REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **23500/2020**

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

Date: 29 August 2023

In the matter between:

SIMPHIWE FREEMAN DUBE Applicant

and

SOUTH AFRICAN LEGAL PRACTICE COUNCIL Respondent

JUDGMENT

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[1] DE VOS AJ

[1] The Legal Practice Council launched proceedings to suspend Mr Dube from practising as an attorney. The Court a quo referred the suspension application to

oral evidence.[1] Our Sisters, Mnyovu AJ and Tlhapi J who penned the judgment of the Court a quo have become unavailable to hear the application for leave to appeal. The parties raised no objection to the reconstitution of the Bench. Before us, Mr Dube seeks leave to appeal against the order of the Court a quo and condonation for the late filing of the application.

[2] The order of the Court a quo reads –

> "The application to suspend or strike the respondent from the roll of attorneys is referred to a freshly constituted bench of this Court for its determination after hearing such oral evidence, on the following aspects-
>
> (a) On the bill of costs which respondent alleges he was not given proper opportunity to prepare his defence;
>
> (b) That the circumstances under which the payment of R100 000.00 was demanded from Mazive; whether this constitutes a transgressions of the LPC Rules, Code of Conduct of LPA, and certain sections of the Legal Practice Act,
>
> (c) The applicant is ordered to avail the respondent with all the documents it acquired from different sources with regard to the Mazive complaint and the Bill of costs in order to prepare his defence, within in thirty days from date of this order;
>
> (d) The applicant is ordered to obtain a date for the hearing from the registrar within thirty days from the date of this order."

[3] Mr Dube's discontent is that he reads, in the reasoning of the judgment of the Court a quo, that certain findings have been made against him. We have carefully studied the judgment of the Court a quo in order to consider Mr Dube's complaint. The judgment of the Court a quo sets out the factual background, the charges and the evidence presented against Mr Dube. The Court a quo stops short from making a final finding against Mr Dube, as it identifies specific disputes of facts. The disputes of fact include whether Mr Dube had acted in contempt of a previous court order suspending him from practice and whether he had misappropriated clients' funds. [2]

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[1] 27 August 2021 per Mnyovu AJ and Tlhapi J

[2] The disputes of fact include -

a) Whether a bill of costs that was prepared under the name of the respondent's firm during a time when he was suspended from practising. The respondent alleges that this was done without his knowledge; and

b) Whether an amount of money demanded by the respondent from a client (Mr Mazive), and which was paid, but never accounted for. The respondent contended that this payment was towards the sale of a bottle store to Mr Mazive, Mr Mazive contended that the respondent

No one can deny these facts are pivotal to a determination of whether Mr Dube should be suspended.

[4] Mr Dube's complaint that the Court a quo made findings against him is not born by the order granted by the Court a quo. To the contrary, the order makes no final finding against Mr Dube. The unambiguous wording of the order is that the decision to suspend Mr Dube is referred to oral evidence. Mr Dube's complaint that a finding of guilt has been against him is not born by the reasoning of the Court, but more centrally, is nowhere to be found in the order of the Court a quo.

[5] Mr Dube's application for leave to appeal lies against the order of the Court. It is settled law that an appeal lies against the order of a court and not against the reasons underpinning the order.[3] Mr Dube must source the basis of his appeal within the four corners the order of the Court a quo. The order is devoid of a finding against Mr Dube. Mr Dube's basis for leave to appeal, that certain findings had been against him, is not born by the express wording of the order. Mr Dube seeking leave to appeal against an order which has made no finding against him, militates against granting leave to appeal.

[6] Mr Dube further submits that the Court a quo erred in its approach to the disputes of fact. Mr Dube criticises the Court for having failed to apply the principles in *Plascon-Evans*. Mr Dube argues that had the Court a quo done so, it would have preferred his version (as the respondent in motion proceedings) and dismissed the suspension application.

[7] We consider Mr Dube's complaint in light of the reasoning adopted by the Court a quo. The Court a quo, after identifying the disputes of fact, considered the unique nature of disciplinary matters[4] and the binding case law guiding courts on how to deal with disputes of facts in this context. The Court a quo relied on the authorities

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informed him it was for disbursements in his matter.

[3] Ayres and Another v Minister of Justice and Correctional Services and Another 2022 (2) SACR 123 (CC).

[4] Solomon v The Law Society of the Cape of Good Hope 1934 AD 401 at 407; Cirota and Another v Law Society, Transvaal 1979 (1) SA 172 (A) at 187H; Prokureursorde van Transvaal v Kleynhans 1995 (1) SA 839 (T) at 851G–H

of *Van der Berg v The General Council of the Bar of South Africa*[5] ("*Van der Berg")* and *Hewetson v Law Society of the Free State* ("*Heweston")*.[6]

[8] In *Van der Berg*, the Supreme Court of Appeal held that the ordinary approach as outlined in *Plascon-Evans* is not appropriate in disciplinary applications launched by the Legal Practice Council. The Supreme Court of Appeal acknowledged that it will not always be possible for a court to fulfil its disciplinary function properly "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". The Supreme Court of Appeal then identifies explicitly the need for referrals to oral evidence -

> "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."[7]

[9] In *Hewetson*, the Supreme Court of Appeal held -

> "... Rather than impose the ultimate penalty on what is, in my view, inadequate evidence, a referral to oral evidence would serve the interests of justice and fairness. A court having heard the relevant evidence will be better placed to determine whether the appellant was indeed dishonest and unjustifiably delayed in reporting the trust-fund deficit, thus deserving of such a sanction."[8]

[10] These judgments temper the application of *Plascon-Evans* where members of the legal profession face disciplinary processes. The Court a quo, appropriately, relied on the reasoning of the Supreme Court of Appeal in these judgments. In fact, the Court a quo was bound by the doctrine of precedent to follow the guidance in these judgments in order to resolve the dispute of facts. The doctrine of precedent is “not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution”.[9] The Constitutional Court has held -

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[5] Van der Berg v General Council of the Bar of South Africa [2007] SCA 16 (RSA); [2007] 2 All SA 499 (SCA).

[6] 2020 (5) SA 86 (SCA).

[7] Id.

[8] Hewetson (above) at par 38 – 39.

[9] Camps Bay Ratepayers’ and Residents’ Association v Harrison 2011 (4) SA 42 (CC) at para 28.

> "[R]espect for precedent, which requires courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice. This is because it is intrinsically functional to the rule of law, which in turn is foundational to the Constitution. Why intrinsic? Because without precedent, certainty, predictability and coherence would dissipate. The courts would operate without map or navigation, vulnerable to whim and fancy. Law would not rule."[10]

[11] Mr Dube's complaint that the Court a quo ought to have followed the *Plascon-Evans* principles is at odds with binding jurisprudence from the Supreme Court of Appeal. If Mr Dube's complaint were upheld, it would require a deviation from these principles, and for the Court to interfere with the doctrine of precedent. These considerations indicate poor prospects of success on appeal and, also, discourage the granting of leave to appeal.

[12] In order to determine if leave to appeal must be granted, the Court must consider the matter holistically, and determine whether it is in the interest of justice to grant leave to appeal. The relevant part of the order reads –

> "The application to suspend or strike the respondent from the roll of attorneys is referred to a freshly constituted bench of this Court for its determination after hearing such oral evidence, on the following aspects."

[13] The order is not final. The order requires a referral to oral evidence. The position that interim and interlocutory orders are not appealable is not an inflexible rule. The test to be applied is that of the interest of justice.[11] The Constitutional Court in *Tshwane City v Afriforum*[12] dealt with the appealability of an interim order, stating that the decisive question is no longer whether it has a final effect or not, but rather whether the overarching role of interests of justice considerations has relativised the

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[10] Ruta v Minister of Home Affairs 2019 (2) SA 329 (CC) at para 21.

[11] The original test was formulated in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) where the court ruled against the appealability of the interim order made by the court of first instance. It tested the interim order against (i) the finality of the order; (ii) the definitive rights of the parties; and (iii) the effect of disposing of a substantial portion of the relief claimed. However, subsequently the Supreme Court of Appeal and the Constitutional Court has subsumed this test under the requirement of interests of justice. In *Philani-Ma-Afrika v Mailula* 2010 (2) SA 573 (SCA) the court held that the interest of justice was paramount in deciding whether orders were appealable, with each case being considered in light of its facts. In *Machele v Mailula* 2010 (2) SA 257 (CC) the Constitutional Court allowed an appeal against an order for eviction that had been put into effect despite a pending appeal. The Constitutional Court suspended the execution order, as irreparable harm would result if leave to appeal was not granted. In *National Treasury v Opposition to Urban Tolling* 2012 (6) SA 223 (CC) the Constitutional Court held that leave to appeal to interim orders is based on the interests of justice, requiring a weighing of circumstances, including whether the interim order has a final effect.

[12] 2016 (2) SA 279 (CC)

final effect of the order or the disposition of the substantial portion of what is pending before the review court. Here the Chief Justice remarked:

> "Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability [...] If appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest. . ."

[14] If the interest of justice demands, then an interim or interlocutory order can be appealed. The test for leave to appeal requires the court to have regard to and weigh germane circumstances. A court has to weigh up several considerations, including whether the relief granted was final in its effect, definitive of the right of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.[13]

[15] The Court is not persuaded that Mr Dube's request for leave to appeal would be in the interests of justice. The prospects of success on appeal are poor as the Court a quo followed authoritative jurisprudence from the Supreme Court of Appeal. This negates Mr Dube's prospects of success on appeal. In addition, the Court has yet to say the final word on Mr Dube's suspension. The Bench considering the oral evidence will still make such a determination. If this Court were to grant leave, at this stage, it would deprive such a Bench of testimony the Court a quo concluded was necessary to resolve the dispute. Lastly, granting leave to appeal at this stage would result in a piece-meal determination of the matter. The costs would increase, and Mr Dube would be deprived of an opportunity to meet the allegations against him. For these reasons, the Court concludes it would not be in the interest of justice to grant leave to appeal.

[16] Mr Dube filed his application for leave to appeal 305 days out of time and applied for condonation the day before the hearing. The Court is willing to grant Mr Dube

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[13] Von Abo v President of the Republic of South Africa (CCT 67/08) [2009] ZACC 15; 2009 (10) BCLR 1052 (CC) ; 2009 (5) SA 345 (CC) (5 June 2009)

condonation in light of the fullness of his explanation and the absence of prejudice to the respondent.

[17] Lastly, in relation to costs. In exercising our discretion we consider that the Legal Practice Council does not participate in the proceedings as an ordinary litigant. It does so under a public duty. The general rule is that the Council is entitled to its costs, even if unsuccessful, and usually on an attorney and client scale.[14] There is no reason, presented in this matter, to substantiate deviation from the general rule.

Order

[18] In the result, the following order is granted:

a) The application for condonation for the late filing of the application for leave to appeal is granted.

b) The application is dismissed.

c) The applicant is to pay costs as between attorney and client.

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I de Vos
Acting Judge of the High Court

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AP Ledwaba DJP
Deputy Judge President

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the appellant:	**Mr Mokotedi**
Instructed by:	Netshipale Attorneys
Counsel for the Respondent:	**L Groome**

[14] Law Society of the Northern Provinces v Dube [2012] 4 All SA 251 (SCA) par 33.

Instructed by:	RW Attorneys
Date of the hearing:	21 July 2023
Date of judgment:	29 August 2023