REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 12379/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

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DATE NP MNGQIBISA-THUSI

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL	Applicant
and	
KGETSEPE REVENGE KGAPHOLA	1st Respondent
KGAPHOLA INCORPORATED ATTORNEYS	2nd Respondent

JUDGMENT

MNGQIBISA-THUSI J

[1] The applicant, the South African Legal Practice Council, is seeking the suspension of the first respondent, Kgetsepe Revenge Kgaphola, from practising as an attorney of this court upon such conditions as the court deems necessary, alternatively, removing the name of the first respondent from the roll of practising attorneys and other ancillary relief.

[2] On 10 March 2021, the applicant launched this application in which it seeks the suspension, alternatively the removal of the first respondent's name from the roll of practising attorneys mainly on the following grounds:

2.1 that the first respondent practiced without being in possession of a Fidelity Fund Certificate for the year of 2020;

2.2 that the first respondent failed to pay membership fees due and payable for the 2020/2021 financial year;

2.3 that he failed to register for a Practice Management Training Course for the year 2021;

2.4 that his trust bank account and business account are registered in a jurisdiction which does not tally with where his office is registered; and

2.5 that he brought the profession into disrepute.

[3] Section 119(2)(b) of the Legal Practice Act 28 of 2014 ("LPA") provides that any rule, code, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document promulgated, issued or granted and any other steps taken in terms of any such law immediately applicable before 1 November 2018 when the LPA was promulgated, shall remain in force, except in so far as it is inconsistent with any of the provisions

of the LPA, until amended or revoked by the competent authority under the provisions of the LPA.

[4] In terms of section 40(3)(a)(iv) read with Section 44(1) of the LPA, an attorney may be struck from the roll or suspended from practice if he or she, in the discretion of the court, is not a fit and proper person to continue to practice as an attorney, on a balance of probabilities. This section allows a court, in the exercise of its discretion, to strike or suspend an attorney who has failed to display the degree of honesty, reliability and integrity expected of an attorney.

[5] Applications for the striking of an attorney from the roll of practitioners are not ordinary civil proceedings but are disciplinary in nature and are *sui generis*. The court in the matter of *Solomon v Law Society of the Cape of Good Hope*[1] said the following:

> "Now in these proceedings the Law Society claims nothing for itself…..it merely brings the attorney before the court by virtue of a statutory right, informs the court what the attorney has done and asks the court to exercise its disciplinary powers over him….The Law Society protects the interests of the public in its dealings with attorneys. It does not institute any civil action against the attorney. It merely submits to the courts facts which it contends constitute unprofessional conduct and then leaves the court to determine how to deal with this officer."

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[6] In *Middelberg v Prokureursorde van Transvaal*[2] the court undertook a full analysis of the nature of an application to strike a legal practitioner off the roll. The Appellate Division as it then was held that such proceedings are *sui generis* but for the purposes of appeals which would constitute civil

[1] 1934 AD 401 at 408-409
[2] [2001] 3 All SA 166 (A)

proceedings. A three-stage enquiry is conducted where the following is ascertained:

(i) whether the offending conduct has been established on a preponderance of probabilities;

(ii) whether the respondent is a fit and proper person to continue to practise as an attorney, taking into account the respondent's conduct; and

(iii) whether, and in consideration of all the circumstances, the respondent should be removed from the attorneys' roll or whether an order of suspension from practise for a specific time will suffice[3].

[7] The court's discretion must be based upon facts before it, which facts must be proven upon a balance of probabilities. The facts should be considered in their totality.

Background

[8] The first respondent was admitted to practice as an attorney of this court on 28 August 2020. He is a sole practitioner practising under the style of Kgaphola Incorporated Attorneys (the second respondent).

[9] The first respondent applied to the applicant for the registration of his own law practice under the name and style of the second respondent with effect from 9

[3] In *Law Society of the Northern Provinces v Soller* [2002] ZAGPPHC 2 (26 November 2002) the court held that a court may, *mero motu,* initiate steps to strike a respondent's name from the roll of attorneys and can do so notionally, without the reliance of the Law Society's cooperation or indeed, against the Law Society's wishes.

October 2020. On 8 October 2020, the applicant confirmed the registration of the firm subject to the condition that a Fidelity Fund Certificate would only be issued once the first respondent has provided it with the following information:

9.1 the details of the trust bank account, inclusive of: the account number; name and address of the banking institution; and confirmation by the bank of the opening of the account;

9.2 a copy of the second respondent's incorporated registration certificate; the firm's postal address and telefax numbers; and proof of registration with the Financial Intelligence Centre; and

9.3 payment by the first respondent of outstanding membership fees for the 2020 year.

Merits

[10] Firstly, the applicant contends that the first respondent practiced as an attorney without being in possession of a Fidelity Fund Certificate for the period 9 October 2020 to 16 March 2021 in contravention of section 84(1)[4] of the LPA which prescribes that a practising attorney, amongst others, must be in possession of a fidelity fund certificate. It is the applicant's contention that at the time these proceedings were launched on 10 March 2021, the first respondent was not in possession of a fidelity fund certificate which was only issued to the first respondent on 16 March 2021, which certificate was later withdrawn by the applicant on 30 April 2021.

[4] Section 84(1) of the LPA reads as follows: "Every attorney or advocate referred to in section 34(2)(b), other than a legal practitioner in the full-time employ at the South African Human Rights Commission or the State as a state attorney or state advocate or who practices or is deemed to practice- (a) for his or her account either alone or in partnership; or (b) as a director of a practice which is a juristic person, must be in possession of a Fidelity Fund Certificate."

[11] Secondly, it is the applicant's contention that the first respondent contravened its Rule 54.16 in that he failed to immediately inform it of the details of his trust banking account. It is common cause that the first respondent opened a trust banking account on 20 November 2020. It was submitted on behalf of the applicant that despite having opened a trust banking account, the first respondent failed to timeously respond to the applicant's queries about the banking details and only responded on 12 February 2021.

[12] Further, the applicant alleges that the first respondent, in contravention of Rule 54.34[5], opened his business accounts in Polokwane, whereas his firm is based in Gauteng.

[13] Thirdly, the applicant contends that the first respondent failed to comply with section 43B of the Financial Intelligence Centre Act 38 of 2001 (FICA) read with regulation 27A(3) of the FICA regulations, in failing to register with the Financial Intelligence Centre (FIC) within the prescribed period. It is the applicant's submission that since the first respondent opened his practice on 9 October 2020, he was obliged to have registered with the FIC by 7 January 2021, and was therefore, in contravention of the applicant's Rule 18.17 which expects him, as an accountable institution, to take all necessary steps to comply with the statutory requirements of FICA. The applicant further complains that despite numerous communication to the applicant about the registration with the FIC, the first respondent failed to respond to the former's enquiries.

[5] Rule 54.34 requires that a firm's trust and business banking accounts should be opened within the jurisdiction of the Provincial Council where the firm's main office is based.

[14] The applicant further alleges that the first respondent failed to pay his subscription fees for the year 2020, which fees were due and payable by 31 October 2021.

[15] Finally, the applicant complains that the manner in which the first respondent has engaged with it throughout the process leading to the institution of these proceedings was hostile, dismissive and disrespectful of the applicant, which conduct amounted to lack of professionalism and brought the profession into disrepute.

[16] In response to the allegations levelled from him, the first respondent denies that he did not practice as an attorney prior to him being issued with a Fidelity Fund Certificate on 16 March 2020. It is the first respondent's contention that the applicant has not presented any evidence proving that before it issued the first respondent with a Fidelity Fund Certificate, he was practising, it was further contended that the mere fact of seeking an auditor's report does not amount to actually practising as an attorney.

[17] With regard to the failure to pay his subscription fees for the year 2020, the first respondent has submitted that during the year 2020, he had not started to practice and since he was not earning any income, he was not in a financial position to pay the subscription fees for that year. However, it was also submitted that the first respondent does not have any outstanding membership fees. Without admitting that he had not complied with the applicant's rule with regard to the opening of bank accounts within the Provincial Council in whose jurisdiction the practitioner practices, the first

respondent alleges that the applicant never raised any objection when he informed the applicant about his bank accounts. Further the first respondent incorrectly contends that the FICA does not prescribe a period within which an accounting institution should register with the FIC, particularly with regard to practitioners who are not practising.

[18] Furthermore, it is the first respondent's contention that his response to the applicant's allegation did not signify any disrespect towards the applicant but was a means to protect himself against allegation made by the applicant.

[19] It was submitted on behalf of the first respondent that the complaints made against the first respondent did not justify the first respondent's removal as an attorney, or his suspension from practising as an attorney.

[20] Taking into account the evidence before me, as correctly submitted by counsel for the first respondent, I am not convinced that the applicant has proven on a balance of probabilities that during 2020 the first respondent practiced as an attorney before he was issued with a Fidelity Fund Certificate. I am further not convinced that in defending himself against the allegations made by the applicant that the first respondent had shown disrespect towards the applicant in his response to the applicant's allegation. The first respondent might have been tardy in his responses to the applicant and /or might have used inelegant language. However, the first respondent's conduct is not indicative of any intentional disrespect towards the applicant.

[21] I am satisfied that the first respondent's infractions were not that serious to warrant a declaration that he is not fit and proper to practise as an attorney and his removal from the roll of practising attorneys.

[22] Having found that the first respondent's removal from the roll of practising attorneys is not an appropriate sanction for the infractions committed, this court needs to determine, taking into account all of the first respondent's infractions, whether first respondent should be suspended from practising as an attorney.

[23] The infractions the first respondent has committed do not entail an element of dishonesty. They relate mainly on tardiness in responding to the applicant's queries and/or compliance with the applicant's rules relating to the pre-conditions for the issuance of a Fidelity Fund Certificate. The first respondent has shown himself to lack experience and insight. After the first respondent was admitted to practice as an attorney, he set up practice as a sole practitioner which was subject to the mentioned conditions required by the applicant being fulfilled. There is no evidence, with the first respondent being a young and inexperienced attorney, that the applicant proffered him any guidance. Further, the first respondent's non-compliance relate to being indigent rather than dishonesty, an issue facing a lot of young entrants into the profession. I am satisfied that the respondent is not an inherently dishonest person. At the time of the launching of this application, the first respondent had substantially complied with the applicant's requirements. Further, the attendance of the training for Practice Management will serve as a corrective measure.

[24] I am therefore of the view that under the circumstances the suspension of the first respondent from practising as an attorney would also not be an appropriate sanction.

[25] With regard to costs, I am of the view that the applicant is not entitled to be awarded costs in that, taking into account the conduct complained of, instead of launching these proceedings, the applicant could have considered less drastic sanctions than removal or suspension. On the other hand, I am of the view that the first respondent could have timeously communicated the challenges he was facing in complying with the applicant's conditions, and is therefore not entitled to his costs even though he has succeeded in defending himself against the applicant's allegations.

[26] In the result the following order is made:

1. The application is dismissed.
2. Each party to pay its costs.

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NP MNGQIBISA-THUSI

Judge of the High Court

I agree

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V M NQUMSE

Acting Judge of the High Court

Date of hearing : 18 January 2022

Date of judgement :

For Applicant: Mr L Groome (instructed by RW Attorneys)

For Respondent: Adv VL Makofane (Instructed by MT Rapetwa Incorporated)