IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable/
Not Reportable

Case no: 3712/2024

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL	**APPLICANT**
And	
TANDO ONGAMA DLABANTU	**RESPONDENT**

Neutral citation:	*The South African Legal Practice Council v Tando Ongama Dlabantu* (3712/2024)
Coram:	**Daniso J, *et* Cronje, AJ**
Heard:	**19 September 2024**
Delivered:	**08 November 2024**

ORDER

1. The respondent is suspended from the roll of legal practitioners of this court on the terms recorded on the order attached hereto and marked as "X."

JUDGMENT

Daniso, J (Cronje, AJ concurring)

[1] In this opposed application, the applicant seeks an order suspending the respondent from practicing as an attorney of this court on the grounds of gross professional misconduct involving practicing without a Fidelity Fund certificate in contravention of the provisions of Section 84(1) of the Legal Practice Act (the LPA)[1] and for failing to pay the legal practitioners' annual fees and contributions to the Fidelity Fund in contravention of Rule 3 and 4 of the Legal Practice Council (the LPC). The usual ancillary relief pertaining to applications of this nature is also prayed for in the notice of motion.

[2] On the papers, it is common cause that the respondent was admitted as an attorney on 19 March 2019 by the high court, Eastern Cape Division in Makhanda. Pursuant to his admission, the respondent practiced as a sole practitioner in the Eastern Cape under the name and style Dlabantu and Associates. On 20 October 2023, he registered a branch in the Free State

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[1] Act 28 of 2014.

Province and practiced for his own account at the offices situated at Regus Business Centre, Ground Floor, Unipark Building, Vodacom Lane, Nobel street, Brandwag in Bloemfontein, Free State Province.

[3] Before dealing with the issue to be considered in this matter, there are preliminary issues raised by the respective parties.

[4] At the commencement of the hearing, the applicant objected to the respondent's answering affidavit on the grounds that it was filed late and no condonation for the late filing has been sought.

[5] On the other side, the respondent disputes this court's jurisdiction to hear these proceedings. He supports his argument by asserting that:

5.1. At all material times he was enrolled and practicing in the Eastern Cape and his Free State branch was only registered on 20 October 2023 therefore this court lacks jurisdiction over him.

5.2. The service of process namely, the documents initiating this application is defective due to non-compliance with Uniform Rule 4(1) (a) in that, having established his absence at the given addresses the sheriff did not leave the process with the persons found at the addresses. As regards the service way of electronic mail, it his submission that he did not consent to such service accordingly, this matter is not properly before court.

[6] The respondent's answering affidavit was due fifteen days from the date of delivery of his notice to oppose on 30 July 2024. It was only filed on 17 September 2024, approximately seven weeks late and barely two days before the date of the hearing of this application. The answering affidavit was served before the hearing, there is no indication that the late answering affidavit has caused prejudice to the applicant and having regard to the fact these proceedings are intended to safeguard the interests of the public including the respondent's clients and the Fidelity Fund, I will therefore not take a technical

approach with regard to belatedness of the answering affidavit. It is in the interests of justice and of the parties as well that this matter is advanced.

[7] There is no merit to the respondent's objection to this court's jurisdiction on the account of being admitted and practicing in the Eastern Cape as on the facts germane to this matter, the allegations foreshadowing his misconduct are directed at his practice situated at Bloemfontein in the Free State.

[8] Uniform rule 4(1)(a) (ii) (as amended) provides that service of the process initiating application proceedings at the place of residence or business of the person in his absence shall be served by:

> *"delivering a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than 16 years of age."*

[9] The examination of the applicant's relevant proof of service, annexures "D" and "E" (sheriff's returns of service) and annexure "G" (proof of electronic transmission) reveals that there is merit to the respondent's contention that the service of the process was irregular for want of compliance with the provisions of subrule (1)(a)(ii). The sheriff's returns indicate that service was attempted on 11 July 2024 at the respondent's Bloemfontein business premises. Upon being informed by the receptionist that the respondent had left the business address, the sheriff returned the process to the applicant's legal representative. On 20 July 2024 and 22 July 2024 service was again attempted at the respondent's residential address in Gqeberha where the sheriff was informed by the respondent's mother-in-law that he no longer resides at the said address likewise, the sheriff returned the process to the applicant's legal representatives without delivering the copies thereof. Service by electronic mail relates to

service of subsequent documents and notices and not the service of process initiating proceedings.[2]

[10] That being said, on the respondent's own version the process did come to his attention with the result that he duly filed the notice to oppose the proceedings followed by a comprehensive answering affidavit *albeit* late. The respondent was not prejudiced by the irregular service and despite the peremptory nature of the provisions of subrule (1)(a) (ii), it is my view that the applicant's subversion of the rules in this regard ought not to hinder this court from adjudicating the real dispute between the parties. I am not suggesting that parties are entitled to bend the rules pertaining to service of process but rather to affirm that the main purpose of uniform rule 4 is to ensure that the person being sued is aware of the suit[3] so as to exercise his right of access to court for the resolution of the dispute as provided for in Section 34 of the Constitution. In the circumstances, the respective parties' *in limine* objections are dismissed.

[11] With regard to the merits of the application, the applicant states that on 24 November 2023 a notice was transmitted to all legal practitioners including the respondent as a reminder to renew their Fidelity Fund certificates for the year 2024 by 31 December 2023. The respondent did not heed the notice, he instead continued to practice at his Free State branch without a Fidelity Fund certificate. Further to this, the respondent failed to pay his annual levies in respect of both the Fidelity Fund certificate and legal practitioners' contributions totalling an amount of R5 588.33 as a result, on 11 January 2024 and 29 February 2024[4] the respondent was notified about his non-compliance and that having failed to adhere to the notifications the applicant's investigation committee of the Free State Provincial office has recommended the institution of legal proceedings for his suspension from practicing pending compliance. Not only did the respondent ignore the communication which required his response and

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[2] Uniform rule 4A(1)(c).
[3] *Odendaalsrus Munisipaliteit v Odendaalsrus Gold, General Investment & Extensions Ltd* **1958 (3) SA 111** (O); *Prism Payment Technologies v Altech information Technologies* **2012 (5) SA 267** (GSJ) at 271H-272A quoting with approval, *United Reflective Converters (Pty) Ltd v Levine* **1988 (4) SA 460** (W).
[4] Annexures "FA4", "FA6" to "FA8" of the applicant's founding affidavit.

compliance with his obligations as a legal practitioner, he also failed to attend the ensuing hearing convened on 25 March 2024.

[12] It is the applicant's case that practicing without a valid Fidelity Fund certificate and failing to pay the legal practitioners' dues constitutes gross professional misconduct. The respondent' recalcitrant conduct also impedes on the applicant's responsibility to protect the public interest by playing its oversight role of ensuring that trust funds are properly managed by the practitioners whilst a Fidelity Fund Certificate indemnifies members of the public against theft of their trust monies. Based on these facts, the applicant contends that the respondent is not a fit and proper person to practice as an attorney, he must thus be suspended and also ordered to pay the costs of this application on the scale of attorney and client scale.

[13] In the answering affidavit, the respondent disputes the allegations of misconduct as proffered by the applicant by attributing the blame for practicing without the Fidelity Fund certificate to the applicant's delay in attending to his application to be exempted from submitting the Auditor's report pertinent to the issuing of the Fidelity Fund certificate.[5]

[14] The respondent states that on 17 December 2023, he addressed an email to the Free State Provincial Officer of the applicant requesting the exemption application forms. When he ultimately received the application forms, he submitted them on 31 December 2023.[6] Receipt was acknowledged on 3 January 2024 however on 11 January 2024 he was requested to provide his business and trust account bank statements, auditor's letter confirming the dormancy of his trust account including proof of payment of an amount of R575.00 in respect of the application fee. It is the respondent's case that it was not even necessary for the applicant to request the said information as rule 54.26 makes no provision for the submission of the auditor's report. In any

[5] LPC rule 54.26.

[6] Annexure AA3.3 of the respondent's answering affidavit.

event, the applicant could read and interpret the bank statements itself, had the applicant granted him the exemption he would have been able to timeously obtain the Fidelity Fund certificate. The respondent admits that he did not pay the application fee timeously and explains that his failure to pay was occasioned by financial constraints. The arrear levies are also not disputed except for the amount due. According to the respondent, he has since paid an amount of R958.33 therefore the total amount due is the amount of R4 630.00 which he undertakes to pay "*as soon as I am in the financial position to do.*"

[15] Regarding his absence at the hearing scheduled for 25 March 2024, the respondent confirms that he was aware of the hearing but explains that he did inform the applicant in writing of his unavailability, see Annexure AA3.9 the hearing was nevertheless proceeded with in his absence denying him his right to be heard.

[16] The respondent submits that the applicant is oblivious to the main purpose of the LPA which is to: "*...provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic*" and merely seeks to have him "*as a black man who is the beneficiary of the Act*" suspended from practice in the circumstances where it is wholly inappropriate to do so for the reasons advanced in the founding affidavit.[7]

[17] The principles applicable for the determination of applications of this nature are trite:[8] the court is enjoined with a discretion to determine a legal practitioner's fitness to remain on the roll of practicing legal practitioners and in exercising its discretion, the court undertakes a three- stage inquiry involving a factual

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[7] Para 18.2 of the respondent's answering affidavit; see also paras 21 to 23.

[8] *Jasat v Natal Law Society* **2000 (3) SA 44** SCA.

enquiry in terms of which the court decides whether or not the alleged offending conduct has been established on a preponderance of probabilities, once the court is satisfied that the offending conduct has been so established, it makes a value judgement on the facts whether the legal practitioner is a fit and proper person to continue to practice and if the court is so satisfied, it then exercises its discretion whether it is proper to suspend or remove a legal practitioner from the roll of legal practitioners.

[18] Having regard to the facts of this matter, it is indisputable that the respondent is practicing without being in possession of a Fidelity Fund certificate and has also failed to pay his legal practitioner's levies thereby contravening the provisions of Section 84(1) of the LPA and the LPC Rules.

[19] The defences raised by the respondent are unsound and basically disingenuous. Despite his attempt to lay the blame of practicing without a Fidelity Fund certificate squarely on the applicant's door nonetheless, the respondent admits that it was only on 17 December 2023 approximately a month after he was reminded about his obligation to apply for the Fidelity Fund certificate that he contacted the applicant requesting the exemption application forms. The application was thereafter lodged on 31 December 2023 the last day on which his application for the issuing of the Fidelity Fund certificate was due. The respondent also seeks to infer that pursuant to the lodgement of his application there was a further delay occasioned by the applicant's request for "unnecessary" information and this is despite the fact that the information that was requested by the applicant is listed on the first page of the application form where it is also clearly stated that "the exemption will only be considered after the necessary documentation is received...". It does not end there, on his own admission, he also did not pay the required application fee. His response regarding his failure to pay the annual levies is merely to fleetingly aver that he will pay the arrear annual levies as soon as he is in a financial position to do so. Whenever that is. With regard to his absenteeism at the hearing, it is important to note that he was informed about the hearing on 8 March 2024. His notification of his unavailability reflects that it was transmitted to the applicant on the same day of the hearing on 25 March 2024 at 10:04, less than an hour

before the hearing. Despite providing all these unsustainable explanations for his transgressions, the respondent has sought to disparage the applicant's motives for launching these proceedings by asserting malice and racism.

[20] I do not detect any malice in the applicant's founding affidavit let alone racism in the allegations levelled against the respondent. Taking into account the gravity of the transgressions perpetrated by the respondent,[9] the applicant would be failing in its public duty if it fails to bring the respondent's conduct before the court. It was aptly pointed out in *Solomon v Law Society of the Cape of Good Hope*[10] that:

> *"...in these proceedings the Law Society claims nothing for itself.... It merely brings the attorney before 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 action or civil proceedings against the attorney. It merely submits to the Court facts which it contends constitutes unprofessional conduct and then leaves the Court to determine how it will deal with this officer [of the court."*

[21] The respondent's attempt to avoid accountability by imputing malice and racial discrimination into these proceedings indicates his lack of understanding of the high ethical standards demanded by his profession. I am thus satisfied on a preponderance of probabilities that the respondent is guilty of unprofessional and dishonourable conduct, he is not a fit and proper person continue to practice as a legal practitioner and his conduct warrants the order sought by the applicant. The application succeeds.

ORDER

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

(1) The respondent is suspended from the roll of legal practitioners of this court on the terms recorded on the order attached hereto and marked as "X."

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[9] Section 83(1) of the LPA makes it a criminal offence for an attorney practicing on his own account to practice without a Fidelity Fund certificate.
[10] **1934 AD 401** at 408-409.

1.1. The Respondent shall immediately surrender and deliver to the Registrar of this Court his certificate of enrolment as a legal practitioner of this Court.

1.2. In the event of the Respondent failing to comply with the preceding paragraph of this order, the Sheriff is authorised and directed to take possession of the certificate and to hand it to the Registrar of this Court.

1.3. The Respondent is prohibited from handling or operating on his accounts as detailed in paragraph 5 hereof;

1.4. The Director / Acting Director / Nominee of the Applicant of the Free State Provincial Legal Council is appointed as the Curator Bonis to administer and control the trust accounts of the Respondent, and any accounts relating to insolvent and deceased estates and any deceased estate and any estate under Curatorship connected with the Respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by the Respondent at a bank in the Republic of South Africa in terms of section 86(1) of the Legal Practice Act 28 of 2014 ("the LPA") and/or any separate savings or interest-bearing accounts as contemplated by section 86(3) and/or section 86(4) of the LPA, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said sub-sections or in which monies in any manner have been deposited or credited (the said accounts being hereinafter referred to as "the trust accounts"), with the following powers and duties:

[a] immediately to take possession of the Respondent's accounting records, records, files and documents in relation to his practice as a legal practitioner and to sign all forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which the Respondent was acting at the date of this order;

[b] where monies have been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against the Respondent in respect of monies held, received and/or invested by the Respondent in terms of section 86(1) and/or section 86(3) and/or section 86(4) of the LPA (hereinafter referred to as "trust monies"), to take an legal proceedings which may be necessary for the recovery of monies which may be due to such persons in respect of incomplete transactions, if any, in which the Respondent was and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);

[c] to ascertain from the Respondent's accounting records the names of all persons on whose account the Respondent appears to hold or to have received trust monies (hereinafter referred to as "trust creditors") and to call upon the Respondent to furnish him/her, within thirty (30) days of the date of service of this order or such further period as he/she may agree to in writing, with the names and addresses of and the amounts due to all trust creditors;

[d] to call upon such trust creditors to furnish such proof, information and/or affidavits as he/she may require to enable him/her to determine whether any such trust creditor has a claim in respect

of monies in the trust account(s) of the Respondent and, if so, the amount of such claim;

[e] except where a trust deficit is determined, to admit or reject, in whole or in part, subject to the approval of the Legal Practitioners Fidelity Fund Board ("LPFF Board"), the claims of any such trust creditor, without prejudice to such trust creditor's right of access to the civil courts;

[f] having determined the amounts which, he/she considers are lawfully due to trust creditors, to pay such claims in full, but subject to the approval of the LPFF Board;

[g] in the event of there being any surplus in the trust account(s) of the Respondent after payment of the admitted claims of all trust creditors in full to utilise such surplus to settle or reduce (as the case may be), firstly, any interest due to the Legal Practitioners Fidelity Fund ("LPFF") in terms of section 86(5) of the LPA, secondly any, curatorship fees and disbursements and costs and expenses payable by the Respondent in terms of this order and thirdly, to pay such balance to the Respondent, or duly authorised representative/trustee/executor subject to the terms contained in this order;

[h] in the event of there being a trust deficit in the trust banking account(s) of the Respondent, in accordance with the available documentation and information, to pay the available balance in the trust banking account(s) of the Respondent to the LPFF;

[i] to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist him/her in carrying out his/her duties as Curator; and

[j] to render from time to time, as Curator, returns to the Applicant showing how the trust account(s) of the Respondent has/have been dealt with.

1.5. The Respondent immediately delivers his/her said accounting records, records, files and documents containing particulars and information relating to:

[a] any monies received, held or paid by the Respondent for or on account of any person while practicing as an attorney;

[b] any monies invested by the Respondent in terms of section 86(3) and/or section 86(4) of the LPA;

[c] any interest on monies so invested which was paid over or credited to the Respondent;

[d] any estate of a deceased person or an insolvent estate or an estate under Curatorship administered by the Respondent, whether as executor or trustee or Curator or on behalf of the executor, trustee or Curator;

[e] any insolvent estate administered by the Respondent as trustee or on behalf of the trustee in terms of the Insolvency Act 24 of 1936;

[f] any trust administered by the Respondent as trustee or on behalf of the trustee in terms of the Trust Property Control Act 57 of 1988;

[g] any company liquidated in terms of the Companies Act 71 of 2008, administered by the Respondent as or on behalf of the liquidator;

[h] any close corporation liquidated in terms of the Close Corporations Act 69 of 1984, administered by the Respondent as or on behalf of the liquidator; and

[i] the Respondent's practice as an attorney of this Court, to the Curator appointed in terms of this order, provided that, as far as such accounting records, records, files and documents are concerned, the Respondent shall be entitled to have reasonable access to them but always subject to the supervision of such Curator or his/her nominee.

1.6. Should the Respondent fail to comply with the provisions of the preceding paragraph of this order the Sheriff for the district in which such accounting records, records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such Curator

1.7. The Respondent be and is hereby removed from office as –

[a] executor of any estate of which the Respondent has been appointed in terms of section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965 or the estate of any other person referred to in section 72(1) thereof;

[b] Curator or guardian of any minor or other person's property in terms of section 72(1) read with section 54(1)(a)(v) and section 85 of the Administration of Estates Act 66 of 1965;

[c] trustee of any insolvent estate in terms of section 59 of the Insolvency Act 24 of 1936;

[d] liquidator of any company in terms of section 379(2) read with section 379(e) of the Companies Act 71 of 2008;

[e] trustee of any trust in terms of section 20(1) of the Trust Property Control Act 57 of 1988;

[f] liquidator of any close corporation appointed in terms of section 74 of the Close Corporations Act 69 of 1984;

[g] administrator appointed in terms of section 74 of the Magistrates' Court Act 32 of 1944.

1.8. The Curator shall be entitled to:

[a] hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;

[b] require claimants to provide any documentation or information which the Curator may consider relevant in respect of a claim or possible or anticipated claim, against the Curator and/or Respondent and/or Respondent's clients and/or fund in respect of money and/or other property entrusted to the Respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;

[c] publish this order or an abridged version thereof in any newspaper he/she considers appropriate;

[d] close the Respondent's practice insofar as it relates to the client files, records and trust accounts;

1.9. The Respondent shall within six (6) months after having been requested to do so by the Curator, or within such longer period as the Curator may agree to in writing, satisfy the Curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to him/her (Respondent) in respect of his/her former practice, and should he/she fail to do so, he/she shall not be entitled to recover such fees and disbursements from the Curator without prejudice, however, to such rights (if any) as he/she may have against the trust creditor(s) concerned for payment or recovery thereof;

1.10. That a bill of costs drawn on the High Court scale of attorney and client costs taxed by the Registrar of this Court (who is authorised to do so) *mutatis mutandis* as if the Curator and the responsible officials of the Applicant in discharging their duties as contemplated in this order had acted as attorneys, shall constitute proof of their reasonable fees and disbursements ("the Curatorship fees and disbursements") and that the Registrar be authorised t issue a writ of execution for payment thereof by the Respondent;

1.11. That the Curatorship will terminate when the Curator receives a final written discharge from such duties from the Applicant consequent upon the Curator filing with the Applicant a final report and account, together with supporting vouchers, in respect of the execution of the Curator's duties in terms of this order;

1.12. In the event of the Respondent failing to comply with any if the provisions referred to in this order, the Applicant shall be entitled to apply through due and proper civil process commensurate with the principles of the Constitution of the Republic of South Africa, 1996, for the appropriate relief against the Respondent including but not limited to an order for the committal of the Respondent to prison for the Respondent's contempt of the provisions of the abovementioned paragraphs.

1.13. That the Respondent be and is hereby directed:

[a] to pay, in terms of section 87(2) and/or section 37(2)(a) of the LPA, the reasonable costs of the inspection/investigation of the accounting records of the Respondent;

[b] to pay the Curatorship fees and disbursements on attorney and client scale;

[c] to pay the expenses relating to the publication of this order or an abbreviated version thereof; and

[d] to pay the costs of this application on an attorney-and-client scale to be taxed.

The Honourable Justice [redacted]

2024 -11- 08

N.S. Daniso

NS DANISO, J

I concur

[redacted]

PR CRONJE, AJ

Appearances

For the applicant:	Mr. PHH Badenhorst
Instructed by:	Badenhorst Attorneys **BLOEMFONTEIN**
For the Respondent:	In Person