the reports the applicants filed three affidavits as envisaged by the requirements of rule 54.30. Gleaned from these affidavits, the applicants attribute the transgressions to incorrect posting and accounting errors and they conceded to non-compliance with rule 54.14.10 in their affidavits²⁹ on the basis that everyone lost sight of this requirement.

[44] I deem it necessary to mention that the submission of these affidavits were preceded by numerous correspondences between the applicants and respondent. In a replying affidavit³⁰ in respect of the other matter, JJ Hefer SC succinctly outlined the attitude of the LPC towards the Newtons' qualified reports. Furthermore, Roux Barry Cloete submitted an affidavit³¹ explaining the basis for qualified findings and the steps taken to rectify the situation. The LPC responded to this correspondence through a letter opined by its director³² specifying the reason for their dissatisfaction and requesting more clarifications. Over and above this request for more clarification, I interpose to mention that Hefer's affidavit in paragraph 13 states as follows:

"Before, I deal with the audit report, the LPC submits that Mr. Cloete's explanation is vague, if it is an explanation at all. It does not even pretend to make any attempt to truly explain what caused the trust accounts deficits of R403 139,63 between the trust account balances and the accounts records during the financial year ending 30 September 2022. It, with respect, will require the LPC to investigate the real cause of the trust deficit in Matsepes Inc. and similarly with the De Lange Attorneys in their deficit of R61 592,97."

[45] In my view gleaned from the aforementioned correspondences, the LPC pertinently explained what should be explicated by the applicants through their affidavits as required by rule 54.30. The argument by the applicants to the effect that they were not given audience after submitting their affidavits instead the LPC just took a decision not to issue them with the Fidelity Fund

²⁹ Page 50 of trial bundle, paragraph 11 of 1st applicant affidavit and page 60, paragraph 3 of Cloete Affidavit.

³⁰ See. Page 299 to 307 of the trial bundle in case number 4514/2023, Josephus Johannes Francois Hefer affidavit dated 1 November 2023.

³¹ See page 345-347 of the other trial bundle. Affidavit dated 27 October 2023.

³² Letter dated 31 October 2023, written by Margarete Kwakye, Director.

Certificate can only find favor if the three affidavits³³ and the letter dated 4 December 2023 were the only correspondences between the applicants and the LPC (being the administrator in this instance). I also deem it necessary to reiterate that I am satisfied that the letter succinctly explains why the Fidelity Fund certificate could not be issued and why further investigations will be conducted by the council. I am not oblivious of the fact that the administrative decision was taken on 4 December 2023. It is apposite to mention at this stage that the rest of the correspondences were dealing with the same subject matter emanating from the Newtons qualified findings.

[46] In my view the LPC's administrative decision is buttressed by the preliminary report dated 22 January 2024 from Kotie Kruger³⁴ calling for further requested documents. Perhaps it is necessary to mention inter alia in his conclusion Kotie Kruger in paragraph 4.2 says:

- "(i) Limitation. No accounting records were maintained of a bank account (Standard Bank Account).
- (ii) No details of posting errors.
- (iii) No details of transgressions referring to transfers from trust bank account to business bank account and withdrawals from trust banking account.
- (v) No breaking down of R406,535.10 transferred to rectify the deficit as it appears that the deficit originated from a combination of posting errors and amounts erroneously transferred.
- (iv) Not sure why posting errors have been corrected by transferring funds instead of adjusting journals."

[47] It is axiomatic from the preliminary report that the affidavits submitted by the Applicants in terms of rule 54.30 fall short of adequately accounting for the transgressions.

[48] The submission by the applicants that there is no misappropriation and that money has been paid back into the trust account therefore by that conduct, ipso facto, entitles them to be issued with the Fidelity Fund Certificate while

³³ Filed on the 8 November 2023 in compliance with rule 54.30.

³⁴ Page 128 TB,AA3.

the process of investigation was under way is misplaced. In my view this argument loses sight of the fact that LPC as *custom morum* of the legal profession is duty bound to regulate the professional conduct of the legal practitioners so as to ensure accountable conduct. It must protect the public interest and preserve the public trust in the legal profession by ensuring that the measures adopted by the Legislature in its wisdom to ensure that trust moneys and property is competently and professionally handled and the public is protected and indemnified from theft thereof.

[49] I am also satisfied that the administrative decision taken by them on 4 December 2023 was regular and made in compliance with the principles of administrative law.

[50] Molitsoane, J in Maree & Bernard Attorneys case at paragraph 30 held that such decisions are not final in effect as the respondent can overturn its decision. I align myself with this finding. Additionally, in my view *in casu* the applicants are afforded an opportunity to give proper account of the transgressions and if the LPC is satisfied with the explanation, it can overturn its decision by simply issuing the Fidelity Fund Certificate. This can only be achieved once the LPC is not prevented from carrying out its functions as a statutory supervisor of the legal practitioners.

[51] I am unable to agree with the applicants that they have made out a case for the relief sought. I thus accordingly order as follows:

ORDER:

1. That the application for mandamus is dismissed with costs.
2. The Applicants are ordered to pay the costs of the application on an attorney and client scale jointly and severally, the one to pay the others to be absolved.


S T MGUDLWA, AJ

On behalf of the Applicants:
Instructed by:

Adv S Grobler
Peyper Attorneys
BLOEMFONTEIN

On behalf of the Respondent:
Instructed by:

Adv SL Mohapi
Amade & Company Inc
BLOEMFONTEIN