REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 49039/2021
DATE OF HEARING: 22 July 2022

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES

_____
DATESIGNATURE

In the matters between:

MAXWELL MAVUDZI	**First Applicant**
JEREMIAH NYASHA MUSIWACHO DUBE	**Second Applicant**

and

SKHUMBUZO MAJOLA	First **Respondent**
and	
LEGAL PRACTICE COUNCIL	**Second Respondent**
and	
NATIONAL PROSECUTING AUTHORITY	**Third Respondent**
and	

GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA **Fourth Respondent**

This judgment has been delivered by being uploaded to the caselines profile on 10 August 2022 at 10h00 and communicated to the parties by email.

JUDGMENT

Sutherland DJP

Introduction

[1] This case is about whether or not to strike the name of the first respondent, Adv Skhumbuzo Majola, off the Roll of Advocates on the grounds of gross unprofessional conduct. The applicants are Mr Maxwell Mavudzi and Mr Jeremiah Dube, both laymen. They are, at present, accused persons, held in custody, in a pending criminal trial before the High Court in Johannesburg. Adv Majola is the lead prosecutor in their case which has been running since 2019 and seems to still have some way to go.

[2] The third respondent is the employer of Adv Majola, the National Prosecuting Authority (NPA), which has delegated him to appear in court on behalf of the State. The second respondent is the Legal Practice Council (LPC), which is the primary regulatory body exercising disciplinary oversight of the legal profession, and with whom Mr Mavudzi lodged a complaint about Adv Majola shortly before launching these proceedings. The fourth respondent, the General Council of the Bar of South Africa, (GCB), has a generic interest in striking off matters which involve advocates, and was joined in pursuance of a directive issued by me. The GCB has however, in this particular case, chosen to

participate as an *amicus curiae*; as such, it has confined its role to the presentation of argument. The other respondents have all filed answering affidavits opposing the relief sought. Mr Mavudzi, who was reputed to be acquainted with the law and who has demonstrated the accuracy of that reputation, addressed the court in person on behalf of the applicants. All respondents were represented by counsel.

[3] This judgment confines itself to the issues pressed in argument during the hearing and ignores those that were abandoned. Three main areas of controversy were:

a) First, is the factual foundation relied upon for the striking off application sound? If it is not the application must be dismissed on that ground alone.

b) Second, what is the proper procedure to bring a striking off application before a court and who may be an applicant? This aspect concerns whether Mr Mavudzi and Mr Dube have standing to bring a striking off application to court, either at all, or in the particular circumstances of this case? An examination of the Legal Practice Act 28 of 2014 (LPA), the role of the LPC and the role of the High Court in the regulation of the Legal Professions is required. Further, independently of standing, once Mr Mavudzi, had on behalf of himself and Mr Dube, lodged a complaint against Adv Majola with the LPC, did that step constitute an election that inhibited an application to court, before or until the LPC process had been completed?

The Controversy on the Facts

[4] The basis for the contention that Adv Majola should have his name struck off the Roll of Advocates is that he deliberately misled a court of law. Adv Majola, in the proceedings before this court, denies having committed any such impropriety.

[5] An act of deliberately misleading a court can be, if serious, a proper ground for a striking off. Well-established authority exists for that proposition. In *Society of Advocates of Natal and the Natal Law Society v Merret [1997] All SA 273 (N),* an attorney, appearing for a plaintiff in a divorce action, ostensibly unopposed, told a court that the defendant was aware of the matter coming before the court that day. The statement was false. The court held that the falsehood was deliberate and warranted a striking off. Similarly, In *Van der Berg v General Council of the Bar of South Africa [2007] 2 ALL SA 499 (SCA),* an advocate had misled a court by refraining from making a full disclosure of facts that ought to have been disclosed. His name, was for that reason, *inter alia*, struck off the Roll.

[6] In the application before this court the premise for the accusation is derived from the obiter remarks made by Gilbert AJ in a judgment. Gilbert AJ had heard an application brought by Mr Mavudzi to challenge the lawfulness of his arrest. That application was dismissed. The ratio for that dismissal was that the issue of the unlawfulness of the warrant of arrest was *res judicata*, having been disposed of finally in an earlier application before Du Plessis AJ.

[7] The roots of the controversy derive from an application to a magistrate to authorise a warrant of arrest. To contextualise the convoluted evolution of the litigation a brief narrative is necessary.

a) Apparently, the South African Revenue Service (SARS) took the view that crimes had been committed by Mr Mavudzi and Mr Dube. This judgment does require the allegations to be addressed. In October 2014, allegations against the applicants by SARS

were submitted to the NPA. The investigating officer was Captain Gobozi. The NPA assigned Adv Majola to deal with the case.

b) On 17 March 2015 Adv Majola signed off on an application in terms of section 43(1) of the Criminal Procedure Act 51 of 1977 (CPA) to procure a warrant of arrest. The essential function of that section is to place before a judicial officer a factual basis that would justify the issue of a warrant of arrest. The text reads:

> "43 Warrant of arrest may be issued by magistrate or justice
> (1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police-
> *(a)* which sets out the offence alleged to have been committed;
> *(b)* which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and
> *(c)* <u>which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.</u>
> (2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.
> (3)…"

(underlining added)

c) The required warrant was issued on 24 March 2015. Mr Mavudzi was arrested on 31 July 2015 and has been incarcerated ever since.

d) The trial commenced in 2019. Certain evidence was led by Captain Gobozi about the procurement of the warrant. In short, Captain Gobozi alluded to the warrant, issued on 24 March 2021 being justified by reliance on an affidavit that reflected the date of 10 April 2015.

e) Alerted by this revelation to what seemed to Mr Mavudzi to be a discrepancy and an irregularity in that process, Mr Mavudzi launched an application for bail which included a challenge to the validity of the warrant of arrest. This application came before Du Plessis AJ in March 2020. The incongruity patent from the dates in question was countered by a deflection; Adv Majola stated, from the bar, that in obtaining the warrant of arrest, reliance was placed by him on an affidavit by captain Gobozi. Such a document was presented to Du Plessis AJ. The application was thereupon dismissed.

f) Only subsequent to that hearing, did Mr Mavudzi scrutinise the affidavit by Captain Gobozi. He read the date on it: 23 March 2015. Thus, he reasoned, although the affidavit was attested to the day before the date upon which the warrant was issued, it could not have been relied upon by Adv Majola on 17 March, when he submitted the application to the magistrate.

g) In August 2020 the criminal trial continued. Captain Gobozi again testified. Nothing was given in evidence to clarify the discrepancy. On 18 December 2020, he brought an application to declare the warrant invalid and the arrest unlawful based on the allegation that the warrant had been procured irregularly because when applied for, the provisions of Section 43(1)(c) of the CPA had not been met. This was the application heard by Gilbert AJ. The result of that case was the dismissal of the application by reason of *res judicata*, Gilbert AJ concluding the issue of the validity of the warrant having been finally disposed of in the proceedings before Du Plessis AJ.

h) In that judgment, Gilbert AJ made critical remarks about Adv Majola's conduct. The content of judgment of Gilbert AJ is the font of the application for the striking off

application before this court. This is manifest in the relief sought. Prayer 1 of the Notice of Motion reads:

> "An order [is sought] declaring that to the extent that the judgment of Gilbert AJ …. made adverse findings of dishonesty against [Adv Majola] ….that he is not a fit and proper person to remain enrolled as an advocate …"

[8] Accordingly, the premise of the application before us is that Gilbert AJ made a finding that Adv Majola misled Du Plessis AJ in the first hearing into the lawfulness of the warrant of arrest and that that finding grounds the application for a striking off. What exactly did Gilbert AJ say?

[9] The circumstances, as ventilated before Gilbert J appear from paras [17] to [24] thus:

> "[17] On 10 December 2019 the applicant launched further bail proceedings on what he contends were 'new facts'. Those are the proceedings that would be heard by Du Plessis AJ. The relief the applicant sought was two-fold. Apart from seeking bail, the applicant sought declaratory relief that the issue of the warrant of arrest was unlawful. The basis for the declaratory relief arose from the applicant's cross-examination of the investigating officer, Mr Gobozi during his criminal trial on 5 December 2019.
> [18] Mr Gobozi under cross-examination during the applicant's criminal trial had testified on 5 December 2019 that the information under oath that had been relied upon for purposes of section 43(1)(c) in applying for the warrant on 17 March 2015 were affidavits by Mr Motsoleni Setswane ("Mr Setswane") as complainant on behalf of the South African Revenue Services ("SARS"). Mr Gobozi testified that those affidavits were dated 10 April 2015. But the warrant of arrest had been applied for on 17 March 2015 and had been issued on 24 March 2015, and so the applicant challenged Mr Gobozi in cross-examination during the criminal trial that the April 2015 affidavits could not have been relied upon those affidavits to apply to the magistrate for the issue of the warrant as those affidavits did not yet exist. The applicant explains in his founding affidavit in these proceedings that when this incongruity was put to Mr Gobozi under cross-examination during the criminal trial, Mr Gobozi then claimed that he had rather relied upon affidavits made by the complainant dated 10 October 2014 and that it was these affidavits that constituted the information taken upon oath pursuant to which the reasonable suspicion was formed necessary to have enabled the warrant of arrest to have been applied for and issued in March 2015. The applicant's argument continued in those proceedings that when regard is had to the October 2014 affidavits, they were in any event insufficient to have justified the formation of the required reasonable suspicion because he was neither mentioned by name nor implicated in those affidavits.

> [19] …..
>
> [20] An issue squarely raised by the applicant in the proceedings before Du Plessis AJ on 5 March 2020 was the lawfulness of the issue of the warrant based upon Mr Gobozi's apparent reliance upon the complainant's affidavits dated April 2015 and how this could not have been possible as the warrant had already been applied for on 17 March 2015.
>
> [21] Du Plessis AJ specifically enquired of Advocate Majola for the first respondent [ie, Mr Mavudzi] whether he had relied on any other information taken upon oath (i.e. other than the complainant's affidavits) for the reasonable suspicion required for him to have applied for the warrant on 17 March 2015. Advocate Majola answered that he had also relied upon an affidavit by Mr Gobozi, as the investigating officer. It must be remembered that Advocate Majola is the prosecutor who applied for the warrant and therefore was informing the court what he had relied upon in applying for the warrant.
>
> [22] The Gobozi affidavit was not available to the court and so Du Plessis AJ postponed the hearing to 12 March 2020 to enable the Gobozi affidavit to be located. Advocate Majola had informed the court on 5 March 2020 that the original affidavit should still be with the magistrate who ordinarily would keep the affidavit and that enquiries must take place at the magistrates' court. Advocate Majola also said that the State may have a copy, but it may be locked away in a storeroom and that it would be like "*looking [for] a needle in a haystack*".
>
> [23] When the hearing resumed on 12 March 2020 before Du Plessis AJ, it transpired that the original Gobozi affidavit could not be found at the magistrates' court. Advocate Majola was nevertheless able to hand up a copy of the affidavit. It is not clear from the papers how Advocate Majola located the copy of the Gobozi affidavit, particularly given his expressed hesitation that it would be found. Although the papers before me included a transcript of the proceedings that took place before Du Plessis AJ on 5 March 2020, I was not furnished with a copy of the transcript of the proceedings of 12 March 2020.
>
> [24] But what the applicant states under oath is that Advocate Majola did hand up the copy of the Gobozi affidavit and notwithstanding objection from the applicant's then legal representative, Du Plessis AJ accepted the affidavit."

[10] Accordingly, on the information that was presented in court, Gilbert AJ held that Adv Majola unequivocally represented to Du Plessis AJ that he had relied on an affidavit by Captain Gobozi. This representation is alleged by Mr Mavudzi to be false and a deliberate lie.

[11] Gilbert AJ thereupon, later in the judgment, goes on to describe the way treated this controversy as follows:

> "[39] The applicant [ie Mr Mavudzi] then further states in his founding affidavit that at the resumed hearing on 12 March 2020 Du Plessis AJ accepted the Gobozi affidavit into evidence on its mere production by Advocate Majola despite objections by his then legal representative, including to its authenticity and that no factual basis had been laid for it to be tendered from the bar. I repeat that have not been provided with the transcript of what took place on 12 March 2020 but in the absence of any evidence to the contrary I accept what the applicant says transpired on that day.
>
> [40] I have no reason to doubt the applicant's version that Advocate Majola persisted on 12 March 2020 in his assurance that he relied upon the Gobozi affidavit for the necessary reasonable suspicion so as to approach the magistrate for the issue of the warrant of arrest. Advocate Majola, who self-evidently has personal knowledge of what transpired both in relation to the issue of the warrant and what transpired before Du Plessis AJ on 5 and 12 March 2020, did not give any evidence to the contrary in these proceedings.
>
> [41] To repeat, the warrant was applied for on 17 March 2015 and appears to have been issued on 24 March 2015. So, the applicant argues, both him and his then legal representative assumed on 12 March 2020 when the hearing resumed before Du Plessis AJ that the Gobozi affidavit must have pre-dated 17 March 2015 as how else could Advocate Majola have relied upon that affidavit if it had not then already existed.
>
> [42] The applicant states in his founding affidavit that it was only after Du Plessis AJ "*had already finalised [his] applications*" and had dismissed them that he noticed that the Gobozi affidavit was dated 23 March 2015. The applicant states that this is the date of the Gobozi affidavit because that is the date reflected on the affidavit when the affidavit was deposed to before the commissioner of oaths.
>
> [43] The difficulty for the first respondent is now apparent. How could Advocate Majola have relied upon and have assured Du Plessis AJ that the Gobozi affidavit existed and that he had relied upon the Gobozi affidavit when applying for the warrant on 17 March 2015 if that affidavit had only been deposed to on 23 March 2015. The applicant squarely raises this in his founding affidavit in these proceedings and makes it plain that Advocate Majola should have informed the court on 12 March 2020 when he handed up the Gobozi affidavit that it was dated 23 March 2015 and that this would have immediately called into question how that affidavit could have been relied upon for the reasonable suspicion necessary in terms of section 43(1)(c) of the CPA for the issue of warrant on 17 March 2015. The applicant argues that as an officer of the court, Advocate Majola was duty bound to draw this difficulty in relation to the date to the court and that it could not have been reasonably expected of the applicant or his then legal

representative in the cut and thrust of the proceedings on 12 March 2020 to have noticed any discrepancy in the date.

[44] The applicant then says as follows in his founding affidavit:

> "*69. From his exchanges with the learned Judge, as reflected in paragraphs 42 to 46 hereinabove, it is clear that Advocate Majola assured his Lordship that he relied on the [Gobozi affidavit] to sign the [application for the warrant of arrest] on 17 March 2015. On the facts it could not have existed.*
>
> *70. One cannot resist inferring that on the facts Advocate Majola misled the bail court or was reckless to the truthfulness or correctness of [the Gobozi affidavit]*."

[45] These are extremely serious allegations being directed at Advocate Majola, who is both an advocate and a state prosecutor. It would have been expected of Advocate Majola to squarely deal with these serious allegations levelled against him. Instead, Advocate Majola did not give any version under oath in the proceedings before me. Instead, Mr Oosthuizen [the Deputy DPP] who has no personal knowledge on this issue, filed an answering affidavit. Notably, no confirmatory affidavit was deposed to by Advocate Majola. In any event the transcription of 5 March 2020 speaks for itself. The applicant's evidence is left unrebutted as to the representations that had been made by Advocate Majola to the court.

[46] This is what Mr Oosthuizen, who has no personal knowledge, had to say in response to these serious allegations:

> "*53.1 The contents of these paragraphs are denied.*
>
> *53.2 It is inconceivable that the investigating officer would obtain the warrant for the arrest of the applicant where no case existed against him. The legal requirement in terms of section 43(1) is that there must exist a reasonable suspicion that an offence had been committed. Such information must be under oath. These requirements were complied with hence the issuing of the warrant of arrest by the magistrate.*"

[47] This is obviously not a satisfactory response to the serious allegations. Mr Oosthuizen in his answering affidavit sidesteps the issue and instead advances reasons why the warrant of arrest was nonetheless lawfully issued and why the matter is in any event *res judicata*. That may be so but what is entirely lacking is any attempt to deal with these serious allegations directed against Advocate Majola.

[48] I have only identified two paragraphs in the applicant's founding affidavit dealing with the averred misrepresentation by Advocate Majola to Du Plessis AJ. The thrust of the founding affidavit – the 'new evidence' that forms the primary

basis of the application – is the averred misrepresentation. It is also the central feature in the applicant's replying affidavit and his heads of argument.

[49] Advocate Majola has not taken this court into his confidence and informed the court of his version. No reason is given why Advocate Majola, who should be the central witness, did not depose to the answering affidavit, or at the very least furnish a confirmatory affidavit.

[50] The applicant submitted that I am to draw the appropriate negative inferences against Advocate Majola and the first respondent and to find that the misrepresentations asserted by him in his founding affidavit as having been made by Advocate Majola are well-founded.

[51] There may be an innocent explanation. It may be that the date of commissioning of the Gobozi affidavit of 23 March 2015 was a typographical error and that it had been deposed to earlier, particularly as there is a typed date on the affidavit of 23 February 2015. There is also the evidence of the further cross-examination of Mr Gobozi by the applicant on 20 August 2020 during the course of the trial and which the applicant has disclosed in his founding affidavit. Mr Gobozi was again challenged on 20 August 2020 as to the date of his affidavit, and appears to advance a version that the date of 23 March 2015 "*might be an error*" and that the correct date was 3 February 2015, which would obviously pre-date 17 March 2015. But the typed date is 23 February 2015 and not 3 February 2015 and the commissioning is reflected to have taken place on 23 March 2015. It would have been expected of both, or at least either, of Advocate Majola or Mr Gobozi to have given their version under oath in these proceedings on this central issue as to the date of the Gobozi affidavit that features squarely in the representations made by Advocate Majola to the court on 5 and 12 March 2020, and which is also the focus on the present proceedings before me.

[52] The situation faced by this court is that the two central witnesses involved in the process of issuing the warrant of arrest, namely Advocate Majola who applied for the warrant on 17 March 2015 and Mr Gobozi on whose affidavit Advocate Majola apparently relied in applying for the warrant have not given any evidence. Particularly disconcerting is the failure of Advocate Majola to do so given that he is a officer of the court and where he has been accused of serious misrepresentations.

[53] In the circumstances, and for purposes of these proceedings, I accept that the applicant has established the misrepresentations upon which he relies. These are motion proceedings and the only version placed before me is that of the applicant. A bare denial in an answering affidavit by someone with no personal knowledge does not suffice to create a genuine factual dispute.[1] A denial will particularly be

[1] As held in *Room Hire Co (Pty) Limited v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162-1163: *"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device."*

> inadequate for creating a genuine dispute of fact where the person making the denial has in his or her possession the relevant facts to amplify the denial,[2] which in this instance is in the form of Advocate Majola's personal knowledge of what happened. The applicant's version is not so inherently improbable or untenable that I can reject it – to the contrary, it is consistent with such other evidence as there is, including the transcription of the court proceedings on 5 March 2020 and such other material as has been placed before the court by the applicant in his affidavits.
>
> [54] Having now found for purposes of these proceedings that the applicant has established the misrepresentations, the next question is whether those can now be relied upon by the applicant to seek of this court to find that his arrest was unlawful.
>
> …..
>
> [91] In my view, the conduct of the first respondent [ie the DPP] is regrettable. As I have emphasised, serious allegations were directed at Advocate Majola's conduct and which went substantively unchallenged. These allegations featured centrally in the applicant's founding affidavit. That Advocate Majola was being called upon to explain himself is clear from the applicant's affidavits and heads of argument. The applicant's challenge to Mr Oosthuizen's evidence as being hearsay was not a technical objection but went to the heart of the applicant's case, which was that Advocate Majola as a central witness was not giving his version in response to the allegations that he had misrepresented by omission to Du Plessis AJ that the Gobozi affidavit predated the application for the warrant. Neither the first respondent nor Advocate Majola has engaged with these serious allegations.
>
> [92] …..
>
> [93] I also intend directing that a copy of this judgment be made available by the Registrar to the Director of Public Prosecutions. As stated, there may be an innocent explanation as to the date of the Gobozi affidavit, but neither the first respondent nor Advocate Majola have proffered any explanation.
>
> (underlining supplied)

How must the judgment be read and understood?

[12] It is plain that Gilbert AJ made a finding that Adv Majola had misled Du Plessis AJ. Importantly, Gilbert AJ stressed that the finding was made for '*the purposes of that application'*. What does this mean?

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[2] *Wightman trading as JW Construction v Headfour (Pty) Limited and another* 2008 (3) SA 371 (SCA) at 375G-376B

[13] The premise for the finding was that the factual allegations made by Mr Mavudzi were corroborated by the transcript of the hearing before Du Plessis J and were unrebutted by Adv Majola. Moreover, whilst recognising that there may be "an innocent explanation", Adv Majola is rebuked for not putting forward an explanation in that hearing. Hence, the issue was referred to the NPA to investigate the conduct of Adv Majola.

[14] The approach of Gilbert AJ has been criticised in two respects:

a) First, that Gilbert AJ was mistaken in rebuking Adv Majola for not tendering an explanation because, although Adv Majola had, ostensibly, perhaps culpably, not provided an answering affidavit to the allegations made by Mr Mavudzi, he had indeed tendered to testify at the hearing to explain, but that tender was disallowed by Gilbert AJ.

b) Second, the analysis Gilbert AJ conducted was founded on the usual engagement with disputes of fact in motion proceedings, best exemplified in the seminal decision in *Plascon Evans v Van Riebeeck Paints 1984(3) SA 623 (AD* in which allegations by an applicant insofar not challenged by a respondent are accepted as the factual premise upon which to decide the matter. It is argued that this was, however, inapposite in regard to a decision about an allegation of professional misconduct.

<u>The question of the tender of an explanation</u>

[15] Adv Majola voices the grievance about the findings and the rebuke by Gilbert AJ in that he was denied the benefit of *audi alterem partem* in a case where he was not a party and for that reason was never put on his guard to rebut the allegations, learning of them only at the hearing. Adv Majola, states that he was not personally involved in preparing the

opposition to the application brought before Gilbert AJ, save to instruct his colleague Adv Oosthuizen, to oppose it on the basis of *res judicata.* Whether it is plausible that he could be ignorant of the allegations implicating him, given that the very foundation of the application before Gilbert AJ was based on allegations that he misled the court, need not be decided for immediate purposes, but plainly remains hanging.

[16] Adv Majola had been promoted and transferred by the time of the hearing before Gilbert AJ and was no longer based in Johannesburg. He nevertheless followed the video-linked proceedings from afar. Listening in on the debate, he tendered to offer an explanation when he 'learned' of the allegations made against him and heard the tenor of the debate.

[17] He states that Gilbert AJ refused to entertain such a tender. This refusal, states Adv Majola, is evident from the recording and transcript of the hearing conducted online via Teams. Adv Green SC, who appeared for the GCB before this court, caused the audio recording to be checked and confirmed this to be so on his understanding of the exchange. Also, a transcript of that hearing was presented to this court which seems to bear that out.

[18] The relevant passage is transcribed thus:

> "MR RATHIDILE: Yes.
> COURT: and now he, Mr Majola, I do not know, because I cannot see who is really this [indistinct], but it looks Mr Majola was a, was it, is that sitting in the gallery. He is listening in, so can, can you see the inferences that I have been asked to draw by the applicant … [intervenes]
> MR RATHIDILE: Ja… [intervenes]
> COURT: That Mr Majola appears to be reluctant to actually say what happened here.
> MR RATHIDILE: Okay Your Lordship, when I was, my instructing attorney was just passing some messages, [indistinct] messages from client, because the client is also listening to this, but we, we are just under pressure. I do not know, because initially Your Lordship asked about the confirmatory affidavit but the

client writes now, he just say, he just wanted to, to give evidence, so I do not know what okay…
[intervenes]
COURT: No Mr Bala, I think, I think we may have passed …
[intervenes]
MR RATHIDILE: Yes
COURT: … that stage.
MR RATHIDILE: Ja.
COURT: He said that it would be unfair to the applicant…
[intervenes]
MR RATHIDILE: Yes.
COURT: Now suddenly have oral evidence putting. Your submission is that if, if we do take oral evidence, I do not know where it is going to go. I do not know what questions might get asked of him by the, the applicant. You know, because the applicant would have also a chance to answer, ask questions. You know it is not an easy, he simply swears under oath.
MR RATHIDILE: Yes.
COURT: So, look I have raised my concern and you say it does not make a difference because in any event there was sufficient information under oath to form a reasonable suspicion and that is based … [intervenes]
MR RATHIDILE: Yes."

[19] The cited passage is to some extent obscure and must of course be read in the context of a much longer exchange that took place in the hearing. Mr Muvudzi contends that a proper reading of the record of the hearing shows that an offer was made to Adv Majola to explain which was rejected by Adv Majola. The counter argument is that the passages Mr Mavudzi cites relate to whether additional evidence about the question if condonation was necessary. There is a clear dispute of fact, but it is apparent Adv Majola did want to put something on record

[20] As to an explanation for the discrepancy, Adv Majola, in an answering affidavit before this court, gave an account of the material that he relied on to procure the warrant. He says he relied on the October 2014 affidavits. He does not, however, deal squarely with the accusations made against him about relying on the Gobozi affidavit.

[21] Plainly, the remarks by Gilbert AJ about a failure by Adv Majola, to explain himself cannot be accepted without further examination of the transcripts and, on the probabilities, additional evidence will be needed to explain what was said and why and in what context.

Dealing with allegations of professional misconduct in a judgment

[22] A court may not risk making material criticisms of a legal practitioner without a proper opportunity for that practitioner to be heard in respect of the allegations or of *prima facie* acts of misconduct. This proposition is incontrovertible. The SCA in *Motswai v RAF 2014 (6) SA 360 (SCA*) was called upon to consider the criticism made by the judge in the trial about the conduct of certain attorneys. The judge *a quo* had made a finding that they had acted fraudulently and in addition to the rebuke disallowed fees. As in this matter, the findings were remarks in the judgment and did not form part of an order. Again, similarly, in *Motswai*, the issue of the behaviour had been referred to the regulatory bodies. These two passages from the SCA judgment setting aside the disallowing of the fees and overruling the rebuke in *Motswai* are pertinent:

> "[46] ….the judge's reasoning is wrong. She drew inferences from the documents that were before her without calling for any further evidence. In this regard our courts have stated emphatically that charges of fraud or other conduct that carries serious consequences must be proved by the 'clearest' evidence or 'clear and satisfactory' evidence or 'clear and convincing' evidence, or some similar phrase. In my view the documents before the judge raised questions regarding the efficacy of the claim and the costs incurred in the litigation to date — no more. The judge was entitled — indeed obliged — to investigate these questions and if necessary to call for evidence. But she was not entitled to draw conclusions that appeared obvious to her only from the available documents. As was said in the well-known dictum of Megarry J in *John v Rees*:
>
> > '(E)verybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

….

[59] Through the authority vested in the courts by s 165(1) of the Constitution judges wield tremendous power. Their findings often have serious repercussions for the persons affected by them. They may vindicate those who have been wronged but they may condemn others. Their judgments may destroy the livelihoods and reputations of those against whom they are directed. It is therefore a power that must be exercised judicially and within the parameters prescribed by law. In this case it required the judge to hold a public hearing so that the interested parties were given an opportunity to deal with the issues fully, including allowing them to make all the relevant facts available to the court before the impugned findings were made against them. The judge failed to do so and in the process did serious harm to several parties."

[23] The argument presented on behalf of the GCB draws attention to the dictum of Nugent JA in Van der Berg v GCB [2007] 2 ALL SA 499 at para [2]:

> "Proceedings to discipline a practitioner are generally commenced on notice of motion but the ordinary approach as outlined in *Plascon-Evans* is not appropriate to applications of that kind. The applicant's role in bringing such proceedings is not that of an ordinary adversarial litigant but is rather to bring evidence of a practitioner's misconduct to the attention of the court, in the interests of the court, the profession and the public at large, to enable a court to exercise its disciplinary powers. It will not always be possible for a court to properly fulfil its disciplinary function if it confines its enquiry to admitted facts as it would ordinarily do in motion proceedings and it will often find it necessary to properly establish the facts. Bearing in mind that it is always undesirable to attempt to resolve factual disputes on the affidavits alone (unless the relevant assertions are so far-fetched or untenable as to be capable of being disposed of summarily) that might make it necessary for the court itself to call for oral evidence or for the cross-examination of deponents (including the practitioner) in appropriate cases. In the present case that might well have been prudent and desirable so as to resolve the many questions that are raised by the evidence, but that notwithstanding, the appeal can in any event be properly disposed of on the undisputed facts. (For that reason it is also not necessary to revisit what degree of persuasion evidence must carry before facts can be taken to have been established in cases of this kind."
> (Underlining added)

Reading a Judgment of a court

[24] A judgment must be read and interpreted as any other legal document: accurately, holistically, contextually and, not least in importance, fairly. The phraseology used by

Gilbert AJ has been seized upon in this matter to launch a serious attack on Adv Majola. As will be addressed elsewhere, the conduct of Adv Majola indeed warrants examination, but that is not the gravamen of the controversy about the remarks by Gilbert AJ.

[25] An understanding of the case Gilbert AJ was required to adjudicate is the place to start in order to grasp the meaning of his remarks in the judgment. The relief sought was to declare a warrant of arrest invalid. The application was premised on allegations that the basis for obtaining the warrant was tainted with irregularity, specifically that the affidavits supposedly relied upon to obtain the magistrate's blessing did not exist when it was applied for on 17 March 2015. The founding affidavit of Mr Mavudzi anticipated the defence of *res judicata* being raised and sought to circumvent that vulnerability by construing the discovery of the date of the Gobozi affidavit as 'new facts'. The NPA countered by a perfunctory answer and plumped for res judicata as complete answer. In the result, the NPA succeeded with that defence.

[26] When Gilbert AJ, expressed himself in the passages of his judgment, cited above, more especially the underlined sentences, it is inescapable that the remarks were made *contingently* in relation to the crux of the matter before him: he had to decide if res judicata was a sound defence, not whether Adv Majola was guilty of dishonesty. Properly understood, the judgment posits, *for the sake of the argument* on *res judicata* point, that even on the premise that Adv Majola misled Du Plessis AJ, as alleged and unrebutted on the papers, those "acts" did not knock out the res judicata defence. It is true enough that Gilbert AJ could have made that position unequivocal by articulating that differently. It not improbable that a legal practitioner reading the judgment would have grasped the

meaning of the text as fundamentally contingent whereas a layman might read it literally. To belabour the point, for the sake of clarity, these passages are critical:

> [44] – the allegation of untruthfulness is cited;
>
> [51] 'There may be an innocent explanation';
>
> [53] 'In the circumstances, [ie the absence of a rebuttal on affidavit] and for the purposes of these proceedings, I accept that the applicant has established the misrepresentations upon which he relies'.
>
> [62] '…that Adv Majola misrepresented by omission to Du Plessis AJ that the Gobozi affidavit predated the issue of the warrant does not constitute a new issue or create a new cause of action';
>
> [93] 'I also intend directing that a copy of this judgment be made available …to the [NPA]. As stated, there may be an innocent explanation as to the date of the Gobozi affidavit, but neither the [NPA] nor Adv Majola have proffered any explanation.'

[27] Accordingly, the judgment of Gilbert AJ cannot be relied upon to found an application to strike off Adv Majola's name from the Roll of Advocates. Because the premise of the relief sought are these remarks or findings, the application must fail for want of a proper foundation.

[28] This conclusion standing alone, disposes of the matter.

The LPA and the roles of the LPC and of the High Court in discipline of the Professions

[29] It is an extraordinary occurrence that laymen bring an application for the striking off of a legal practitioner. There is no known precedent for such action drawn to our attention.

During the case management stage of this case, I directed the parties to address the standing of Mr Mavudzi to be an applicant in this application.

[30] Mr Mavudzi invokes section 44(2) of the LPA. Section 44 reads:

> "Powers of High Court
> (1) The provisions of this Act do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity.
> (2) Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or juristic entity or in connection with any decision of a disciplinary body, the Ombud or the Council in connection with such complaint or charge."

[31] This section must be understood in the context of the architecture of the LPA and the history of the regulation of the legal professions. The Constitution is silent about the legal profession, save for a reference to the right to counsel in criminal proceedings.

[32] Prior to the enactment of the LPA, advocates were regulated by the Admission of Advocates Act 74 of 1964 and the attorneys were regulated by the Attorneys Act 53 of 1979. The GCB was recognised as having standing in the Admission of Advocates Act, a rare mention of a voluntary organisation in a statute. [3]

[33] The public recognition of a Legal Practitioner as an 'officer of the court,' a popular label not one rooted in law, has historically been the sole preserve of the High Courts in accordance with the Common Law in terms of which the court wields inherent power to regulate its own process. That exclusive preserve of power to admit and to expel Legal Practitioners was codified in section 44 of the LPA. The section creates nothing, rather, it clarifies that nothing has changed the Common Law in this respect.

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[3] See: *Ex Parte Goosen 2019(3) SA 489 (GJ)* where the history of the regulation of the legal profession is addressed.

[34] The LPC as the 'primary regulator' of the professions, is vested with several powers by the LPA. The apparatus to discipline is extensive. The principal attribute of the apparatus is that a practitioner who is accused of misconduct must enjoy a fair procedure, inclusive not only of *audi alterem partem* but that there be an appropriate investigation of the allegations against the practitioner. These matters are the subject matter of chapter 4, sections 36 – 44. Section 38 requires Rules to be promulgated to facilitate orderly disciplinary proceedings. If found to have transgressed, an appeal is available.

[35] The use of term 'complainant' in section 44(2) must be understood in the context of the LPA apparatus. On behalf of the GCB, Mr Green submitted that it must mean a person who had put in a complaint to the LPC, and moreover, had exhausted the LPA process. Upon such a platform a *complainant* would become eligible to become an *applicant* before a court. This must be correct in both respects. The word 'complainant' is a technical term denoting a status acquired by having taken a particular step; a section in the LPA using the term must be understood to mean a complainant for the purposes of the LPA.[4] Moreover, once having lodged the complaint, it would be senseless to contemplate parallel contemporaneous proceedings before a court by that complainant whilst the LPC remained engaged in the investigation and was yet to reach a conclusion.

[36] Section 44 (2) does afford standing to a complainant to approach the court but that opportunity must be understood in the context of the statutory process. The same section envisaged other interested persons approaching a court. However, the process is not a free-for-all. The section stipulates that an approach to court may be made 'in connection with a complaint'. Because the 'complaint' is the foundational premise of the further

[4] *Natal Joint Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA) at para [18]*

action by any of the eligible persons, it must be understood that it is inappropriate to do so in respect of a complaint that is still being addressed.

[37] Moreover, a critical facet of the process is the description of the power of the court to order 'appropriate relief'. This echoes the common law principle of the inherent power of the court. It could not be 'appropriate relief' to pre-empt a professional body, least of all the LPC, from completing its task of addressing the complaint. The section is wide enough to encompass an approach to the court to seek relief against the LPC for not doing a proper job or rendering an absurd outcome in a disciplinary proceeding. Such approach would be by way of a mandamus to fulfil its function or a review of an inappropriate decision. However, none of these considerations can apply to the complaint lodged by Mr Mavudzi. Accordingly, Mr Mavudzi has not shown that he became eligible to an applicant and at best, the application was premature.[5]

[38] There are, furthermore, sound reasons why it would be extremely rare that a court would entertain an application to strike off the name of a legal practitioner from the roll before and until a professional body had investigated and concluded, whether or not, in its opinion, that such a step was necessary. Mr Green on behalf of the GCB has made several submissions in this regard which we fully endorse:

[39] First, there is the simple fact, probably uncomfortable to some observers but no less valid for that reason, that its less rather than more likely that laymen will recognise and appreciate the appropriate graduations of discipline suitable for professional misconduct. Not every impropriety warrants the attention of the court. It is the role of the LPC and

[5] In this case, the LPC opposed the relief sought by Mr Mavudzi on the ground that it was premature because it has not completed its investigation into the complaint. The answering affidavit further states unequivocally that the mere fact that a judge remarked adversely on the conduct of a legal practitioner is not a foundation for discipline and that the LPC is required to investigate the substance of the adverse remarks and solicit information from the interested parties. This approach is wholly correct.

other voluntary regulatory bodies such as the GCB, the several bars, Attorneys Associations and the Law society, that is to so, professional peers, to assess deviancy and initiate the proper steps.

[40] Second, the courts will, as they have for centuries, rely heavily on the insight and the rules of professional bodies to assess professional misconduct. [6]For a court to devise what appropriate relief" would be is practically unattainable without the assistance of the professional bodies.[7]

a) Third, the distinct danger exists of what Mr Green has labelled the "weaponising" of the striking off application to advance personal interests rather than advance the public interest. This very case, in which two accused persons during their trial seek a striking off of the prosecutor, is a signal example of that danger.

[41] To sum up:

a) It is inappropriate for any lay person or entity to apply *ab initio* to the courts for a striking off of the name of a legal practitioner from the roll, save for the reason mentioned in (3)

b) A complaint of misconduct against a legal practitioner must be lodged with the LPC or any one of the voluntary regulatory bodies of legal practitioners and the court shall insist on a report from one or more of

[6] The Code of Conduct issued by the LPC in terms of section 36 of the LPA has statutory force: GN 168 of 29 March 2019 (GG 42337) as amended.

[7] Mr Mavudzi referred us to the decision in the Free State Division, *Melato v South African Legal Practice Council*. There a Full Bench held that section 44(2) should be interpreted to encompass a striking off application being brought by anyone and, moreover, that no prior formal disciplinary enquiry by the LPC was required as a precondition. (at para [15]). These remarks were made in- circumstances where the delinquent attorney sought to review the LPC for bringing a striking off application when it had not had an oral hearing. The decision in the case bears no relationship to any issue that arises in this matter.

them in any striking off application that comes before it to facilitate the court reaching a conclusion on 'appropriate relief'.

c) Only where a regulatory body is itself delinquent in performing its functions in addressing a complaint, would it be appropriate for a lay person to approach the court for 'appropriate relief'.

d) Any person aggrieved at the decision of a regulatory body may seek to review its decision.

The conduct of Adv Majola

[42] It is unnecessary for this court to express a view about the allegations against Adv Majola because the LPC is required to complete an investigation and reach a conclusion about whether there has been misconduct or not, and if so, what an appropriate sanction would be. The report of the events in the several court hearings warrant an investigation and it is regrettable that Adv Majola has not addressed the allegations in his affidavit before this court.

Conclusions

[43] In the result the application must fail. As to costs, although it seems objectively unlikely that Mr Mavudzi and Mr Dube are able to meet costs orders under their present circumstances, it is appropriate that the LPC, NPA and Adv Majola be awarded their costs.

[44] This court expresses its appreciation to Advocate Green SC and Adv Chanza who appeared for the Amicus, the GCB, for their assistance.

The Order

(1) The application is dismissed.

(2) The applicants shall bear the costs incurred by the first, second and third respondents, joint and severally.

_____
Sutherland DJP

I agree:

_____
Molahlehi J

Heard: 27 July 2022
Judgment: 10 August 2022

The Applicants were represented by the first Applicant, in person.

The First and Third respondents (Adv S Majola and the National Prosecuting Authority):
Adv C Georgiades SC
Instructed by the State Attorney.

The Second respondent (The Legal Practice Council):
Adv T C Tshavhungwa,
Instructed by Damons Magardie Richardson Attorneys.

The fourth respondent : (the amicus Curaie; the General Council of the Bar of South Africa)
Adv I P Green SC, with him, Adv J Chanza,
Instructed by Edward Nathan Sonnenbergs