IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, MTHATHA

CASE No: 4021/2016

REPORTABLE

In the matter between:

AYANDA NDINGA

And

CAPE LAW SOCIETY

J U D G M E N T

BROOKS J

The applicant seeks her admission and enrolment as an attorney of this court. To that end notice of her application was given to the Law Society of the Cape of Good Hope in terms of the provisions of the Attorneys Act 53 of 1979, (the Act). This gave rise to the emergence of a number of factors which eventually culminated in the Law Society of the Cape of Good Hope being joined as a respondent in the application proceedings.

The application is opposed by the respondent. As it is entitled to do, the respondent has elected to express its opposition to the application in the form of a notice which has been served and filed pursuant to the provisions of Rule 6(5)(d)(iii) of the Uniform Rules of Court. The content thereof encapsulates the basis of the respondent's opposition and the allegations in the applicant's founding affidavit which are relevant thereto. It reads as follows:

"1. In paragraph 4 of her founding affidavit, record page 4, the applicant states that she entered into a contract of articles of clerkship on 4 November 2013 at Mthatha with Mnikelo Winfred Dalasile. The applicant avers further, that at the time of entering into the contract Mr Dalasile was an admitted and practising attorney of the High Court of South Africa. He had practised for an uninterrupted period of more than three years, and that he still so practises as the director of the firm Mnikelo Dalasile at No 79 Stanford Terrace, Mthatha.

2. In paragraph 9 of her founding affidavit, record page 7, the applicant states that she was advised that Mr Dalasile, "was not in possession

of a fidelity fund certificate for the period 4 November 2013 to 11 April 2014."

3. On 4 November 2013 being the date on which the applicant entered into a contract of articles with Mr Dalasile and thus the date on which she was engaged as a candidate attorney, Mr Dalasile was not in possession of a fidelity fund certificate.

4. Section 3(1) of the Attorneys Act 53 of 1979 as amended, (the Attorneys Act) provides that "a candidate attorney shall only be engaged or retained by a person practising the profession of attorney."

5. Section 41(1) of the Attorneys Act provides as follows,

"A practitioner shall not practise or act as a practitioner on his own account or in partnership unless he is in possession of a fidelity fund certificate."

6. By virtue of the provisions of Section 23(9) of the Attorneys Act, the provisions of Section 41(1) of the Attorneys Act apply to Mr Dalasile in his capacity as a director of the firm referred to in paragraph 4 of the founding affidavit.

7. On a proper construction of the provisions of

Section 3(1) of the Attorneys Act, Mr Dalasile was not practising the profession of attorney on the date on which he concluded a contract of articles with the applicant because he was not in possession of a fidelity fund certificate on that date, and thus not entitled in law so to practise.

8. For these reasons, as a matter of law, the contract of articles concluded between the applicant and Mr Dalasile on 4 November 2013 is void.

9. In the premises the applicant does not qualify to be admitted as an attorney and her application to be admitted as an attorney should be refused with costs."

Accordingly, the crisp issue for determination which emerges is whether the contract of articles of clerkship relied upon by the applicant was valid or whether it was void by virtue of the circumstances in which her principal was practising when the contract was entered into.

The confirmatory affidavit filed by the applicant's principal discloses that he is an attorney of this court and a director of a juristic person who conducts a legal practice. The provisions of Section 23 of the Act permit such an arrangement, and

specifically make the provisions of the Act applicable thereto.

The Act requires attorneys to hold trust bank accounts which are entirely separate from their business or personal bank accounts. Any money entrusted to an attorney must be deposited expeditiously into the trust account operated by him or her. The respondent's rules regulate the management of these trust accounts in a manner which is intended to protect members of the public against pecuniary loss. One of the regulatory requirements is the annual audit of the trust accounts and the provision of unqualified audit certificates by attorneys to the respondent. The provision of an unqualified audit certificate shall entitle the attorney concerned to the issue of a fidelity fund certificate which is valid for a year. Regrettably circumstances do arise in which members of the public are confronted by pecuniary loss resulting from the theft by the attorney, or by his or her articled clerk, or by his or her employee, of funds entrusted to the attorney. Section 26, as read with Section 45 of the Act, provides that the fidelity fund shall be applied to reimburse members of the public who establish their claims that they have suffered such pecuniary loss. **King v the Attorneys Fidelity Fund Board of Control 137/2008, 2009 ZASCA 44 12 May 2009, Law Society for the Northern Province v Ntobeng and Others 1744/2013 2014 ZANWHC 50 26 November 2014, Law Society of the**

Northern Province v Dube 2015 JOL 33564 GP para 15.

Plainly, there are manifold purposes in requiring attorneys to manage their trust accounts honestly and professionally, to provide the respondent with annual unqualified audit certificates in respect thereof and thereby to qualify for the issue of valid fidelity fund certificates. Primarily, compliance with the regulations must be to minimise as much as possible the occurrence of circumstances in which members of the public suffer pecuniary loss. Of equal importance must be the purpose of ensuring that a fund is maintained as a viable resource from which compensation can be made where appropriate. A third purpose, which may amount to no more than a shift of focus from the interests of members of the public to a focus upon the interests of the respondent, is to minimise the potential exposure of the respondent to claims by members of the public who have suffered pecuniary loss.

The relevant portions of Section 41 of the Act provide as follows:

> "(1) A practitioner shall not practise or act as a practitioner on his or her own account or in partnership unless he or she is in possession of a fidelity fund certificate.
>
> (2) Any practitioner who practises or acts in contravention

> of sub-section (1), shall not be entitled to any fee, reward or disbursement in respect of anything done by him or her while so practising or acting."

Viewed from all perspectives the adversities intended to be eliminated, minimised and where necessary, to be met by the requirement that attorneys hold valid fidelity fund certificates are all pecuniary in nature. The need for the respondent to ensure that both it and members of the public are protected therefrom as much as possible is understandable and sensible.

It is apposite at this point to raise the question which lies at the heart of the respondent's opposition in this matter. What is the effect of non-compliance by an attorney with one or more of the relevant rules of the respondent which has the effect of denying him or her qualification for the issue of a fidelity fund certificate?

Section 83(10) of the Act provides that:

> "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 fidelity fund certificate, shall be guilty of an offence and on conviction liable to a fine not exceeding

> R2 000,00 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment."

The distinction drawn between a person who purports to act as a practitioner and a practitioner who practises without being in possession of a fidelity fund certificate is noteworthy. This distinction imports recognition that although it constitutes an offence, the practise by a practitioner of his or her profession without a fidelity fund certificate does not have the effect of invalidating that practise and reducing the attorney to the status of one who purports to act as a practitioner. This has been recognised judicially in the matter of **S v Hedgie and Others 2007 JOL 20099 C** at para 14 where the following is stated:

> "The purpose of that fund in short, is the reimbursement of persons who may suffer pecuniary loss as a result of theft committed by an attorney. That objective would not be frustrated if criminal proceedings in which the attorney appeared are not invalidated. Put differently, the possession of a fidelity fund certificate has no relevant connection with the qualifications or competence of the attorney concerned."

Nowhere in the Act is there a provision for the automatic suspension or invalidation in any way of the practise of an attorney where such practise is conducted without a fidelity fund certificate.

In the Law Society of the Cape of Good **Hope v Mvapantsi 2015 JOL 34720 ECG** Smith J had the following to say about practising without a fidelity fund certificate:

> "The applicant seeks an order interdicting the respondent from practising for his own account, or in partnership, only for as long as he has not been issued with the requisite fidelity fund certificate. To this extent, he will be the master of his own destiny. If he complies with the statutory requirements, and is issued with the certificate, the efficacy of the court order will immediately fall away."

It is to be noted that in terms of the definitions section of the Act, "attorney" is defined as follow: "**'attorney'** means any person admitted to practise as an attorney in any part of the Republic, whether in terms of this Act or any other law listed in the Schedule to the Attorneys Amendment Act, 2014." And again, "**'practise'** means practise as an attorney or a notary or a conveyancer, and **'practice'** has a corresponding meaning."

Nowhere in the definitions section is it apparent that it is intended by the legislature that the definition of an attorney shall include that the person concerned shall be possessed of a valid fidelity fund certificate in order to qualify for the appellation. Similarly the definition of practise is not in its definition dependent upon the possession of a valid fidelity fund certificate.

The provisions of Section 41(2) of the Act disqualify an attorney who practises without a fidelity fund certificate from claiming any fee, reward or disbursement while so practising. However, this amounts to no more than an incentive towards compliance with the respondent's regulations. Non-compliance therewith will hurt an attorney in his or her pocket. Consequently, both the sections of the Act which provide for the consequences of non-compliance with the requirement of holding a valid fidelity fund certificate recognise within their terminology the reality that attorneys may well, at the risk of criminal prosecution and a reduction in income, continue so to practise.

The reality addressed in the preceding paragraph is also illustrated by the fact that all too frequently applications are brought in our courts by the respondent seeking an interim interdict which will have the effect of stopping an attorney from

practising until such time as he or she is possessed afresh of a fidelity fund certificate. In all such applications the claim is made in the founding affidavit, as it must be, that the respondent has no satisfactory alternative remedy but to approach the court for an interim interdict. Given the nature of the provisions in the Act, this is indeed so.

Nowhere in the Act is there a provision which either directly or indirectly prescribes that a contract entered into by an attorney during the conduct of his or her profession, or arising therefrom, or associated in any manner therewith, shall be void if at the time of entering into such contract the attorney is not in possession of a fidelity fund certificate. This is the reason why the highest point achieved by the respondent's opposition to this application is the assertion that the applicant's principal, in not having a fidelity fund certificate, was not a person practising the profession of attorney in accordance with the provisions of Section 3(1) of the Act. The problem with the assertion is that it finds no support in the provisions of the Act upon which it is purported to be based. Section 3(1) provides for all the categories based upon self-employment, employment and years of experience into which an attorney should fall before he or she may engage a candidate attorney. The only prohibitions against persons who might otherwise be so qualified from engaging a candidate attorney are to be

found in sub-section 3 thereof. Those provisions restrict the number of candidate attorneys who may be engaged by an attorney at any one time to 3, subject to certain qualifications, and further prohibit an attorney who has been debarred under Section 72(1)(a)(iii) of the Act from continuing with a contract of articles. None of the prohibitions in this sub-section of the Act are applicable in the circumstances of this matter.

In accordance with the accepted approach pertaining to the interpretation of statutes the definitions of both “attorney” and “practise” to which reference has been made in this judgment ensure that the persons referred to in Section 3(1) are simply required to be admitted attorneys of this court who are qualified by virtue of the length of time of service and the position which they hold to take a candidate attorney. Nowhere in Section 3 of the Act or elsewhere is there any provision which directly or indirectly prohibits an attorney from engaging an articled clerk or from continuing with a contract of articles whilst he or she may be practising without a fidelity fund certificate.

The circumstances in the **Law Society of the Northern Provinces v Mahon 2011 (2) SA 441 (SCA)**, which is a case relied upon by Mr Hobbs who appeared on behalf of the respondent, is distinguishable from the present circumstances.

There the contract of articles of clerkship was invalid. It contained clauses which did not comply with the provisions of the Act. Another example of the invalidity of a contract of articles of clerkship is afforded by the circumstances in *ex parte* **Singer Law Society Transvaal, Intervening 1984 (2) SA 757 (AD)**, where the contract of articles entered into by an advocate was ruled as a nullity. It is trite that where a contract of articles is invalid, irregular service thereunder cannot be condoned. **Bosman v Prokureurs *Orde* van Transvaal 1984 (2) SA 633 (T)**. I am satisfied that the contract of articles of clerkship between the applicant and her principal is valid.

There is another perspective from which the applicant's position may be assessed. None of the factual allegations made by the applicant in the various affidavits to which she has attested in this matter have been disputed on behalf of the respondent. Amongst those is the fact that the contract of articles of clerkship which she entered into with her principal was registered by the respondent in terms of the provisions of the Act and on 11 April 2014. This fact was confirmed by the legal officer of the candidate attorney's office in the employ of the respondent in a letter addressed to the applicant on that date. A copy of the letter forms part of the application papers placed before the court. The letter confirms that the contract

of articles of clerkship was registered in terms of section 5(2) of the Act. The provisions of that section are not without significance, they provide as follows:

> "The secretary of the society concerned shall, on payment of the fees prescribed under section 80, examine any articles or contract of service lodged with him or her and shall, if he or she is satisfied that the articles are or contract of service is in order and that the council has no objection to the registration thereof, on payment of the fees so prescribed, register such articles or contract of service and shall advise the principal and candidate attorney concerned of such registration in writing by certified post."

The only possible inference to be drawn in the absence of any contradictory evidence is that immediately prior to the registration of the articles of clerkship submitted by the applicant, the respondent's counsel had no objection to the registration thereof. This presupposes, as it must, that the members of council applied their collective mind to the regularity and the validity of the contract of articles of clerkship. Presumably a resolution was taken on the issue. It appears to remain extant. It has been held recently by the Supreme Court of Appeal, Maya DP, as she then was,

delivering the judgment of the full court in **Law Society of the Northern Provinces v Le Roux 185/2015, 2015 ZASCA 168 26 November 2105.** That a law society such as the respondent is an organ of State or juristic person exercising a public power and performing a public function under empowering statutory provisions. A decision taken by it which is of an administrative nature and which has a direct external legal effect on practitioners, and affected their rights, constitutes administrative action within the meaning of Section 1(a) and (b) of the Promotion of Administrative Justice Act 3 of 2000. The point emphasised in the judgment at paragraph 17 is that

> "It is trite in our law that an invalid administrative action may not simply be ignored, but may be valid and effectual and may continue to have legal consequences until set aside on judicial review."

The resolution of the respondent's council to offer no objection to the registration of the applicant's contract of articles of clerkship, or indeed to register it, is a decision which stands until it is set aside on judicial review. This point is motivated and relied upon by the applicant in a supplementary affidavit which she filed on 4 August 2017, only days after the respondent's notice in terms of Rule 6(5)(d)(iii) of the Uniform

Rules of Court had been served and filed on 31 July 2017, setting out the basis upon which the respondent opposed the application.

The registration of the applicant's contract of articles of clerkship had a direct external legal effect upon the parties thereto. That the applicant *bone fide* placed reliance upon the validity of the external effect upon her is more than adequately demonstrated by the content of the various affidavits filed by her in this application. The same can be said for the acceptance by her principal of the external effect upon his rights brought about the registration of the contract of articles of clerkship. In my view, there is no substance to the opposition raised by the respondent, namely that by operation of law the contract of articles was void. If in the collective mind of the respondent's council the decision made by it to register the contract of articles was wrong because the applicant's principal was not in possession of a fidelity fund certificate at the time when he entered into the contract, then at worst for the applicant, the administrative action taken by the respondent, which the latter may regard as invalid, cannot be ignored, is valid and effectual with continued legal consequences until set aside on review. It may well be that one of those legal consequences is that until such time as the

applicant's principal again received a fidelity fund certificate, the applicant's service under her articles of clerkship from 11 April 2014 until 28 July 2016 when the principal again became possessed of a fidelity fund certificate, was irregular service as contemplated in the provisions of Section 13 (2) of the Act. If this be so, I am satisfied that such irregular service was occasioned by sufficient cause, that such service is substantially equivalent to regular service and that the respondent has had due notice of this application. To the extent that it may be necessary, the irregular service should be condoned. Moreover, since the expiry of her articles of clerkship on 11 April 2016, a period of one year and 10 months ago, the applicant has continued to serve her principal on the same conditions and terms as before.

There is no dispute as to the sufficiency of the content of the application papers before the court to demonstrate that in other respects, the applicant has complied with the requirements of the Act in respect of her entitlement to be admitted as an attorney of this court.

On the applicant's amended notice of motion which was served and filed on 18 May 2017, the applicant seeks as ancillary relief an order directing the respondent to pay the costs of her application on an opposed basis. This is supported by a

supplementary affidavit deposed to by the applicant in which she sets out extensive details of what she describes as “the sorry history” of her application for admission. The description is appropriate.

The applicant and her principal entered into the contract of articles of clerkship on 4 November 2013. They were registered by the respondent on 11 April 2014 for a period of two years. During the period of her articles the applicant wrote and passed her admission examinations. She also obtained certification from the respondent that her attendance at a full time course run by the East London School for Legal Practice during 2012 was satisfactory for the purposes of her compliance with the requirements of the Act, provided that she serve under articles of clerkship for two years.

It was only when the applicant first applied for her admission and enrolment as an attorney of this court that the respondent started to raise objections to her articles of clerkship. The full details hereof are given in a supplementary affidavit which has been filed by the applicant. The application submitted to the respondent was kept by it well beyond the statutory period of notice required by the Act. During this time the applicant received poor service from the respondent. She battled to establish a communication stream with the respondent’s

designated official. When this was eventually achieved, she was advised that the respondent would not recognise her articles of clerkship because her principal had not had a fidelity fund certificate since 2013. It was alleged to the applicant that she had been told of this difficulty on 7 July 2014. Not only is this denied by the applicant in her affidavit, but nothing was attached to this letter emanating from the respondent to verify the assertion. It was suggested to the applicant that she should enter into a new contract of articles once her principal obtained a fidelity fund certificate. She was asked to withdraw her application for admission.

The applicant then sought legal advice. Her attorney informed the respondent that the applicant had never been told of there being any problem with her contract of articles. Her attorney's letter went unanswered. Eventually the applicant's attorney managed to make telephonic contact with a member of the respondent's secretarial staff. It was now 16 February 2016. A resultant confirmatory letter written by her attorney thereafter went unanswered too.

On 4 March 2016 the respondent's designated official sent an email to the applicant's attorney. Therein she was advised to complete either the School for Legal Practice in terms of Section 2(1)(a) of the Act or the 23 to 26 day LEAD course in

terms of Section 15(1)(b)(iv)(A) of the Act. She was then told to withdraw her application and to apply afresh once these requirements had been met. She was told that in the new application she must pray for an order in terms of Section 13(2) of the Act condoning her irregular service from 4 November 2013 to 11 April 2014. On 15 March 2016 the applicant's attorney addressed further correspondence to the respondent. The applicant's displeasure at the manner in which her application had been handled was recorded therein.

On 23 March 2016 the respondent wrote to the applicant informing her that its designated officer was "out of office" until beginning of April 2016. The applicant withdrew her application. She sought the requisite accreditation from the School for Practical Legal Training in order that her attendance during 2012 at the six month long course for Practical Legal Training, already considered by the respondent, should be regarded as compliant with the statutory requirements. On 13 April 2016 she was issued with the relevant certificate.

On 19 May 2016 the applicant launched her second application for admission. She served it on the respondent. More than four weeks went by without any response from the respondent. On 24 August 2016 the applicant became aware that her

principal had been in possession of a fidelity fund certificate since July 2016. On the same date she wrote to the respondent asking what further outstanding requirements remained which must be attended to before the respondent considered her application for admission as an attorney.

On 15 September 2016 the respondent's designated official contacted the applicant telephonically. She was told that now that the applicant's principal had a valid fidelity fund certificate, the applicant should withdraw her application and make a fresh application. The content of this telephone conversation was confirmed in an email dated 22 September 2016. Again the applicant complied.

On 4 November 2016 the applicant instituted a third application for her admission as an attorney. It is this application that now serves in opposed form before the court. It was received by the respondent on 9 November 2016. However, only 2 December 2016 was the applicant advised that certain errors need to be corrected therein, that the application would be placed before the candidate attorneys' committee of the respondent, which was due to meet on 16 January 2017 and thereafter would be placed before the counsel of the respondent on 30 January 2017. In the circumstances, the applicant was directed to remove her

application from the roll of 13 December 2016 being the date targeted by the notice of motion. The applicant complied by postponing her application. Indeed it was postponed on two more occasions during 2017. The respondent made no attempt to communicate with the applicant. Eventually on 16 May 2017 the applicant deposed to a supplementary affidavit and sought the joinder of the respondent as a party to the proceeding with a clear and substantial interest in the relief which she claims. This appears to have been the step required to bring the respondent's attention to the matter afresh. That attention came in the form of opposition and the notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court to which I have referred. The fact that the respondent seeks therein a costs order against the applicant is significant.

The wholly unsatisfactory manner in which the respondent has failed consistently and over a long period of time to address the applicant's circumstances emerges glaringly from this summary of events. The applicant obtained her LLB degree from Fort Hare University on 10 May 2011. No doubt with enthusiasm and optimism she pursued the full time training program at the School for Legal Practice in East London during 2012. She secured articles of clerkship in 2013. Those came to an end in April 2015. For two years and eight months since then, the applicant has been pushed from pillar to post by the

statutory professional body which is meant to facilitate and to regulate her access to the legal profession as an attorney of this court.

In its disastrous handling of her application for admission, the respondent has frustrated the applicant's access to the profession which she has chosen and in respect of which she has prepared herself at great cost. Her right to choose her profession accrues to her by virtue of the provisions of Section 22 of the Constitution. The frustration of that right by the statutory regulating body intended by the legislature to regulate, facilitate and govern it, is deserving only of the censure of this court. Apart from the exposure thereof, this is conduct which is best addressed by the award of costs to be made. No reason exists why the applicant, a candidate attorney, should have to bear any costs in relation to the application which she has been obliged to drive through the opposed court. It is appropriate that costs be awarded to her on the scale as between attorney and client.

The following order will issue:

1. To the extent that it may be necessary, any irregularity in the applicant's service under her contract of articles of clerkship which may have been caused by her principal

not being, at all times material thereto, possessed of a valid fidelity fund certificate, is condoned in terms of Section 13(2) of the Attorneys Act 53 of 1979 as amended.

2. The applicant is admitted as an attorney of this court.
3. The registrar of this court is directed to enter the applicant's name on the roll of attorneys of this court.
4. The respondent is directed to pay the costs of this application on an opposed basis and on the scale as between attorney and client.

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RWN BROOKS

JUDGE OF THE HIGH COURT,

MTHATHA

I agree to the judgment of my brother Brooks J and I accordingly concur.

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ZM NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

MTHATHA

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Date heard: 13 December 2017

Date delivered: 13 December 2017