

SOUTH AFRICA / JUDGMENT

South African Legal Practice Council v Mohamed (66706/20) [2021] ZAGPPHC 786 (9 November 2021) [2021] ZAGPPHC 786

COURT

North Gauteng High Court, Pretoria

BEFORE

Phahlane, Noncembu

CASE / FILE NUMBER

66706/20

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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: YES

09-11-2021

CASE NO: 66706/20

In

the matter between:

SOUTH

AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

TASNIM

MOHAMED

Respondent

JUDGMENT**PHAHLANE J**

- [1] This is an application in terms of section 44(1) of the Legal Practice Act 28 of 2014 (“LPA”) in which the applicant (the “LPC”) seeks an order suspending the respondent from practicing as an attorney on such conditions as the court may deem appropriate, alternatively that the name of the respondent be struck from the roll of attorneys.
- [2] The proceedings of this nature are sui generis, being no more than a request by the LPC as custos 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[1].
- [3] The LPC placed facts before the court concerning the respondent for consideration. The court will consider the evidence and then make a decision pertaining to the appropriate sanction, namely a suspension from practice or striking from the roll.
- [4] The respondent was admitted as an attorney on 20 March 2006. She has been practicing on her own account as a sole practitioner under the name and style of Mohamed Attorneys in Johannesburg, Gauteng and her name is still on the roll of attorneys.
- [5] The facts and circumstances which prompted the LPC to bring this application are as follows:
- (a) The respondent opened her practice on 1 July 2019 and was required to submit an opening auditor’s report to the council in respect of her firm after having opened her practice. The auditor’s report had to be submitted to the council on or before 31 January 2020 and the respondent failed to submit her opening auditor’s report to the council. As a result of this failure, she did not qualify for and was not issued with a Fidelity Fund certificate.
 - (b) The respondent also failed to submit her annual auditor’s report for the financial period ending 29 February 2020, and as a result thereof, she could not be issued with a fidelity fund certificate for 2021.
 - (c) It is the applicant’s contention that the respondent has been practising as an attorney without being in possession of a Fidelity Fund certificate.

- (d) The respondent was required to attend the prescribed compulsory Legal Practice Management course on or before 30 June 2020, and submit a practice management certificate to the Council. She failed to complete the Course as contemplated in Section 85(1)(b) of the LPA, read together with Rule 27.1 of the LPC Rules, and on 20 August 2020, she applied for an extension for the completion of the course. The extension was granted on 15 December 2020.
- (e) The respondent failed to pay her membership/subscription fee in full, for the year 2019. Her membership fees for 2019 amounted to R4 095.00 and had to be paid on or before 1 July 2019. The respondent paid an amount of R2 845.00 to the Council, and failed to pay the outstanding balance of R1 250.00
- [6] The respondent has as a result, contravened the following provisions of the Attorneys' Act, the LPA, the Rules for the Attorney's Profession, the LPC Rules and the Code of Conduct:
1. Rule 85(1) of the LPA 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. The corresponding provision under the repealed Attorneys' Act was Section 41(1) which provided that a practitioner shall not practise or act as a practitioner for her own account or in partnership unless she is in possession of a fidelity fund certificate.
 2. Rule 54.21 of 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. By contravening the provisions of Rule 54.21, the respondent made herself guilty of misconduct in terms of Rule 57.1 of the LPC Rules.
 3. Rule 4 relating to unprofessional conduct.
 4. Section 85(1)(b) of the LPA, read together with Rule 27.1 of the LPC Rules, require a legal practitioner, to complete a legal practice management course approved by the Council. These provisions were a requisite for the respondent to be issued with a fidelity fund certificate in terms of Section 85(1)(a) read with Section 85(6) of the LPA.
- [7] As indicated above, 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.
- [8] The court's discretion entails a three-stage enquiry[2]
- 8.1 The first enquiry is for the court to decide whether or not the alleged offending conduct has been established on a preponderance of probabilities. These are factual enquiries.

8.2 Once the court is satisfied that the offending conduct has been established, the second enquiry is whether the practitioner concerned is a fit and proper person to continue to practice. This enquiry entails a value judgment, which involves the weighing up of the conduct complained of against the conduct expected of an attorney.

8.3 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 whether in all the circumstances, the practitioner in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice. 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.

- [9] Where the court finds that an attorney is not a fit and proper person to continue to practise as an attorney, that legal practitioner must be removed from the roll. 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 would not remove the legal practitioner from the roll but order an appropriate suspension. Conversely, 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 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. [3] 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,[4] and must be proven upon a balance of probabilities.
- [10] An attorney must scrupulously observe and comply with the provisions of the Attorneys Act and the Rules promulgated thereunder, the LPA, the Rules and the Code of Conduct.
- [11] In her answering affidavit, the respondent stated that she opened her practice in July 2019 and was issued with a Fidelity Fund certificate on 24 July 2019. She indicated that during this period, she had not taken any clients and or received any funds to be held in Trust or business accounts.
- [12] She alleges that she had ceased practicing as an attorney due to ill-health and referred to two medical certificates which she contends support her allegations. The first certificate is dated 15 January 2019 and recommends temporary incapacity of the respondent from 14 January 2019 to 1 July
2019. The second certificate is dated 10 September 2020 and confirms that the respondent was last seen in March 2019 and lists various conditions of her ill-health.
- [13] The respondent further alleged in her answering affidavit that she resumed practicing on her Trust account in August 2020 and denied that she had been practicing without a fidelity fund certificate since 1 January 2020. Her denial is based on the contention that she received

one payment in her Trust account and thereafter ceased all transactions until such time that the extension of her fidelity fund certificate was decided and approved. She also alleged that the LPC met on 15 December 2020 and granted her extension until the end of December 2021.

- [14] Mr Groome appearing for the applicant argued, and correctly so, that the medical certificates presented by the respondent in support of her allegation that she had ceased practicing as an attorney due to ill-health do not assist the respondent because she opened her practice and commenced practicing on her own account from 1 July 2019, that is after the dates referred to in the medical certificates. As such, the medical certificate have no bearing on how the respondent conducted herself and her practice during the years of 2020 and 2021 respectively.
- [15] Mr Groome further argued that the respondent does not deny that she is currently practising as an attorney because she has in her answering affidavit indicated that she practised as an attorney during August 2020 to December 2020, and that during that period, the respondent was not in possession of a fidelity fund certificate for the year 2020.
- [16] He insisted that by failing to submit an opening auditor's report in respect of her first and second trust banking account to the council, and practicing without a fidelity fund certificate for the year 2020 and 2021 respectively, the respondent was in violation of the peremptory requirements imposed by the Legal Practice Act, the LPC Rules and the Code of Conduct. Further that the respondent's 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.
- [17] The respondent appeared in person and stated that she stands by her arguments and submissions made in her answering affidavit, and denied that she practiced without a fidelity fund certificate from 1 January 2020. Her address to the court was basically a repetition of her argument as contained in her answering affidavit and submitted that the extension granted to her by the Council was to allow her to fulfil her obligations and her undertakings as imposed by the Attorneys Act; the rules and code of conduct of the LPC.
- [18] The respondent conceded to the following aspects in her answering affidavit:
- "18.1 I concede that I did not submit my audit report as scheduled on the opening of the practice.*
- 18.2 I do concede that I have not complied with the requirements imposed by the Attorney's Act, the rules of the Applicant and the rules and Code of Conduct, as when it was due.
- 18.3 I commenced practicing on the trust account August 2020. I had received one payment in my trust account I ceased all transactions pending the outcome of my application for an extension of my fidelity fund certificate".

[19] It is clear from the concessions made by the respondent that the respondent has undoubtedly violated the rules and committed a serious misconduct and an offence,[5] especially of practicing without a fidelity fund certificate following her failure to submit her auditor's reports to the

LPC. What is however certain is that the respondent has been practicing, as it is clear from paragraph 7 of her answering affidavit where she stated that: "My trust account had been closed due to inactivity and I have opened a new trust account and have begun taking on clients". (my underlining)

[20] It is evident from the documents filed of record that the respondent was issued with a fidelity fund certificate for the year 2019, which expired on 31 December 2019. Having submitted in her answering affidavit that the LPC extended her fidelity fund certificate until the end of December 2021, the respondent however stated in her heads of argument that she was under the impression that the fidelity fund certificate was extended.

[21] In my view, this submission is unfounded and does not have merit. The respondent's submission is actually misleading to the court because she received an email from Ms. R. Schmiedeskamp of the LPC on Tuesday, 15 December 2020 at 13:41 which is an annexure to her answering affidavit, in which the following is noted:

"Dear Ms. Mohamed

APPLICATION FOR EXTENSION TO COMPLETE THE PRACTICE MANAGEMENT TRAINING COURSE - MS. T MOHAMED [M25291]

I refer to the above and wish to confirm that your application was considered and approved by the Extensions Committee of the Gauteng Provincial Council on a round robin basis on Tuesday, 15 December 2020. An extension has been granted until 31 December 2021".

[22] I am inclined to agree with Mr Groome's submissions that the fidelity fund certificate becomes valid only for a year and cannot be extended as it expires on 31 December of the year in respect of which it was issued. This is specifically provided for in terms of section 34(2)(b). Furthermore, there is no proof to the respondent's allegation that her fidelity fund certificate was extended because she was not issued with any further fidelity fund certificates for the years 2020 and 2021 when her fidelity fund certificate for 2019 expired on 31 December 2019. This circumstance is confirmed by correspondence from the LPC in an email of 04 August 2020 at 09:30, from a certain Frank Sudron, informing the respondent that she was in contravention of the provisions of section 84(1)(a) and (b) of the LPA by practicing without a Fidelity Fund Certificate for 2020.

[23] It is on this basis that Mr Groome argued that it was incumbent upon the respondent to ensure that she was in possession of a fidelity fund certificate for the years 2020 and 2021 respectively.

- [24] Not only did the respondent contravene the provisions of Section 84(1) of the LPA, but she also failed to comply with the provisions of Rules 54.31 and 54.32 of the LPC Rules requiring her to inform the council in writing that she has ceased practising, and failed to submit an audit or inspector's report confirming that her trust banking account had been closed. The respondent's failure to comply with the provisions of Rules 54.31 and 54.32 constitutes misconduct in terms of Rule 57.1 of the LPC Rules.
- [25] The respondent may have been unable to operate or practice due to ill-health and had her trust account closed due to inactivity, but she has failed to inform the council of these circumstances. Even after subsequently opening a new trust account, she still failed to inform the council about the status of her trust affairs and submit the required auditor's report in respect of the new trust account. On the other hand, the respondent also violated the provisions of Rules 18.4 and 18.5 of the Code of Conduct which provides that an attorney shall not abandon his or her practice, and shall also not close his or her practice without prior written notice to the Council.
- [26] With regards to the respondent's failure to pay her membership/subscription fee in full for the year 2019, the respondent stated in her answering affidavit that she was "not aware that her fees were outstanding and stated that she puts the applicant to the proof thereof". However, she submitted the following in her heads of argument, that: "the firm where I was employed (ie. Shireen Meersingh) undertook to pay the membership in full but this was not done". This aspect was not mentioned in the respondent's answering affidavit. Nonetheless, she had the 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.
- [27] I have thoroughly weighed up the respondent's misconduct against the conduct expected of an ordinary attorney and I found the respondent to be comparatively wanting. The court has a duty to act where a legal practitioner's conduct falls short of what is expected of them, and to curb the erosion of values in the profession. In my view, all the allegations levelled against the respondent have been established. It follows that the LPC has succeeded in proving that the respondent misconducted herself by not complying with the peremptory provisions of the LPA, Attorney's Act and the Code of conduct. Consequently, the first inquiry relating to whether or not the respondent's alleged conduct has been established on a preponderance of probabilities, has been satisfied. I am therefore satisfied that the applicant has sufficiently established the offensive conduct in respect of fidelity fund certificate which was not issued as a result of the fact that the respondent had failed to provide the LPC with the required opening and annual audit reports.
- [28] With regards to the second inquiry 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 that she did not commit any criminal act by defaulting on compliance, and should therefore not be removed from the roll of attorneys or suspended. She stated in her heads of argument that she was unable to comply with the rules because she was in relapse, an

aspect which was never raised in her answering affidavit. It was as a result of the respondent's failures to comply with the rules of the profession that the LPC resolved to bring this application to court to have the respondent suspended from practicing as an attorney of this court. The respondent's conduct is serious and should not be countenanced.

- [29] The LPC had in its founding affidavit referred to various Rules and sections of the LPA which have been contravened by the respondent. Mr L Groome argued in heads of argument that the respondent has not provided thorough and convincing explanations for her conduct and has denied misconduct. He submitted 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. I am inclined to agree with this submission because in addition to what is expected of an attorney, all attorneys are expected in the exercise of their duties, to conduct themselves with honesty and dignity. The question raised by the second leg of the inquiry is accordingly answered in the affirmative and is therefore determined and ruled in favour of the LPC.
- [30] With regards to the third leg of enquiry relating to whether the respondent deserves the penalty of being removed from the roll of attorneys or whether an order suspending her from practice for a specified period will suffice, this is a matter of the discretion of the court. 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 showing her to be unworthy to remain in the ranks of an honourable profession, the likelihood or otherwise of a repetition of such conduct. Although the court in *Law Society, Northern Provinces v Mogami and Others*[6] held that practising without a fidelity certificate is a serious misconduct but not bad enough to merit removal from the roll, the court must not look at each issue in isolation.
- [31] Having considered all the aspects, we are of the view that despite all the transgressions committed by the respondent, the conduct of the respondent warrants a penalty of suspension. We are further of the view that it would be an appropriate sanction to suspend the respondent from practicing as an attorney for two years, with effect from 15 November 2021, until such time as the respondent satisfies the honourable court that she is a fit and proper person to continue to practise.
- [32] In the circumstance, the following order is made:
1. The respondent is suspended for a period of two years from practicing as an attorney on her own account
 2. After the expiry of the suspension period the respondent may approach the applicant for permission to practice on her own account
 3. The respondent is ordered to pay the costs of this application on attorney and client scale.

PD. PHAHLANE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree,

NONCEMBU, AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

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Date of Hearing :

12 August 2021

Date of Judgment :

09 November 2021

- [1] 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.
- [2] The principles were re-iterated in Law Society of the Northern Provinces v Mogami and Other 2010 (1) SA 186 (SCA) at para 4 and confirmed in Hepple & another v Law Society of Northern Provinces 2014 (3) ALL SA 408 (SCA) where the court said the three-fold enquiry is the one to be applied in applications of this nature.
- [3] Malan v The Law Society of the Northern Provinces [2008] ZASCA 90; 2009 (1) SA 216 (SCA) at p 219, par 7.
- [4] 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
- [5] Section 83(10) of the Attorneys Act provides that any person who directly or indirectly purports to act as a practitioner in his own account or in partnership without being in possession of a fidelity fund certificate shall be guilty of an offence.
- [6] 2010 (1) SA 186 (SCA)

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