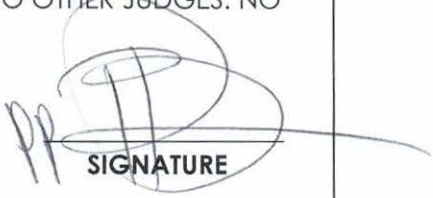


**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION: PRETORIA)**

Case number: 5849/21

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
22 NOVEMBER 2022	
DATE	SIGNATURE

IN THE MATTER BETWEEN:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

MBONGENI DEREK DLADLA

Respondent

JUDGMENT

KHWINANA AJ (MUNZHELELE J. *concurring*)

INTRODUCTION

[1] This is an application brought by the Legal Practice Council for striking the name of the respondent Mbongeni Derek Dladla in terms of Section 44(1) of the Legal Practice Act (LPA).

1.1 That the respondent be suspended from practise as an attorney or be struck from the roll of attorneys;

1.2 That the respondent is to surrender and deliver to the registrar his certificate of enrolment as an attorney and a conveyancer of this honourable court;

1.3 That the respondent in the event the respondent fails to comply with in terms of supra paragraphs the sheriff be authorised and directed to take possession of the certificates and to hand it to the Registrar of this Honourable Court;

1.4 That the respondent be prohibited from handling his trust account;

1.5 That Johan Van Staden, head of Risk Compliance or any person nominated by him be the *curator bonis* to administer and control the trust account of the respondent including accounts relating to insolvent and deceased estates kept by respondent in terms of section 86(1) and 86(2) of LPA and separate savings or interest-bearing accounts in terms of section 86(3) and 86(4) with powers act accordingly.

[2] The respondent has opposed this application and request that the application be dismissed with costs.

[3] The parties have both filed heads of argument which are explicitly, the applicant is still persistent that the respondent be suspended or struck off the roll, whereas the respondent says he has now complied with audit requirements and membership fees have been paid therefore he must not be suspended or struck off the roll.

[4] This court is therefore ceased with a decision as to whether the offences that have been committed by the applicant warrant that he be suspended or struck of the roll.

BACKGROUND

[5] The respondent was admitted as an attorney on this the 26th day of November 2007. He has been practising as a sole practitioner for his own account under the name and style of Dladla (MD) Attorneys in Alberton, Gauteng.

[6] The respondent is still in practice and his business address is now in Northworld, Johannesburg. The respondent fails to mention when the address was changed and whether he did inform Council.

[7] The respondent has not submitted his annual auditor's report for the periods ending 28 February 2019 and 29 February 2020 to the Council. He admits his failure to do so. He has since submitted these reports on the 08th day of November 2021 electronically to Ms. Clarissa Hetzel. The Respondent does not dispute that the reports were late.

[8] The respondent has failed to provide an explanation for his failure to do so. This resulted in the respondent not being entitled to an FFC since the 01st day of January 2020 and him practising for his own account without being in possession of an FFC.

[9] The respondent's conduct is serious:

9.1 The clients on whose behalf he held/holds funds in trust were/are at risk;

9.2 The LPA confirms the seriousness of the transgression by creating an offence for doing so, which is punishable by a fine or imprisonment.

9.3 The respondent admits that he is not in possession of an FFC. He contends that he has not taken any further instructions since the end of 2019. He relies on section 34(1) of the LPA which says

“an attorney may render legal services in expectation of fees, a commission, gain, or reward as contemplated by this Act, or any other applicable law, upon receipt of a request directly from the public for that service”

9.4 He says he does not downplay the seriousness of this matter however he did not take new instructions and closed his offices in 2020.

[10] The applicant submits there is no caveat in the wording of section 84(1) that would relieve the first respondent of his obligation to be in possession of an FFC subject to receipt of instructions, as he appears to contend.

[11] Every legal practitioner who is admitted and enrolled as such is required to pay an annual fee to the Council. The respondent has not paid his membership fees for the 2019 and 2020 years to the Council which amounts to R5 275,00 (five thousand two hundred and seventy five rands).

[12] The respondent fails to dispute the amount in toto he says paid his membership fee for the 2020 year, however his membership fee for the year 2019 is R1 250,00 (one thousand two hundred and fifty rands) which remains outstanding. The respondent says he made an error in the calculation of the membership fees payable when he did his answering affidavit which he has since corrected.

[13] A complaint was submitted to council on the 12th day of September 2017 by Jali, which appears to be a failure to handle instruction properly, or at all. The respondent confirms that Jali terminated his mandate but has not addressed the complaint. The respondent says he is not attacking the applicant however says the entire file was given to the complainant and the applicant has not seen the file in order to make a finding on whether the instructions given were handled properly as is required of a legal practitioner.

[14] The council says it addressed several letters to the respondent, all of which the respondent failed to respond to. The council addressed three letters to the

respondent between January and June 2018 regarding Jali's complaint and requested his comments thereto.

[15] The respondent says he complied with the council's request and attaches e-mail correspondence to the complaint on the 02nd day of March 2018. The respondent's own annexure reveals that he received a response from the Council, 23 minutes later querying whether the attached document is the response to his complaint. Council's records confirm that no response has been received to the complaint.

[16] Council says it further sent two subsequent letters to him on 02nd day of May and 28th day of June 2018 repeating its requests for the respondent's comments to the complaint, to which he did not respond. Council says the letters were sent to the respondent's postal, e-mail, and P.O Box addresses between the 25th day of November 2019 and 18th day of March 2020.

[17] The applicant says these letters related to his failure to submit his 2019 auditor's report, that they were summoning him to appear before a disciplinary enquiry which he failed to attend. They also informed him that charges would be brought against him in respect of the Jali's complaint. The respondent in his reply says that he was not aware of the communication as his address had changed in May 2019 and that he informed the applicant of the relocation. He says he would have attended and he says he is not attacking the applicant. He says he is remorseful and is taking corrective measures.

FIT AND PROPER

[18] The applicant says the respondent has failed to comply with legislative safeguards intended to protect his clients and the public. He shows no insight into the seriousness of his conduct nor does he indicate any intention of rectifying his failure. The applicant opines that the cavalier manner in which he has addressed the present application reflects a dire lack of insight into the seriousness of his misconduct.

[19] The applicant submits that respondent's failure to respond to correspondence addressed to him by the Council and comply with directions of the Council, is also serious. It is indicative of a refusal to be regulated. The respondent denies that he does not want to be regulated and says he ceased taking instructions as a sign to protect the public. He says he did not have any active files whilst he did not have a fidelity fund certificate.

[20] The applicant opines that the respondent can no longer be considered a fit and proper person to be allowed to practise as a member of a learned, respected and honourable profession. The respondent refutes that and says that he showed remorse and has taken the necessary corrective measures.

LEGAL MATRIX

[21] It is trite that applications of this nature constitute a disciplinary enquiry by the Court into the conduct of the practitioners concerned, they do not constitute ordinary civil proceedings but are sui generis in nature. The applicant, is *custos morum* of the profession, which places facts before the Court into the officer's fitness to remain on the roll of attorneys. Council fulfils the role of an *amicus curiae*.

Objects of Council¹

5. *The objects of the Council are to— (self-explanatory)*

(a) facilitate the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent;

(b) ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice;

(c) promote and protect the public interest;

(d) regulate all legal practitioners and all candidate legal practitioners;

(e) preserve and uphold the independence of the legal profession;

(f) enhance and maintain the integrity and status of the legal profession;

(g) determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners;

¹ Legal Practice Act 28 of 2014

[22] This court has a discretion which is not derived only from LPA but is inherent in nature to either strike or suspend a legal practitioner.

This discretion is faced with a three-stage inquiry²:

(a) the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities; if so

(b) it must decide in its discretion whether the person concerned is a fit and proper person to practise as an attorney and this requires a value judgment; and if not

(c) the court must in its discretion, which involves yet again a value judgment, determine whether the attorney should be merely suspended for a period or whether the attorney should be removed from the roll.

[23] The council's main consideration is the protection of the public whereas legal practitioners are expected to treat the interests of their client's as paramount and use their best efforts to carry out work in a competent and timely manner. They are also expected to perform professional work with such a degree of skill, care or attention, or of such quality or standard, as may be reasonably expected of an attorney.

[24] In terms of the Legal Practice Code of Conduct³ :

"Replying to communications 10. An attorney –

10.1 shall within a reasonable time reply to all communications which require an answer unless there is good cause for refusing an answer;

10.2 shall respond timeously and fully to requests from the Council for information and/or documentation which he or she is able to provide;

10.3 shall comply timeously with directions from the Council; and

10.4 shall refrain from doing anything that may hamper the ability of the Council to carry out its functions."

[25] It is the duty of the applicant and the courts to act where an attorney's conduct falls short of what is expected and to curb the erosion of values in the profession. courts are there to uphold the law by protecting the integrity of the courts and the legal profession.

² Malan & another v Law Society, Northern Provinces [2008] ZASCA 90; 2009 (1) SA 216 (SCA)

³ Code of Conduct made under the authority of section 97(1)(b) of the Legal Practice Act, 28 of 2014

[26] The respondent is required to submit annual auditor's reports to the council, reporting on his firm's trust affairs, within six (6) months of each financial year-end. These reports enable the council to exercise its oversight function over practitioners and satisfy itself that the practitioner concerned is conducting a trust banking account correctly, that trust funds are being administered properly, and that trust accounting records are being kept in terms of the LPA and the LPC Rules.

[27] In terms of section 84(1) of the LPA⁴

"(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 practises or is deemed to practise— (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."

ANALYSIS

[28] This court considers the allegations against Mr. Dladla very serious. It frowns at the conduct of the legal practitioner. The respondent in his answering affidavit does not take this court into his confidence. He approaches this matter as rightly pointed out as though he is dealing with a criminal matter. The respondent disputes allegations without bringing any proof.

[29] It is so that when one changes an email that the office must do so in writing. It would be proper of the legal practitioner to furnish proof that depicts the communicate between himself and the applicant. It is not sufficient to simply deny. The respondent

⁴ Legal Practice Act 28 of 2014

must at all times remind himself that the applicant is approaching this matter with the view to exercising its mandate.

[30] The applicant as a regulator is answerable to the members of the public and the profession at large. Most importantly it is the mandate of the regulator to ensure that the rules and regulation of a legal practitioner in practice are observed. It is prudent upon the legal practitioner to be of assistance to the applicant which could curtail the proceedings unlike trying to outsmart the applicant whose interest are of the public and the profession at large.

[31] The conduct of the respondent in the manner he has dealt with this case lives much to be desired. The law in relation to a legal practitioner to practice is very clear. He must be in possession of a fidelity fund certificate. If a practitioner does not have a fidelity fund he puts the public at risk. The applicant is clearly brushing aside the fact that in 2020 he practised without a fidelity fund certificate.

[32] The respondent does not seem to understand that he cannot remain in practice whilst he continues to flaunt the laws of practice. The reason given by the respondent that his doors were kept open in 2020 though he did not have an active file is neither here nor there. He does not understand that the two are in conflict with each other. It is not about him having an active file but it is about him remaining in practice without a fidelity fund certificate.

[33] As though this was not enough the respondent carries on saying he has subsequently submitted an audit report therefore he has complied. He refuses to see the light. The respondent clearly shows a great lack of understanding the rules that he has flaunted. It is therefore imperative to note that as a legal practitioner he seems not to comprehend the seriousness of the transgression. The respondent does not have a fidelity fund certificate for the period 2020 to-date yet his offices remains open.

[34] The respondent seems to think that because there are not claims against the firm now there is no risk. This is definitely a wrong approach to the matter. I must say Practice Management Training particularly with regard to possession of a fidelity

fund certificate and who the regulator is imperative in relation to this matter. In terms of the objects of the applicant at section 5(h)⁵ training must be done. The applicant must consider continuous training which seeks to achieve its objects. The respondent is one candidate that must receive further training. Maybe it is time that despite the initial training received the legal practitioners attend a further training just to ensure that they do not rust and they keep themselves abreast of the rules and regulations that govern them being in practice.

[35] The respondent does not furnish the reasons for his failure to submit the audited statements timeously. The respondent merely says he has now submitted and therefore that is a sign of remorse and that he is correcting his actions. The respondent is missing the point of the fact that as a legal practitioner, a member of the honourable profession, and one who must uphold the law, faults it. It is concerning that he only in his heads of argument says he is remorseful and he has corrected his actions. He fails to substantiate. This court still does not know why he flawed the procedure.

[36] During the court proceedings the respondent had to be cautioned by the senior judge as to his submissions and it was only then that he retreated his attack to the regulator. Again, I reiterate the respondent's lack of insight into how he as a legal practitioner he must conduct himself towards the regulator is evident in his response both in his papers and in court. The legal practitioner must view the regulator as an institution that has the interest of the legal profession at large. It is not about one legal practitioner but it is about the profession and the public views about the legal practitioners.

[37] It is thus imperative that legal practitioner do their best to have matters resolved and only in worst case scenarios that matters I say this mindful of the fact that the respondent would have been fined for his late submission of the audit report without this matter being brought to court. The courts are inundated with matters where legal practitioners have stolen trust funds and matters such as the one before

⁵ promote high standards of legal education and training, and compulsory post-qualification professional development;

us could and would have been resolved in a disciplinary hearing. I must implore on the legal practitioners to engage the offices of the applicant in resolving conflicts by schooling themselves with the rules and regulations that govern legal practice.

[38] A calibre of a legal practitioner must be such that the law is at all times particularly when it relates to remaining in practice. Legal practitioners must be sticklers for rules. The respondent says he has a fidelity fund certificate for the year 2019 to the end thereof. If that is so the respondent would have taken the necessary measures in protecting the public. However, in relation to the period 2020 he admits that he did not have the fidelity fund certificate and his membership fees were not paid. Now, that is a contravention of the law and the members of the public are at risk⁶.

[39] The respondent is quick to be defensive and says he did not take instructions however the question is did he notify the applicant that he is not in practice. What happened to the files that he had started in 2019, what became of those clients? It is evident that the respondent did not follow procedure in relation to him being a non-practicing attorney. It is concerning that the respondent moved offices whilst he says he was not taking instructions.

SANCTION

[40] The following principles have been laid down by our courts in the determination of sanction:

1. The question before court is whether the respondent should be permitted to continue practising as a legal practitioner in the prevailing circumstances.
2. The objectives of the court's supervisory powers over the conduct of legal practitioners has been described as being two-fold:
first, disciplining and punishing errand attorneys, and

⁶ The primary purpose of the Legal Practitioners Fidelity Fund ('the Fund') is to reimburse clients of Legal Practitioners who may suffer pecuniary loss due to the theft of money or property entrusted to an attorney in the course of his/her practice as such, or where an attorney acts as executor or administrator in a deceased estate, or as a trustee in an insolvent estate.

secondly, to protect the public. In deciding which course to follow, the court is not first and foremost imposing a penalty, the main consideration is the protection of the public.

[41] This court has a discretion in determining the appropriate sanction regard being had to rules, and precedents. The respondent's conduct is serious. He has failed to report the status of his trust affairs to the Council for consecutive financial periods, has failed to pay his membership fees, has failed to respond to a complaint, and continues to practise contrary to peremptory provisions of the LPA. He provides no indication that he intends to rectify the situation. The respondent cannot continue to practise in contravention of the LPA⁷. The imposition of immediate sanction is, therefore, warranted.

[42] The respondent's answers fall woefully short in providing the court with any basis upon which it could formulate conditions of suspension that could cater to his rehabilitation. The respondent appears to be content to continue unabated. It is respectfully submitted that the respondent ought to be suspended pending finalisation of the application and ordered to show cause why his name should not be struck from the roll of legal practitioners. This proposal, of course, does not interfere with the honourable court's inherent discretion in matters of this nature.

[43] The respondent has committed transgressions which are not strikable I therefore do not think they warrant that he be removed from the roll. The respondent should be suspended from practicing for his own account until he has completed a course in practice management training. The respondent should be allowed to practise under another legal practitioner with a fidelity fund certificate.

[44] The punishment must be in line with the transgression. I believe the respondent can be saved from himself thus I do not believe he should be taken to the guillotine. Mr Dladla, can be rehabilitated considering that he has already submitted an unqualified report for the year 2020 and paid his membership fees. He

⁷ Law Society of the Northern Provinces v Kyle (2015) [2016] ZASCA 120 (19 September 2016)

must still close his books and account for all the creditors in his trust account, pay the membership fees before he can bring an application for reinstatement.

[45] The respondent by practising without a fidelity fund certificate conducts a criminal offence. Section 83(10)⁸ provides:

'Any person who directly or indirectly purports to act as a practitioner or to practise on his or her own account or in partnership without being in possession of a fidelity fund certificate, shall be guilty of an offence and on conviction liable to a fine not exceeding R2 000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.'

[46] In the resultant I order that the respondent be suspended for a period of six months. The respondent is to register for Practice Management Training which results he must submit to the applicant. The respondent is however allowed to practice as an attorney provided he do so under an attorney who has a fidelity fund certificate.

COSTS

[47] The council must not be put out of pocket as it is the regulator. The council's interest is those of the public and the legal profession at large. The general rule is that the council is entitled to its costs, even if unsuccessful, and usually on an attorney and client scale⁹. There is no reason present in this matter to substantiate deviation from the general rule.

[48] The respondent's failure to engage the applicant in this matter has exacerbated the legal costs. This could have been avoided. There is a lesson learned from the conduct of the respondent, that compliance with the rules and regulations of the applicant is key. The applicant has a mandate that if they fail to carry out will lead to a chaotic profession and the public will have no regard for the

⁸ LPA 28 of 2014

⁹ Botha v LSNP 2009(1) SA 227 SCA 236F

profession. It is incumbent upon the respondent to school himself about what is required of him in order to sustain his practice.

[49] In *casu* I do not find any reason to deviate from the general rule regard being had to the conduct of the respondent in his answering affidavit and also during the hearing of this matter. I do not think this matter should have proceeded to the extend that it did. I reiterate this could have been avoided however, it required that the legal practitioner concerned engage those in authority in order to make the necessary arrangements.

[50] The respondent is a seasoned attorney whom one would think would have known how to deal with issues of this nature. The respondent has been an attorney for over twelve years. In resultant, I order that the respondent pay the costs of the applicant at attorney and client scale.

ORDER

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

1. The respondent, **MBONGENI DEREK DLADLA**, is suspended from the roll of attorneys (legal practitioners) of this Honourable court for a period six months.
2. The respondent is allowed to practice under an attorney with the right of appearance.
3. The respondent must register with the practice management training course within the period of suspension.
4. The respondent is to pay the costs of the application on the attorney and client scale.



ENB KHWINANA
ACTING JUDGE OF NORTH GAUTENG
HIGH COURT, PRETORIA

Heard On: 21st July 2022

Electronically delivered: 22nd November 2022

Appearances:

Counsel for the Applicant

Mr L. Groome

Instructed by

Rooth & Wessels Inc.

Counsel for Respondent:

Mr Dladla

Instructed by:

MD Dladla Attorneys