




OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
<u>25-01-2023</u>	<u>PD. PHAHLANE</u>
DATE	 SIGNATURE

Case Number: 5927/2021

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

APPLICANT

And

BONISIWE MAKHOSAZANE SABELA

RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by her secretary. The date of this judgment is deemed to be 25 January 2023.

JUDGMENT

PHAHLANE, J

- [1] This is an application brought by the Legal Practice Council (the LPC) in terms of section 44(1) of the Legal Practice Act 28 of 2014 (the LPA) for the removal of the respondent's name from the roll of attorneys.
- [2] The respondent was admitted as a legal practitioner (attorney) on 10 April 2011. She has been practising as a sole practitioner on her own account under the name and style of Sabela Attorneys in Randburg, Gauteng, and her name is still on the roll of attorneys.
- [3] On 11 November 2021, by way of an order of this court, the respondent was suspended from practicing as an attorney pending finalization of the application to strike her from the roll. She was also ordered to show cause on 28 July 2022 why her name should not be struck from the roll of legal practitioners.
- [4] The respondent did not file a notice to oppose but on 20 July 2022, she filed a document titled "Founding Affidavit" which from the reading of its contents, was intended to be an answering affidavit and will be referred to as such. Notice of set down for the hearing on 28 July 2022 was served on the respondent via email on 15 November 2021 at 09:58, and she acknowledged receipt thereof on the same day. That being so, the court was satisfied that the respondent was aware of the application and that it was set down for hearing on 28 July 2022.
- [5] The facts and circumstances which prompted the Legal Practice Council (LPC) to bring this application are as follows:
- 5.1 The respondent failed to submit her opening auditor's report to the LPC for the periods ending 28 February 2015 and 28 February 2017 timeously. The reports were due to be submitted on or before 31 August of the respective years, but the respondent submitted them seven months and three months late respectively.

5.2 The respondent also failed to submit her annual auditor's report for the periods ending 28 February 2018; 28 February 2019; and 29 February 2020. On 4 November 2019, the LPC addressed a letter to the respondent, calling upon her to remedy her affairs by submitting her outstanding auditor's reports for 2018 and 2019, and the respondent did not reply to this correspondence and did not remedy her affairs.

5.3 The respondent has been practicing as an attorney without being in possession of a fidelity fund certificate and she has done so since 1 January 2015. As a result, she did not qualify for and has not been issued with a fidelity fund certificate since 1 January 2015 to 2021.

5.4 The respondent also failed to pay her annual subscriptions (membership fees) for the years 2015, 2016, 2017, 2018 and 2019 to the LPC. On 28 January 2020 the LPC addressed a letter to the respondent regarding her failure to pay her membership fees and she did not respond to the letter nor comply.

5.5 During September 2019, the PLC received a complaint from Mrs Hartzenberg who alleged that the respondent acted on behalf of her husband and son in a criminal matter during 2019. The complaint was that:

(a) The respondent failed to attend hearings in the matter as instructed and opted instead to send another person to appear on her client's behalf.

(b) The respondent failed to handle her instruction properly, which eventually resulted in a warrant of arrest being issued against Mr Hartzenburg.

5.6 The LPC referred the complaint to the respondent in a letter dated 18 September 2019 and requested her to furnish it with her comments thereon

on or before 1st of October 2019. The respondent failed to comply to this letter. The respondent further failed to reply to correspondence addressed to her by the LPC on 31 October 2019; 4 November 2019; 3 December 2019; 23 January 2020; and 27 October 2020. This included correspondence of 28 January 2020 calling upon her to appear before a disciplinary enquiry on 21 February 2020, which she failed to attend. The disciplinary enquiry was as a result removed from the roll, and the respondent was ordered to pay the costs of the enquiry. The costs of the enquiry remain outstanding.

[6] It is the applicant's contention that the respondent has contravened several provisions of the Attorneys' Act; the Legal Practice Act (LPA); the Rules for the Attorneys' Profession; the LPC Rules and the Code of Conduct which can be summarised as follows:

6.1 Rule 85(1) of the LPA read with sections 41(1) and 41(2) of the Attorney's Act for practicing without being in possession of a fidelity fund certificate as required by the peremptory provision under section 84(1) of the LPA requiring every attorney to be in possession of a fidelity fund certificate.

6.2 Rule 35.19; 35.21; 35.22 and 35.23 of the Rules for the Attorney's Profession and the corresponding Rule 54 provision under the LPC Rules, which provides that a firm which commences practice for the first time shall within six months of commencing practice, furnish an opening auditor's report.

6.3 The respondent's failure to comply with the provisions of Rule 54 constitutes misconduct in terms of Rule 57.1 of the LPC Rules, and failure to comply with the committee's order to remedy this situation constituted a contravention of Rules 16.3 and 16.4 of the Code of Conduct

6.4 Rule 2.24 of the Rules for the Attorney's Profession, for her failure to pay her

membership fees.

6.5 Section 78(1) of the Attorneys Act and sections 86(1) and (2) of the LPA, including Rule 21.1 of the Code of Conduct.

6.6 Rules 47.1 to 47.3 of the Attorney's Profession and the corresponding provisions of Rules 10.1 to 10.3 under the Code of Conduct, for her failure to reply to the PLC's correspondence and her failure to attend the disciplinary enquiries.

[7] Applications for the striking off an attorney's name from the roll of attorney's are not ordinary civil proceedings. They are proceedings of a disciplinary nature and are *sui generis*¹, being no more than a request by the applicant as *custom morum* of the profession for the court to use its disciplinary powers over the officer who has misconducted himself/herself and impose an appropriate sanction within the court's discretion ranging from striking-off, if the court finds that the individual is no longer a fit and proper person to remain on the roll of attorneys, or suspend him/her from the profession for a particular duration.²

[8] When the LPC applies for an attorney to be struck off the roll, it places before the court facts which in its submission, show that the respondent is no longer a fit and proper person to continue in practice as an attorney. The question whether an attorney is no longer a fit and proper person to practice as such lies in the discretion of the court, which is not exclusively derived from the LPA but is inherent in nature.

¹ *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 393D-E.

² See: *Solomon v Law Society of the Goodhope* 1934 AD 401 at 407; *Hassim v Incorporated Law Society of Natal* 1977(2) SA 757 (A) at 767-8.

- [9] The court's discretion entails a three-stage enquiry as set out by the Supreme Court of Appeal in *Botha v Law Society of the Northern Provinces*³. In exercising its discretion, the court will firstly decide whether the alleged offending conduct has been established on a preponderance of probabilities. Once the court is satisfied that the offending conduct has been established, the second enquiry is for the court to consider whether the person against whom the application is brought is a fit and proper person to continue to practise.
- [10] This enquiry entails a value judgment, which involves the weighing up of the conduct complained of against the conduct expected of an attorney. If the court is of the view that the practitioner is not a fit and proper person to practice as an attorney, the third enquiry is to decide whether in all the circumstances the attorney is to be removed from the roll of attorneys or whether an order suspending him/her from practice for a specified period would suffice.
- [11] This will depend on factors such as the nature of the conduct complained of; the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession; the likelihood or otherwise of a repetition of such conduct and the need to protect the public. Where the court finds that an attorney is not a fit and proper person to continue to practise, that attorney must be removed from the roll.
- [12] If the court however has grounds to assume that it may suspend and after a period of suspension the legal practitioner will be fit to practise as an attorney in the ordinary course of events, it will not remove the legal practitioner from the roll but order an appropriate suspension. On the other hand, where the court finds the legal practitioner guilty of unprofessional conduct where such conduct does not make him/her unfit to continue to practise, this does not mean that the court

³ 2009 (3) SA 329 (SCA) para [4]; See also: *Summerly v Law Society Northern Provinces* 2006 (5) SA 613; *Jassat v Natal Law Society* 2000 (3) SA 44 SCA; *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) para 2 at 13-14B.

is powerless. The court may discipline the legal practitioner by suspending him/her from practise with or without conditions or by reprimanding the legal practitioner.⁴ It is therefore imperative that the facts upon which the court's discretion is based, should be considered in their totality and not in isolation, and must be proven on a balance of probabilities⁵.

[13] Every legal practitioner is expected, as a member of a learned, respected and honourable profession, to observe and comply with the provisions of the Attorneys Act and the Rules promulgated thereunder, the LPA rules and the Code of Conduct. These include timeously responding and complying with the directions of the LPC.

[14] The respondent has not advanced any argument or plausible reasons why her name should not be struck from the roll of attorneys. In her answering affidavit, she does not deny the allegations or complaints made by the LPC, or what the LPC has done to reach a stage where an application was launched to have her suspended.

[15] She concedes in her answering affidavit that she was last in possession of fidelity fund certificate in 2014 when her law firm was established. She however contends that "she was labouring under the misconception that she did not need a fidelity fund certificate because she held no monies in her trust account".

[16] As regards her failure to submit the auditor's report, the respondent avers that she had submitted a full audit report to the accounts department of the Law Society and was told via email that there was no need for her to submit a full audit report if her trust account was not in operation.

⁴ Malan v The Law Society of the Northern Provinces 2009 (1) SA 216 (SCA) at p 219, par 7.

⁵ See: Law Society, Cape of Good Hope v Segall 1975 (1) SA 95C at 99B; Beyers v Pretoria Balie Raad 1966 (2) SA 593 (A) at 606B; Malan v The Law Society of the Northern Provinces (supra) at para 9; Olivier v Die Kaapse Balie-Raad 1972 (23) SA 485 (A) at 496 F-G

- [17] Mr Groome appearing for the applicant argued, and correctly so, that the respondent's belief is alleged in exceptionally vague terms because there is no basis upon which her belief is premised as regards her misconception of practicing without a fidelity fund certificate. He submitted that the respondent should have approached the LPC and followed the exemption processes available to practitioners whose trust accounts has been dormant, as the provisions of the Attorneys Act and the LPA are peremptory and must be complied with. He further submitted that it was incumbent upon the respondent to ensure that she was in possession of a fidelity fund certificate for the years commencing 2015 to 2021.
- [18] I am inclined to agree with Mr Groome's submission because it cannot be, that the respondent did not know or that she was not aware that she was in constant violation of the rules because she was first informed by the LPC to correct her state of affairs before being summoned to appear before a disciplinary committee of the Council for *inter alia*, her repeated failure to be in possession of a fidelity fund certificate.
- [19] When allegations were made by the LPC, the respondent was duty bound to respond meaningfully to those allegations and to furnish a proper explanation. Having alleged that she was told via email that there was no need for her to submit a full audit report, she failed to attach the said email as the basis of her argument.
- [20] In the absence of any evidence to the contrary, I am bound to accept the averments made by the applicant as true and correct. I am therefore satisfied that the applicant has sufficiently established the offensive conduct in respect of fidelity fund certificate which was not issued because the respondent had failed to provide the LPC with the required annual audit reports.

- [21] Accordingly, her transgressions are serious and amount to misconduct in terms of Rule 57.1 of the LPC Rules and Rules 21.1 and 21.2 of the Code of Conduct, considering that she had conceded that she has been practicing as an attorney without being in possession of a fidelity fund certificate since 2015.
- [22] With regards to the respondent's non-compliance with the requirement that she had to pay her annual membership/subscription fee to the LPC, the respondent does not provide a cogent explanation for her consistent failure to pay her membership fees. She however concedes that she had a duty to pay the membership fees and has failed to pay same since 2015 and alleges that she is willing to enter a payment arrangement with the LPC to bring her affairs up to date. In this regard, the applicant contends that if that were the case, the respondent would have already approached the LPC to this end and not merely pay lip-service to tender her compliance, as has been done.
- [23] The respondent's failure to advance reasons for her repeated conduct and not take the court into her confidence or explain why she proposes to enter into a payment arrangement which is contrary to the peremptory provisions of the Act is a clear indication of her unwillingness to comply with the various Rules and sections of the LPA.
- [24] It is on this basis that Mr. Groome argued that the respondent's conduct does not meet the standard of behaviour, conduct and reputation which is required of attorneys and officers of the court.
- [25] In my view, the respondent had a responsibility as the sole practitioner of her law firm to make sure that her membership/subscription fee was paid in full, and that the prescribed rules were complied with. In addition to what was expected of the respondent, all legal practitioners are expected in the exercise of their duties, to conduct themselves with honesty and dignity.

- [26] With regard to the Hartzenberg complaint, the respondent avers that she attended court for bail hearing and the matter was referred for mediation, but that when she realized that there was a conflict of interest in the matter, she referred the matter to her colleague and her mandate was as such terminated.
- [27] It was argued on behalf of the applicant that while the respondent focused on addressing the conflict of interest, it is inconceivable that she did not realise well before the mediation meeting that she represented both parties. It was further argued that the respondent charged Hartzenberg for services rendered while she was practising without being in possession of a fidelity fund certificate and has failed to address the bulk of the complaint against her in her answering affidavit.
- [28] In this regard, Mr. Groome argued that the respondent unlawfully charged her clients for services that were rendered while the Attorneys Act and the LPA disentitled her to claim any fees; rewards or disbursements in respect of anything done by her while practising without being in possession of fidelity fund certificate. He submitted that the respondent should not be allowed to continue to practice as a legal practitioner and that her conduct renders her to be struck off the roll because it is indicative of a refusal to be regulated.
- [29] It is not in dispute that the LPC had previously, and on more than one occasion, sent letters to the respondent to respond to the complaint or allegations against her and she failed to respond thereto. The letters were sent to the e-mail and postal addresses provided by the respondent to the LPC. She stated in her answering affidavit that: *"I have never received any communication pertaining to the matter of Ms. D. Hartzenburg as the e-mail address and the physical service of the notices has never been delivered physically to me"*.
- [30] In my view, the respondent's denial that she did not receive any correspondence from the LPC has no merit. She elected a specific method of communication

between herself and the LPC and she can therefore not expect the letters to have been physically delivered to her. As a legal practitioner, the respondent had an obligation to diligently guard the interests of her clients, and she did not.

[31] The protection of the public goes hand in hand with the court's obligation to protect the integrity of the courts and the legal profession. Public confidence in the legal profession and in the courts is necessarily undermined when the strict requirements for membership to the profession are tainted.

[32] I have thoroughly weighed the respondent's misconduct against the conduct expected of an ordinary attorney and I find the respondent to be comparatively wanting. Her conduct constitutes a material deviation from the standards of professional conduct which is expected of an officer of the court and should not be countenanced because it creates a bleak image of her conduct as an attorney. Accordingly, the offending conduct of the respondent has been established on the preponderance of probabilities.

[33] With regards to the second enquiry relating to the determination of whether or not the respondent is a fit and proper person to continue practicing as an attorney, the respondent submitted in her answering affidavit that she should not be removed from the roll of attorneys and deals with her personal problems relating to her family, rather than addressing the issues of concern.

[34] Notwithstanding her failure to comply with her lawful obligations as an attorney and her contravention of the peremptory norms, the respondent has not undertaken corrective measures, nor has she proffered any explanation to the court for her conduct.

[35] The question raised by the second leg of the enquiry is accordingly answered in the affirmative. Consequently, the respondent fails the fitness and propriety test

and can no longer be considered to be a fit and proper person to be allowed to practice as an attorney and a member of this respected and honourable profession.

[36] With regards to the third leg of the enquiry relating to whether the respondent deserves the penalty of being removed from the roll of attorneys, it is worth mentioning that the respondent has undoubtedly violated the rules and committed serious misconduct and various offences,⁶ especially of practicing without a fidelity fund certificate for a considerable period following her failure to submit auditor's reports to the LPC.

[37] Having considered the totality of the facts and circumstances of this case, I have come to the conclusion that the respondent is indeed no longer a fit and proper person to continue practicing as an attorney and that the removal of her name from the roll of practising attorneys is a fitting and appropriate punishment in the circumstances.

[38] With regard to the issue of costs, the general rule is that the LPC is entitled to its costs even if unsuccessful. Mr. Groome submitted that the LPC should be fully indemnified for its costs because it does not approach the court as an ordinary litigant, but as the customs *morum* of the attorney's profession in circumstances where the respondent has failed to comply with her lawful obligations. A costs order is sought on an attorney and client scale. I find no reason present in this matter to deviate from the general rule.

⁶ Section 83(10) of the Attorneys Act

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

1. The respondent, BONISIWE MAKHOSAZANE SABELA is struck from the roll of attorneys (legal practitioners) of this Honourable Court.
2. The respondent must immediately surrender and deliver to the Registrar of this Honourable Court her certificate of enrolment as an attorney of this Honourable Court.
3. That in the event of the respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate and hand it to the Registrar of this Honourable Court
4. That paragraphs 3 to 11 of the order of 11 November 2021 shall remain in force.
5. The respondent is ordered to pay the costs of the application on attorney and client scale.



PHAHLANE J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

PRETORIA

I agree,



COLLIS J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA

APPEARANCES

Counsel for the Applicant:	Mr. L. Groome (Attorney)
Attorney for the Applicant:	Rooth and Wessels Incorporated
Counsel for the Respondent:	No Appearance Noted
Attorney for the Respondent:	In Person
Date of Hearing:	28 July 2022
Date of Judgment:	25 January 2023