

REPUBLIC OF SOUTH AFRICA

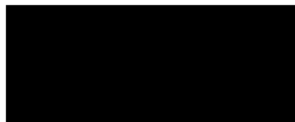


**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

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

08 March 2022

DATE



SIGNATURE

CASE NUMBER: 12383/21

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

APPLICANT

And

BONGINKOSI DALINGCEBO MDIYATA

RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

- [1] This is an application for the suspension of the respondent from practicing as an attorney of the above court alternatively, that the name of the respondent be struck from the roll of attorneys. The application is brought in accordance with the disciplinary procedures to adjudicate over his conduct which is alleged to be unprofessional, or dishonourable or unworthy as provided for in section 44(1) of the Legal Practice Act No 28 of 2014 (the LPA). The LPA Act came into effect on 1 November 2018. Proceedings which have been instituted in terms of any law repealed by the LPA, which were not concluded as at the time of the repeal, must continue and be concluded as if such law has not been repealed.
- [2] The application was served upon the respondent and his notice of opposition was served on the applicant on 23 March 2021. The respondent acknowledged receipt of the notice of set down on 12 April 2021 and has to date not filed any answering papers.

THE FACTS

- [3] The applicant was admitted as an attorney on 29 April 2019 and is currently practicing of his own account under the style Mndiyata BD Attorneys in Sandton, Johannesburg. The complaints which prompted this application are the following:
1. Since 11 September 2020 he has practiced as an attorney without being in possession of the fidelity fund certificate and continues to practice without such certificate to date. Section 84(1) of the LPA is peremptory and it requires that an attorney practicing of his own account, to be in possession of a fidelity fund certificate. In terms of section 93(8) of the LPA, failure to comply is punishable with a fine or imprisonment. A fidelity fund certificate is valid till 31 December of each year and is issued on the strength of an unqualified auditor's report which must be submitted annually.
 2. He failed to comply with a request dated 20 October 2020 to provide the applicant timeously with details of his trust account, being confirmation from the bank that a trust banking account had been opened and further requirements regarding details of the practice, a practice registration and registration certificate. On 25 January 2021,

of the above requests, he had only complied with one request which was giving details of his trust account.

3. He failed to comply with Rule 4 of the LPC Rules, which required him to pay his membership fees for the year 2020, which fees amounting to R1 725.00 were due on or before 30 September 2020, and which still remained outstanding. This failure on his part amounted to unprofessional conduct in terms of Rule 57.1 of the LPC rules.
4. The respondent contravened Rule 18.17 of the Code of Conduct in that he failed to comply with the provisions of the Financial Intelligence Centre Act, 38 of 2001, (FICA) and, he failed to satisfy the applicant that he has registered with such body. FICA provides that the practice of an attorney is regarded as an accountable institution. Although presently, law has not as yet been amended to remove the law societies as supervisors of the financial affairs of an attorneys practice, the applicant has an arrangement in which it has delegated such supervisory duties to FICA until such time as the amendment takes place.
5. Section 85(1)(b) read with section 95(l) of the LPA required of the respondent to attend the Legal Management Course and to acquire a practice management certificate, which is a prerequisite for the issue of a fidelity fund certificate. The respondent failed to register for the course during 2021.

- [4] The Council of the applicant has determined that the respondent has made himself guilty on unprofessional or dishonourable or unworthy conduct.

THE ISSUE TO BE DETERMINED AND THE LAW

- [5] The issues to be determined are the following:

- (i) has the applicant established the offending conduct on a balance of probabilities?
- (ii) Is the respondent a fit and proper person to continue to practice as an Attorney;

(iii) What sanctions must be given to the respondent

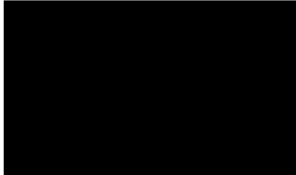
[6] It is trite that in an enquiry such as this, the court is expected to exercise its discretion in the three-pronged enquiry it engages and determine:

- 1) Having regard to the alleged transgressions, is the respondent a fit and proper person to remain in the practice of a legal practitioner under the auspices of the Legal Practice Council?
- 2) what sanction is appropriate in the circumstance;
- 3) the need to appoint a *Curator Bonis*
- 4) appointment of an auditor
- 5) Costs of this application

[7] It is trite that the courts engage this *sui generis* disciplinary procedure to enquire into the conduct of a legal practitioner. The court has to be satisfied that the applicant has on a preponderance of probabilities established its case against the respondent I consider the transgressions we are presently dealing with to be of a serious nature, in that they concern a practitioner who in the early stages of his practice, has started off on a wrong footing; that is, failure to put in place processes and mechanisms in order to run an efficient legal practice under the auspice of the Legal Practice Council and under FICA. The respondent has not deemed it necessary to respond to these serious allegations and this makes it the more difficult as the court and applicant do not have insight as to what extent these problems have escalated to or whether the respondent is still running a practice. The other concern I raise is that the applicant does not seem to have availed itself of convening a preliminary enquiry to investigate the possibility of any remedial process before approaching the courts for a suspension or removal. The extract of the minutes of a meeting of the applicant on 12 September 2020 is not helpful in gaining insight into whether there were any attempts to engage the respondent personally before resolving to suspend him. The respondent not having answered to the allegations leave me with no option but to suspend the respondent.

[8] In the result the following order is granted:

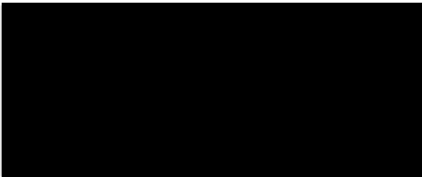
1. The draft order dated 1st FEBRUARY 2022 on case lines 007 -1 to 007-12 is hereby made an order of court



TLHAPI V V

(JUDGE OF THE HIGH COURT)

I, agree



BOKAKO T

(ACTING JUDGE OF THE HIGH COURT)

FOR SALPC:

LIAM GROOME

R W ATTORNEYS