THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 141/17 and 180/17

In the matter between:

NOMGCOBO JIBA **FIRST APPELLANT**

LAWRENCE SITHEMBISO MRWEBI **SECOND APPELLANT**

and

THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA **FIRST RESPONDENT**

SIBONGILE MZINYATHI **SECOND RESPONDENT**

and in the matter between:

LAWRENCE SITHEMBISO MRWEBI **APPELLANT**

and

THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA **RESPONDENT**

Neutral citation: *Jiba & another v The General Council of the Bar of South Africa and Mrwebi v The General Council of the Bar of South Africa* (141/17 and 180/17) [2018] ZASCA 103 (10 July 2018)

Coram: Shongwe ADP, Leach, Seriti, Van der Merwe and Mocumie JJA

Heard: 22 March 2018

Delivered: 10 July 2018

Summary: Advocate – misconduct – whether fit and proper person to practise as an advocate – appellants not advocates in private practice – employed by the National Prosecuting Authority – alleged to be not fit and proper persons to remain on the roll of advocates while acting as litigants – found not to have benefitted – appeal upheld.

ORDER

On appeal from: Gauteng Division, Pretoria (Legodi and Hughes JJ sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The counter-appeal is dismissed with costs including the costs of two counsel.

3 Paragraph 177.1 of the order of the court a quo is confirmed.

4 Paragraph 177.2.1 and 177.2.2 are set aside and replaced with the following:

'The application for the striking off the roll of Ms Jiba and Mr Mrwebi is dismissed with no order as to costs, however as regards Mr Mrwebi he is suspended as an advocate for a period of six months from the date of this order (15 September 2016).'

JUDGMENT

Shongwe ADP (Seriti and Mocumie JJA concurring)

Introduction

[1] The General Council of the Bar (GCB), a voluntary association with legal personality in terms of its constitution, brought an application in terms of s 7(1)(*d*) of the Admission of Advocates Act 74 of 1964 (the Act) to strike from the roll of advocates, alternatively to suspend officials of the National Prosecuting Authority (NPA) in April 2015. These officials are Ms Nomgcobo Jiba (Jiba), who held the position of Deputy National Director of Public Prosecutions (DNDPP); Mr Lawrence Sithembiso Mrwebi (Mrwebi), who held the position of Special Director of Public Prosecutions and head of the Specialised Commercial Crime Unit (SCCU) and Sibongile Mzinyathi (Mzinyathi) who held the position of Director of Public Prosecutions in North

Gauteng. (For ease of reference and without disrespecting them, I shall refer to all parties by their surnames.)

[2] This appeal is against the order of the Gauteng Division, Pretoria (Legodi and Hughes JJ), striking from the roll of advocates, the names of Jiba and Mrwebi with costs including the costs of two counsel, the one paying the other to be absolved. The application against Mzinyathi was dismissed with costs to include the costs of two counsel. Against the order of costs, the GCB filed a counter-appeal. The appeals are with the leave of the court a quo. The three applications were dealt with in one hearing and were therefore heard together in this court as the factual and legal background was similar.

[3] The appointment of members of the NPA is in terms of s 179 of the Constitution read with s 11 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act). The NPA Act provides for the members of the NPA to be appropriately qualified and to possess legal qualifications that would entitle him or her to practise in all courts in the Republic (s 9(1) of the NPA Act). The GCB has the authority to apply to court for suspension of its members as advocates from practice and the removal of their names from the roll of advocates in terms of s 7(1)(*d*) of the Act.

[4] Only a court has the authority to strike a name from the roll of advocates or attorneys. In this case the GCB amassed information from various sources and public records, for instance from judgments handed down from various courts such as *Freedom Under Law v National Director of Public Prosecutions & others* 2014 (1) SA 254 (GNP); *National Director of Public Prosecutions &*

others v Freedom Under Law 2014 (4) SA 298 (SCA); [2014] ZASCA 58; and *Zuma v Democratic Alliance & others* [2014] ZASCA 101; [2014] 4 All SA 35 (SCA). And also sourced information contained in the affidavits in the various cases and from the office of the NPA. The gist of the information gathered sought to prove that the appellants (Jiba and Mrwebi) were not fit and proper persons to remain admitted as advocates.

Legal Framework

[5] I now turn to deal with the relevant legal principles to be considered before an advocate can be struck from the roll. The application is brought in terms of s 7(1) of the Act – and it reads as follows:

'Subject to the provisions of any other law, a court of any division may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates–

(*d*) if the court is satisfied that he is not a fit and proper person to continue to practise as an advocate . . . .'

[6] This court in *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) ([2000] 2 All SA 310 (A) placed the following guidelines which were followed with approval in *Malan & another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA) para 4:

'First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry.

Second, it must consider whether the person concerned "in the discretion of the Court" is not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment.

And third, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice.'

The principles that apply in striking off an attorney from the roll also apply where an advocate is concerned. It is common cause that these proceedings are not ordinary civil litigation proceedings but are said to be *sui generis* in nature. The GCB as *custos morum* of the profession acts in the interest of the profession, the court and the general public. The GCB's role is to present evidence of the alleged misconduct to court, and for the court to exercise its disciplinary powers. On the other hand the practitioner is expected to proffer an acceptable explanation to gainsay the allegations. The nature of the proceedings is not subject to the strict rules that govern ordinary civil proceedings. (See *General Council of the Bar of South Africa v Matthys* 2002 (5) SA 1 (E) para 4 and *Society of Advocates of South Africa (Witswatersrand Division) v Edeling* 1998 (2) SA 852 (W) at 859l et seq.)

Facts

[7] The genesis and the long history of this appeal arose after a certain Lieutenant-General Richard Mdluli (Mdluli), the head of Crime Intelligence within the South African Police Service (SAPS) had been charged with fraud, corruption and related charges and also with murder and attempted murder. The fraud and corruption charges were subsequently withdrawn by Mrwebi and later Advocate Chauke, the Director of Public Prosecutions (DPP) South Gauteng, also withdrew the murder and related charges against Mdluli. Unhappy about the withdrawal of these charges, Freedom Under Law (FUL), a non-profit organisation recognised to be acting in the public interest in terms of s 38 of the Constitution, launched review proceedings to have the withdrawals set aside. It is significant to mention that Jiba was appointed DNDPP with effect from 22 December 2010 when the GCB launched the application for her to be struck

from the roll of advocates. She had been acting as the NDPP after the position became vacant when Advocate Simelane was removed as NDPP. The context of her involvement in this office vis-à-vis the grounds on which she is accused of not being a fit and proper person is important in the proper consideration of the adjudication of this matter.

[8] Several complaints were raised by FUL against Jiba, Mrwebi and Mzinyathi during the hearing of the review proceedings. For example that, through their conduct, they delayed and frustrated the prosecution of the review proceedings by failing to file a record of decision in terms of rule 53 of the Uniform Rules of Court. (I shall revert to this complaint later in the judgment.) For now, it suffices to say that it is one of the reasons put forward by the GCB to show that the appellants were not fit and proper persons. The other complaint by FUL was that the delay to file a record of decision prolonged the review proceedings which resulted in the late filing of the appellants' answering affidavits in the review proceedings. The Deputy Judge President of the Gauteng Division, Pretoria (DJP) had to intervene, by directing the appellants to file their answering affidavit by 24 June 2013, which was eventually filed nine days later. This delay resulted in Murphy J, who presided in the review proceedings, to remark that the reasons advanced for the various delays, and late filing were sparse and mostly unconvincing. This was also raised by the GCB as an indicator of them being unfit persons to remain on the roll of advocates. However Murphy J condoned the non-compliance with the rules and directives of the DJP. I now turn to deal with the complaints against Jiba and Mrwebi which according to the GCB justify declaring them to be not fit and proper persons to remain on the roll of advocates.

Complaints against Jiba

[9] Initially Jiba raised certain points in limine, that she had not been afforded a proper hearing and the issue of separation of powers. She argued that the GCB should have held an enquiry before approaching a court of law, as is usually done where a practising advocate is charged with misconduct. These points were not pursued on appeal, therefore there is no need to decide them. I now turn to deal with the specific complaints levelled against Jiba.

[10] The first complaint dealt with by the court a quo was in connection with *Booysen's* case. In that case Jiba, in her capacity as acting NDPP issued two authorisation letters charging Major General Johan Wessel Booysen with the contravention of s 2(1)(*e*) and (*f*) of the Prevention of Organised Crime Act 121 of 1998 (POCA). In a nutshell Booysen alleged that Jiba was 'mendacious' when she asserted that she considered statements together with other information in the docket before she took the decision to charge him. This allegation was further exacerbated by the negative remarks of Gorven J who presided in the *Booysen* matter when he drew an inference that none of the information upon which Jiba relied linked Booysen to the offence in question. The court a quo found that '[i]t suffices for now to conclude on [the] *Booysen* matter by stating that no case has been made for removal or suspension from the roll of advocates'. I do not find it necessary to deal with the detail of the complaint in view of the finding of the court a quo. I share the sentiment expressed. Before us counsel for the GCB dealt with some of the complaints but, in my considered view did not take the matter any further. The court a quo could not find 'any mala fides and or ulterior motive in the authorisation by Jiba as contemplated in POCA'.

[11] The next complaint against Jiba was in connection with a challenge on review by the Democratic Alliance (DA), a political party, against the decision of the NPA in which the then acting NDPP, Advocate Mokotedi Mpshe, withdrew corruption charges against the former President Jacob Zuma. The withdrawal came after Adv Mpshe had listened to a recorded conversation on tape between the former NDPP (Mr Bulelani Ngcuka) and the then DPP for Durban (Mr McCarthy). The complaint was in connection with Jiba's handling of this matter in her capacity as acting NDPP. This case popularly became known as the 'spy tapes case'. The specific complaint was that Jiba failed to comply with the requirements of rule 53 of the Uniform Rules which require the disclosure of the record of proceedings under review. As a result the DA approached the high court, Pretoria seeking an order to compel the NPA to comply with the rule. The application was dismissed, subsequently the DA appealed to this court. The appeal was upheld and certain orders were made which the NPA failed to comply with. As a result certain negative remarks were made by this court. Such remarks and failure to comply with the court order were advanced as reasons why Jiba was not fit and proper to remain on the roll of advocates. Because of the findings of the court a quo, which I agree with, it will not be necessary to deal with specifics, save to add that the court a quo concluded that the GCB failed to show any *mala fides* on Jiba's part or that she was motivated by an ulterior motive. (See the judgment of the court a quo reported as *General Council of the Bar of South Africa v Jiba* 2017 (2) SA 122 (GP).)

[12] The main reason, in the court a quo's view, why Jiba and Mrwebi were found to be not fit and proper persons to remain on the roll of advocates was their handling of the so called Mdluli case. It is significant to note that the court a quo started by describing who Mdluli was and detailed his personality,

characterised him in an egregious manner as if he was already convicted of the allegations against him. This characterisation, in my view, negatively influenced the court a quo's evaluation of the manner in which Jiba and Mrwebi handled the Mdluli case. The relevance of which is not clearly explained. The court a quo, in its judgment, referred to a letter by Mdluli to former President Zuma, the Minister of Safety and Security and the Commissioner of Police, which stated that the charges brought against him were a conspiracy. I was unable to glean the relevance of quoting from the said letter. In my view the content of the letter was far-fetched and did not establish whether Jiba was a fit and proper person to practise as an advocate.

[13] The specific complaints were: (a) that she failed to file a full complete rule 53 record even after a court order to that effect; (b) that she failed to file an answering affidavit after the DJP had directed her to do so and that she did not file her heads of argument timeously; (c) that her reason for the delays were sparse and unconvincing; (d) that her conduct as a person of high rank in the public service was unbecoming; (e) that she failed to disclose that she had received a 24 page memorandum from Advocate Breytenbach and that she deliberately attempted to mislead the court with reference to the memorandum; (f) that this court had criticised her conduct in the handling of the Mdluli matter; and (g) that she failed to make a full and frank disclosure to refute, explain or ameliorate the serious allegations against her.

[14] It is significant to consider these complaints together with Jiba's answers and explanation in the context of her position as acting NDPP and the fact that she is cited herein as a litigant. Jiba was not acting as counsel representing a client. She acted as head of the NPA, therefore the State Attorney and counsel

had to be appointed to represent her. In her answering affidavit she explained the policy applicable where an official had been cited in his or her representative capacity. She further explained that the Legal Affairs Division (LAD) tasked with the handling of all matters pertaining to civil litigation dealt with this matter. The LAD was headed by Advocate Nomvula Mokhatla the Deputy National Director of Public Prosecutions. In her team, were deputy directors, senior State advocates and senior State prosecutors. This team would prepare a memorandum on steps to be taken, arrange consultations with her and advise on how the LAD would handle the matter further. Counsel would be briefed by the State Attorney. She further explained that the LAD is similar to 'an in-house legal department . . . '.

[15] Jiba's explanation to counter the complaint that she failed to file a full and complete rule 53 record was that Advocate Motimele SC and Advocate Notshe SC had been briefed to advise on the preparation of the rule 53 record. It was prepared by Advocate Chita on behalf of the NPA on the advice of the Motimele SC team. This was done after Advocate Chita had consulted with Mrwebi and Advocate Chauke whose impugned decisions were to be reviewed. Her conduct must be viewed and equated to an attorney and client relationship to her advisors. She is a trained lawyer, however her opinion would be secondary to that of counsel and the LAD. She cannot, in my considered view be said to be not a fit and proper person simply because she was advised otherwise. It must be considered that she did not benefit in any manner whatsoever from providing an incomplete rule 53 record, nor did she act dishonestly. In para 24 of Murphy J's judgment he condoned the non-compliance with the rules and directives of the DJP. To me this is an indication that no prejudice was caused to any party. We preside in matters daily where attorneys and counsel take incorrect decisions or instructions, and also file court

processes out of time, however, they apply for condonation; and in most cases such would be granted if no prejudice would result. The legal practitioners in these instances are not necessarily unfit persons to practise as advocates or attorneys in so doing.

[16] The complaint that she failed to disclose the memorandum from Advocate Breytenbach and thereby deliberately attempted to mislead the court, was explained as follows. It must be clear from the onset that this was a confidential internal memorandum prepared by Advocate Breytenbach to Jiba expressing a different view to the impugned decision by Mrwebi. The court a quo concluded in para 136.3 that '[f]ailure by Jiba not to disclose Breytenbach's memo in the proceedings before Murphy J and failure to consider the request by Breytenbach for internal review of Mrwebi's decision was, in my view, deliberate and was intended to mislead Murphy J'. It was not Murphy J who said that Jiba attempted to mislead the court. It was the court a quo's conclusion on the reasons set out above. The truth of the matter is that when Murphy J heard the review proceedings, the Breytenbach memo had already been in the public domain at the labour court when Breytenbach was fighting against her suspension. It cannot, therefore be fair, to accuse Jiba of failing to disclose the Breytenbach memo before Murphy J. Jiba cannot, fairly be accused or alleged not to be a fit and proper person for failing to consider the request by Breytenbach for the internal review of Mrwebi's decision. Surely Jiba should be entitled to her own opinion based on facts at her disposal. She should not be punished for differing with Breytenbach. Murphy J went further to say that 'The NDPP in her answering affidavit, though not dealing directly with the [Breytenbach] memo, maintained that the decision to withdraw charges had not come to her office for consideration "in terms of the regulatory framework"'.

[17] The next complaint arose from a meeting between Jiba and Advocate Motau SC, who had been briefed after Motimele SC's team withdrew on 26 July 2013, in an unscheduled consultation. She is reported to have said that she had not received the answering affidavit settled by Advocate Motau SC. Whereas Advocate Sebelemetsa of the State Attorney's office had written to Advocate Motau SC's team advising them that the draft answering affidavit had been amended by separating Jiba's from that of Mrwebi. Advocate Sebelemetsa also wrote a memo on 3 September 2013 advising that they 'never had any consultation with the team [i e Advocate Motau SC] in preparation of the said affidavit'. The court a quo concluded that Jiba 'was steadfast to defy logic and advice [from Advocate Motau SC] for as long as her wishes were not accommodated. That is the kind of conduct making Jiba to cease to be a fit and proper person and to remain on the roll of advocates'. Therefore the court a quo was of the view that Jiba lied when she told Advocate Motau SC that she had not received the affidavit. In my view it is not the only reasonable inference to be drawn. As explained above, the State Attorney would liaise with the LAD and deal with issues and correspondence without necessarily informing Jiba. All that needed to happen was to have Mrwebi sign the affidavit and that Jiba sign a supporting affidavit. The explanation could be that Jiba's team was of the view that the impugned decision in the Mdluli matter was that of Mrwebi. The signed affidavit was received by Advocate Motau SC. The difference of opinion between Advocate Sebelemetsa on the second and third of July 2013 long after the unscheduled consultation with Motau SC and Jiba's team and the inference drawn by the court a quo, in my considered view, would not justify labelling Jiba a dishonest person and consequently not fit and proper to remain on the roll of advocates. As a result of this misunderstanding Advocate Motau SC and his team withdrew from the matter.

[18] Advocate Halgryn SC was briefed after the withdrawal of Advocate Motau SC. After several consultations Advocate Halgryn was in disagreement with the manner in which the case had been conducted. He was of the view that from the papers there was no defence. Jiba responded to Halgryn SC's team by saying that 'it assumed that there was a *prima facie* case against Mdluli of fraud and corruption which had to be enrolled and prosecuted . . . it assumed that the decision of Adv Chauke not to proceed with the other charges while he had referred the matter to a formal inquest was incorrect . . . it assumed that I [Jiba] had stood back and did nothing since the withdrawal of the charges'. She further explained that the fraud and corruption charges against Mdluli were withdrawn for purposes of further investigation and that the intention was to reinstate these charges if further incriminating evidence came to hand. The difference of opinion should not and cannot fairly be considered sufficient to conclude that Jiba is not a fit and proper person to remain on the roll of advocates. Perhaps one may infer some form of incompetence with regard to her duties, which may be a ground to remove her from being the DNDPP but not sufficient enough to be removed from the roll of advocates. Jiba also referred, in her answering affidavit, to the view of two senior State prosecutors who also handled this matter, namely Advocate Andre Becker and Advocate Rita Viljoen who expressed the view that there was insufficient evidence to prosecute Mdluli on the fraud and corruption charges. It follows therefore that the GCB failed to establish any misconduct against Jiba. Therefore the first jurisdictional requirement was lacking. In the circumstances of this case there is no need to deal with a value judgment to determine whether Jiba is a fit and proper person to remain on the roll of advocates. Therefore even the sanction imposed of striking her name from the roll does not arise. The court a quo materially

misdirected itself when it came to the conclusion that the decision is one no reasonable court could make.

Complaint against Mrwebi

[19] The main complaint against Mrwebi was that he sought to mislead the court on the extent of the consultation or 'in consultation' between himself and Mzinyathi. Put differently that he took a decision to withdraw the fraud and corruption charges against Mdluli before he consulted with Mzinyathi in terms of s 24(3) of the NPA Act. It is alleged further that Mrwebi persisted with this conduct even after having been advised by Motau SC and Halgryn SC that he was wrong. The other complaints were that he sought to mislead the court by not providing a proper record of all the documents and facts relevant for the proper determination of the FUL review proceedings. Some of the answers and explanations given by Jiba relating to the rule 53 record are relevant and applicable to the case of Mrwebi and may be properly considered herein.

[20] What weighs heavily against Mrwebi are the answers and explanations proffered by him against these allegations. Mrwebi received representations from Mdluli regarding the fraud and corruption charges. He apparently decided to withdraw and discontinue the prosecution of Mdluli before discussing with Mzinyathi or 'in consultation' with Mzinyathi as required by s 24(3) of the NPA Act. It is apparent that Mrwebi furnished contradictory explanations of when and why he decided to withdraw the charges against Mdluli. It is clear from Mzinyathi's confirmatory affidavit that he contradicted Mrwebi's assertions that there was any form of consultation on 5 December 2011 when the two met and discussed the Mdluli matter. At some point while discussing this matter Mrwebi created the impression that the decision to discontinue the prosecution fell

squarely within the mandate of the Inspector General of Intelligence (IGI) in terms of the Intelligence Services Oversight Act 40 of 1994. Murphy J found that '[i]t is common cause that Mrwebi did not consult the SAPS or the IGI prior to withdrawing the charges, and that Mzinyathi and Breytenbach informed Mrwebi at the meeting with him on 9 December 2011 that the IGI was not authorised to conduct criminal investigations'. The IGI, indeed, confirmed that '[t]he mandate of the IGI does not extend to criminal investigations which are court driven and neither can the IGI assist the Police in conducting criminal investigations'.

[21] It is highly possible that Mrwebi, genuinely, did not comprehend what the concept 'in consultation' meant, however the concessions he made under cross examination by counsel for the GCB, indicated that he was at most confused. I would not classify his explanations as dishonest. However I am prepared to find that the GCB succeeded in establishing the alleged offending conduct on a preponderance of probabilities. Because there was no personal gain from Mrwebi's conduct, I do not think that the sanction handed down is justified. The purpose of these proceedings is to uphold the rules regulating the profession and not to punish the wrongdoer. (See *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* 1976 (4) SA 350 (T) at 357 G-H.)

Complaints against Mzinyathi

[22] Murphy J made some negative remarks against Mzinyathi suggesting that the confirmatory affidavit of Mzinyathi differed from his evidence tendered at the disciplinary hearing of Breytenbach. The GCB interpreted this supposed contradiction as misconduct, hence it was of the view that Mzinyathi was not a fit and proper person. The court a quo placed the misunderstanding by Murphy J

into perspective and contextualised it. It came to the conclusion that Mzinyathi, should be commended for standing firm against Mrwebi's withdrawal of the charges against Mdluli. His evidence during Breytenbach's disciplinary proceedings was consistent with his stand point surrounding what transpired on the fifth, eighth and ninth of December 2011. The court a quo, correctly so in my view, dismissed the complaint against Mzinyathi with costs, up to the stage when the GCB indicated that it will not persist against Mzinyathi.

[23] The GCB was granted leave to appeal the costs order against it in favour of Mzinyathi. The GCB contended that it acted reasonably and in the interest of its members and the public at large when it brought the application against Mzinyathi. It further contended that Mzinyathi together with Jiba and Mrwebi had been criticised by not only the high court (Murphy J) but also by this court. Finally it averred that the normal rules of costs in adversarial proceedings should find no application.

[24] On the other hand, counsel for Mzinyathi contended that the general principle with regard to costs is that the court exercises its discretion and that the successful party should, as a general rule, have his or her costs. (See *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (2) SA 621 (CC) para 3.) He argued that the fact that the GCB was the *custos morum* should not insulate it from paying costs and that no special treatment should be given to the GCB.

[25] I am unable to find any reason that demonstrates that the court a quo did not exercise its discretion honestly and judiciously. Therefore this court is not empowered to interfere with the findings of the court a quo. The only recognisable basis is possibly that the GCB acted as a *custos morum*. However, s 9(1) of the Constitution provides that everyone is equal before the law and has

the right to equal protection and benefit of the law. (See *Biowatch Trust v Registrar Genetic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).) I am unable to provide a cogent reason as to why Mzinyathi should be out of pocket when the GCB dragged him to court without sound and reasonable grounds for doing so. The GCB should at least, have withdrawn the application to strike Mzinyathi's name from the roll of advocates, immediately after the filing of his answering affidavit in this matter. The court a quo was able to identify the misunderstanding Murphy J was labouring under and the explanation given by Mzinyathi. The GCB recklessly, if not irresponsibly, continued to implicate Mzinyathi in a matter where he had no involvement without verifying the allegations. The only matter wherein Mzinyathi filed a confirmatory affidavit was the FUL matter; he was not involved in the so-called 'spy tapes' investigation and the *Booysen* case. The GCB did not even explain its insistence in its replying affidavit. Counsel for Mzinyathi elaborated at length on the various instances where the GCB unreasonably continued to implicate Mzinyathi in its heads of argument. Due to the view I take on the issue of costs, it is not necessary to exhaust the list. The counter-appeal stands to be dismissed with costs.

Appropriate sanction

[26] A court of appeal is entitled to interfere with the exercise by the court a quo of its discretion if it is satisfied that it did not bring an unbiased judgment to bear on the issues before it, or exercised its discretion upon a wrong principle and or as a result of a material misdirection. (See *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 654E-H and 655G and *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 537; also reported at [1998] 3 All SA 358 (A).) Stated differently, but to the same effect, in *Fine v Society of Advocates of South Africa (Witwatersrand Division)* 1983 (4) SA 488 (A) at 494H – 495A, the court remarked that:

'[T]he Appeal Court will only interfere with the exercise of this discretion on the grounds of material misdirection or irregularity, or because the decision is one no reasonable Court could make.'

[27] As regards Mrwebi, I am of the considered view that the court a quo treated him harshly. Mrwebi, notwithstanding his misconduct, did not personally gain anything from his actions. His failure to comprehend the concept of 'in consultation', in my view should perhaps be attributed to his incompetence or naivety rather than his honesty and lack thereof. I recognise the principle that the main consideration is the protection of the public and not to punish. In my view the court a quo over-emphasised the nature and personality of Mdluli, his past misdemeanours or alleged criminal activities and found it abhorrent that Mrwebi had withdrawn the fraud and corruption charges against him. Although it later transpired that the charges were not finally withdrawn, it was a provisional withdrawal. The approach of the court a quo did not only close its reasoning but ultimately led it to commit material misdirections by finding that Mrwebi had committed misconduct arising from allegations irrelevant to his case. The withdrawal of charges against Mdluli became the centrepiece of the inquiry, whereas the handling and conduct of the administrative procedures and negative remarks by the judges a quo were indeed the cause for the complaint. The court a quo, in my view, did not bring its unbiased judgment to bear.

[28] The GCB alleged that Mrwebi sought to mislead the court by not placing before it a proper record of all the documents. That Mrwebi sought to mislead the court as to the date of the consultation with Mzinyathi, whether it was the fourth or fifth of December 2011. All these complaints collectively or

individually cannot justify the striking off the roll of advocates. These are common mistakes which counsel make in their daily work and are mostly excusable. Moreover Mrwebi was not acting for a client but was a litigant advised by the LAD and counsel. Nowhere in the judgment of the court a quo was it shown that the court considered a suspension instead of the ultimate penalty of striking an advocate off the roll and reasons why a suspension was not an appropriate sanction. I am of the view that considering all the facts and circumstances of this case a suspension of Mrwebi as an advocate would be the appropriate sanction. I am alive to the fact that a court of appeal's interference with the trial court's discretion is permissible on restricted grounds. The basis of my interference is grounded on my findings that the court a quo did not bring its unbiased judgment to bear on the question before it, and materially misdirected itself. (See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I-782A.)

[29] In conclusion, as regards Jiba, the evidence presented by the GCB juxtaposed with the explanation proffered by her failed to establish the alleged offending conduct on a preponderance of probabilities. On that ground the appeal must succeed. It becomes unnecessary to consider the discretion of the court on the question whether or not she is a fit and proper person to remain on the roll of advocates. As regard Mrwebi, I am satisfied that the alleged offending misconduct has been established and also concur that the court a quo exercised its discretion judicially when it concluded that he is not a fit and proper person to practise as an advocate, however, misdirected itself regarding the appropriate sanction to be imposed. Based on the reason given above, this is a case where the court a quo should have suspended Mrwebi, more especially, that he did not personally benefit from his misconduct nor did he prejudice any client. All that the court a quo was dissatisfied with was that '[b]y their conduct,

they did not only bring the prosecuting authority and the legal profession into disrepute, but have also brought the good office of the President of the Republic of South Africa into disrepute by failing to prosecute Mdluli who inappropriately suggested that he was capable of assisting the President of the country to win the party presidential election in Mangaung during 2011 should the charges be dropped against him'. Surely this is irrelevant and cannot be a good reason singularly or cumulatively to remove an advocate from the roll.

[30] We have had cases in this court against advocates who had admitted to unlawfully enriching themselves of millions of rands, who in the result have been either suspended or ordered to repay the spoils (see *General Council of the Bar of South Africa v Geach & others; Pillay & others v Pretoria Society of Advocates & another; Bezuidenhout v Pretoria Society of Advocates* [2012] ZASCA 175; 2013 (2) SA 52 (SCA)). In the case of Mzinyathi on costs, no cogent and justifiable grounds have been placed before this court to interfere with the discretion of the court a quo, save to underscore the tradition of the GCB being insulated against a costs order regardless. The appeal in this regard must also fail.

[31] In the result I make the following order:

1 The appeal is upheld with no order as to costs.

2 The counter-appeal is dismissed with costs including the costs of two counsel.

3 Paragraph 177.1 of the order of the court a quo is confirmed.

4 Paragraph 177.2.1 and 177.2.2 are set aside and replaced with the following:

'The application for the striking off the roll of Ms Jiba and Mr Mrwebi is dismissed with no order as to costs; however as regards Mr Mrwebi he is

suspended as an advocate for a period of six months from the date of this order (15 September 2016).'

_____

J B Z Shongwe
Acting Deputy President
Supreme Court of Appeal

Van der Merwe JA (Leach JA concurring)

[32] I have had the benefit of reading the judgment of Shongwe ADP, and find myself respectfully unable to agree with his conclusions in respect of the appeal and cross appeal. In my judgment the appeals of Ms Nomgcobo Jiba (Ms Jiba) and Mr Lawrence Sithembiso Mrwebi (Mr Mrwebi) should fail and the cross appeal of the General Council of the Bar (the GCB) should succeed.

[33] An advocate is required to be of 'complete honesty, reliability and integrity'. See *General Council of the Bar of South Africa v Geach and others* [2012] ZASCA 175; 2013 (2) SA 52 (SCA) paras 126-127. It goes without saying that these qualities are particularly required of an advocate who holds high public office in the administration of justice.

[34] Whether a person should be struck from the roll of advocates for failure to comply with these standards, is determined by a three-stage process. The first entails a factual finding in respect of the alleged offending conduct. If that conduct is established, the second stage comprises a finding as to whether the person is a fit and proper person to continue to practise. If not, the third stage involves the exercise of a discretion in respect of whether a removal from the

roll of advocates or suspension from practise is appropriate. This court, on appeal, has limited grounds to interfere with such discretion. It can only do so if the court a quo acted capriciously, or on a wrong principle, or if it failed to bring an unbiased judgment to bear on the issues or did not have substantial reasons – see *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 654D-G.

[35] In light of these considerations I deal with the appeals of Ms Jiba and Mr Mrwebi in turn.

Ms Jiba

[36] Ms Jiba was a Deputy National Director of Public Prosecutions. During the period from 28 December 2011 to 30 August 2013 she acted as the National Director of Public Prosecutions and thus headed the National Prosecuting Authority (NPA). The contention that Ms Jiba is not a fit and proper person to continue to practise as an advocate was based on her alleged conduct in her capacity as Acting National Director of Public Prosecutions (ANDPP) in relation to three matters.

[37] In the first matter, Freedom Under Law (FUL), a public interest organisation, *inter alia*, sought the review and setting aside of the decision of Mr Mrwebi, who was at the time a Special Director of Public Prosecutions, to withdraw charges of fraud and corruption against Lieutenant-General Richard Mdluli. At the time Mr Mdluli was the head of the Crime Intelligence Unit of the South African Police Service (SAPS). FUL succeeded in the Gauteng Division, Pretoria where Murphy J reviewed and set aside the decision to withdraw these charges against Mr Mdluli. His judgment is reported as *Freedom Under Law v National Director of Public Prosecutions and others* 2014 (1) SA 254 (GNP) (the *FUL* matter). An appeal to this court against that

part of the order of Murphy J was unsuccessful. In *National Director of Public Prosecutions and others v Freedom Under Law* [2014] ZASCA 58; 2014 (4) SA 298 (SCA) Brand JA, speaking for a unanimous court, held that Mr Mrwebi had failed to comply with the provisions of s 24(3) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act), which required him to take the decision in consultation with, that is with the concurrence of, the Director of Public Prosecutions for the Gauteng Division, Pretoria (Mr Mzinyathi).

[38] In the second matter, Major-General Johan Booysen, in essence, sought the review and setting aside of the decision of Ms Jiba to authorise the institution of a prosecution against him. The matter served before Gorven J in the KwaZulu-Natal Local Division, Durban who granted the relief claimed. Gorven J found that the decision was irrational. His judgment is reported as *Booysen v Acting National Director of Public Prosecutions and others* [2014] 2 All SA 391 (KZD) (the *Booysen* matter).

[39] The relevant aspects of the third matter appear from the judgment of this court in *Zuma v Democratic Alliance and others* [2014] ZASCA 101; [2014] 4 All SA 35 (SCA) (the *Zuma matter)*. This judgment formed part of protracted litigation between Mr Zuma and the Democratic Alliance and dealt with the precise ambit of a previous order that the ANDPP produce and lodge the record relating to the decision to discontinue the prosecution of Mr Zuma.

[40] The court a quo based its finding that Ms Jiba was not a fit and proper person to practise as an advocate, only on her conduct in the *FUL* matter. In the process it rejected the contentions of the GCB that the conduct of Ms Jiba in the *Booysen* and *Zuma* matters also justified her being struck from the roll of advocates. In this court, counsel for Ms Jiba argued that in the absence of a

cross appeal it was not open to the GCB, on appeal, to rely on the conduct of Ms Jiba in the *Booysen* and *Zuma* matters.

[41] This argument is without merit. It is trite that on appeal a respondent may seek to justify the order appealed against on any ground that the record of appeal allows. A cross appeal is only required when a respondent seeks a variation of the order of the court a quo, as is the case here in respect of the costs order against the GCB. The reason for this is that an appeal lies only against an order, not the reasons for the order. It matters not that the reasons for the order may to some extent have been incorporated in the order itself. The court a quo made the order in respect of Ms Jiba that the GCB had proposed. A cross appeal in respect thereof would be nonsensical. Thus, the GCB was entitled to seek to justify this order with reference to the *Booysen* and *Zuma* matters.

[42] The essential issue in the *Zuma* matter was whether the record of decision that had been submitted by Ms Jiba should have included certain tapes or transcripts, alleged by Mr Zuma to be confidential, and internal memoranda of the office of the NDPP relating to the tapes and transcripts. Navsa ADP said that in her answering affidavit Ms Jiba failed to adopt a position in respect of the former and resorted to 'a metaphorical shrugging of the shoulders'. He said that this displayed a baffling lack of interest in being of assistance to the court. In respect of the internal memoranda, Navsa ADP stated that 'Ms Jiba provided an "opposing'' affidavit in generalised, hearsay and almost meaningless terms'. Navsa ADP added that the generalisation resorted to by Ms Jiba was, 'to say the least, disingenuous'. Thus, this court held in the *Zuma* matter that Ms Jiba had acted in a singularly unhelpful manner and had been less than truthful.

[43] In her answering affidavit in the *Booysen* matter, Ms Jiba stated that she had based the decision to authorise the prosecution of Mr Booysen on, *inter alia*, four documents that were annexed to her answering affidavit, as annexures NJ2, NJ3, NJ4 and NJ5. She said that Mr Booysen 'is directly implicated under oath in the statements placed before me in Annexures "NJ2" to "NJ5"'.

[44] In this regard Gorven J held as follows:

'[31] The submissions of Mr Booysen in his replying affidavit can be summarised as follows. Two of the annexures are sworn statements made under the name of Colonel Aiyer. These are annexures NJ2 and NJ4 respectively. Mr Booysen describes these as statements which concern "office politics" and submits that they in no way implicate him in any of the offences with which he has been charged. The second of these, in addition to not implicating him in any of the offences in question, was deposed to on 31 August 2012, some two weeks after the first impugned decision was taken. The document referred to as a statement by Mr Danikas, annexure NJ3, is not a sworn statement. It is not even signed by anyone. It is not dated. Even if it can be attributed to the named person and even if it was a sworn statement as claimed by the NDPP, the contents do not cover the period dealt with in the indictment except for one event which does not relate to Mr Booysen. As regards annexure NJ5, this does not implicate Mr Booysen in any of the offences in question.

[32] In argument, the respondents did not in any way challenge the above factual submissions concerning the nature and content of the annexures in question. The factual submissions appear to me to be accurate.'

[45] Counsel for Ms Jiba pointed out that annexure NJ3 was patently not an affidavit, it had not even been signed, and argued that it is improbable that Ms Jiba intended to express a deliberate falsehood or attempted to mislead the court in respect of this annexure. That may be so, but the force of the argument is reduced by the fact that Ms Jiba did not explain in her answering affidavit, in the present matter, that she had mistakenly described annexure NJ3 as a

statement under oath. In any event, this could not explain the objectively false statements by Ms Jiba under oath that she had regard to all these annexures when she made the decision to authorise the prosecution of Mr Booysen and that Mr Booysen had been directly implicated in the alleged crimes in all of these statements. The court a quo should, in my view, have taken cognisance thereof that unexplained false statements were made by an advocate acting as the NDPP in respect of the essence of the *Booysen* matter, namely the reasons for the decision to authorise the prosecution.

[46] In the *FUL* matter a dismally incomplete record of the decision had been filed out of time. I am in agreement with counsel for Ms Jiba that in terms of rule 53(1) the primary obligation to submit the record of decision rested on Mr Mrwebi. He had taken the decision to withdraw the fraud and corruption charges against Mr Mdluli. But that did not absolve Ms Jiba from all responsibility. Indeed, in her answering affidavit in the present application she did not rely on the absence of an obligation on her to ensure the filing of a proper record of the decision. Instead, she attempted unconvincingly to justify the filing of an incomplete record on the basis of uncertainty at the time as to what should be included in such a record of decision. As the head of the NPA, who had been cited in that capacity as a party in the *FUL* matter, Ms Jiba bore the overall responsibility for the submission of a proper record of the decision. It suffices to say that this conduct displayed at least a lack of appreciation of the duty of an advocate to assist the court to come to a speedy and just conclusion.

[47] This is also illustrated by the following. On 8 October 2012, FUL delivered a supplementary founding affidavit in terms of rule 53(4). On 14 March 2013 it filed a further supplementary affidavit. This was necessitated by the paucity of the records filed and by further documents that had become publicly available. The respondents in the *FUL* matter, including Ms Jiba and

Mr Mrwebi, had to file answering affidavits by no later than 2 May 2013. They did not do so. On 5 June 2013, Ledwaba DJP issued a directive obliging the respondents to deliver answering affidavits by no later than 24 June 2013. One would have thought that the timeous filing of the answering affidavits of Ms Jiba and Mr Mrwebi would in the circumstances have become a matter of critical concern to them. On her own evidence, however, Ms Jiba made no attempt to ensure compliance with the directive. New counsel was briefed to draft the answering affidavits of Ms Jiba and Mr Mrwebi only on 18 June 2013. Nevertheless, by 21 June 2013 counsel had managed to prepare draft answering affidavits and made them available for perusal and comments to be given by midmorning on Sunday, 23 June 2013. Ms Jiba said that she was unaware hereof. On 26 June 2013, two days after the deadline for the filing of the answering affidavits, Ms Jiba had an unscheduled meeting with counsel in chambers. Counsel personally informed her that the draft answering affidavits had been made available. This notwithstanding, the answering affidavits were only filed on 4 July 2013.

[48] Mr Mrwebi took the decision to withdraw the fraud and corruption charges against Mr Mdluli on 4 or 5 December 2011. These charges related only to certain motor vehicle transactions. During April 2012, two members of the NPA, advocates G Breytenbach and J M Ferreira, submitted a memorandum to Ms Jiba. This memorandum was referred to by the parties as the Breytenbach memorandum and for convenience I continue to do so. The Breytenbach memorandum implored Ms Jiba to review the decision of Mr Mrwebi to withdraw the fraud and corruption charges in respect of the motor vehicle transactions. It also mentioned that new evidence of possible further similar offences by Mr Mdluli had since become available.

[49] Ms Jiba did not mention the Breytenbach memorandum in her answering affidavit in the *FUL* matter. In the founding affidavit in the present matter, the GCB suggested that this failure to disclose the Breytenbach memorandum constituted an attempt to mislead the court and that suggestion found favour with the court a quo. However, FUL had obtained the Breytenbach memorandum and it formed part of its papers in the *FUL* matter. This is not clear form the record, but I accept that it was probably submitted with one of FUL's supplementary founding affidavits. Although Ms Jiba did not appear to be aware that the Breytenbach memorandum formed part of the papers, I accept that it is improbable that she intended to conceal the Breytenbach memorandum.

[50] However, this is not the end of the enquiry for present purposes. Ms Jiba stated in her answering affidavit, in the *FUL* matter, that the decision of Mr Mrwebi 'had not been brought to my office for consideration in terms of the regulatory framework' and that she had not received a request to review the decision by a person whom she considered to be relevant. She went so far as to say that to 'descend into the arena without any representations being made to my office' would prejudice Mr Mdluli or any other interested party.

[51] A different picture emerged from Ms Jiba's answering affidavit in the present matter. First, she said that immediately after she learnt that the charges against Mr Mdluli had been withdrawn, she called for a briefing by Mr Mrwebi and Mr Chauke (who had withdrawn murder charges against Mr Mdluli) and was satisfied with the reasons that were advanced for the withdrawal of the charges. Thus, Ms Jiba in fact did review or reconsider the withdrawal of the charges.

[52] Second, Ms Jiba elaborated as follows in respect of the Breytenbach memorandum:

‘135. I deny that the memorandum received from Adv Breytenbach, was from a person or party that I considered relevant or was obliged to consider relevant. It therefore did not constitute representations from a person contemplated by the provisions of section 22(2)*(c)* of the NPA Act, or at all. It was a document from a prosecutor who failed to execute tasks assigned to her by her superior. Pursuant to the suspension of Adv Breytenbach another team of prosecutors was appointed to take the case forward, namely Adv Becker and Adv Viljoen. There were memoranda submitted by these prosecutors in terms of which the opposite view was expressed.’

[53] This view about the Breytenbach memorandum could not have been honestly held. Ms Breytenbach was the regional head of the Specialised Commercial Crime Unit in Pretoria. This memorandum was submitted by ‘the lead prosecutors in the matter’. In their 24 page memorandum they made a persuasive case that Mr Mdluli should be prosecuted on the fraud and corruption charges relating to the motor vehicle transactions. The Breytenbach memorandum was certainly worthy of consideration. The statement that it emanated from a person that was not and should not have been considered relevant, is simply spurious.

[54] Third, after the answering affidavit of Ms Jiba in the present matter had been filed, the GCB requested copies of the memoranda by advocates Becker and Viljoen, in terms of the provisions of rule 35(12). Only one memorandum, dated 25 June 2013, was produced. It did not at all convey that the prosecution of Mr Mdluli should not proceed. It only conveyed that the investigation of the fraud and corruption charges in respect of the motor vehicle transactions and four other matters of similar nature, had not yet been concluded. Thus Ms Jiba’s evidence was untruthful in all three of these respects.

[55] The matters that I have mentioned extend beyond mere incompetence or unsuitability for the position of ANDPP. First, they demonstrate a serious lack

of appreciation or disregard of the duty of an advocate to be of assistance to the court and to uphold the administration of justice. The fact that Ms Jiba was a litigant in official capacity in these matters is no excuse. That was all the more reason for her to conduct the litigation with the utmost trustworthiness and integrity. Second, in all three matters Ms Jiba gave untruthful evidence under oath and thus displayed dishonesty and a lack of integrity.

[56] The importance of legal practitioners being scrupulously honest in their dealing with the court has been stressed time and again in this country – see eg *Toto v Special Investigating Unit* 2001 (1) SA 673 (E) at 683A-F and the cases there cited. As the court stressed in *Kekana* at 655G-656B, in our system of justice the courts should be able to rely absolutely on the word of practitioners, and for that reason there is a serious objection to allowing a practitioner who is untruthful, and deceives or attempts to deceive a court, to continue in practice. What is also relevant, but was not taken into account by the court a quo, is that Ms Jiba has persisted throughout these proceedings with a denial under oath of misconduct on her part. This shows a lack of insight into what she did wrong. In itself it is an important factor which refers adversely on her character, and is a weighty consideration in militating against any lesser stricture than her removal from the roll – see *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 539B-C.

[57] As is mentioned in more detail below, the GCB is the watchdog of the profession. As such, it bears an onerous duty owed to the public at large to ensure that practitioners meet the high standards of integrity expected of them. Instead of recognising the importance of the functions the GCB carries out as *custos morum* of the profession, she berated it. She alleged, inter alia, that the GCB had displayed ‘double standards’, that the founding affidavit of the GCB ‘seeks deliberately to mislead the court and indeed the public’ and that the application ‘is therefore misconceived, mischievous and is designed to

embarrass me.' All these allegations are unsubstantiated. None of this is consistent with the high standards of integrity expected from a practicing advocate.

[58] For the aforementioned reasons I am not persuaded that the court a quo erred in finding that Ms Jiba was not a fit and proper person to practice as an advocate. In fact the reasons to do so are more extensive than those relied on by the court a quo. There is therefore not only no reason to interfere with the exercise of the discretion of the court a quo in respect of the appropriate sanction, but in my view it was correct in ordering Ms Jiba's name to be removed from the roll.

Mr Mrwebi

[59] Mr Mrwebi was a Special Director of Public Prosecutions and headed the Specialised Commercial Crime Unit of the NPA. As I have said, he was directly responsible for submitting the record of his decision in the *FUL* matter. He failed to file a proper record and did not deliver his answering affidavit in time. He gave no acceptable explanation for these failures. On his own evidence he took no interest in these aspects.

[60] These instances of unreliability must be also viewed in the light of what follows. Mr Mrwebi said that he took the decision to withdraw the fraud and corruption charges against Mr Mdluli on 5 December 2011, after he had spoken to Mr Mzinyathi earlier that day. He recorded the reasons for his decision in a memorandum which he said was incorrectly dated 4 December 2011. In the memorandum he expressed scepticism in respect of the merits of the charges, but said that this was unimportant in view of his conclusion. His conclusion was that 'the offences for which Mdluli was charged fall squarely within the mandate' of the Inspector-General of Intelligence (IGI) in terms of the

Intelligence Services Oversight Act 40 of 1994. He concluded that the prosecution of Mr Mdluli could therefore not continue and that the investigator should advise the complainants to refer the complaint to the IGI.

[61] On 22 January 2013 Mr Mrwebi testified in disciplinary proceedings instituted against Ms Breytenbach, after her suspension from office during April 2012. His evidence under cross examination in respect of his engagement with Mr Mzinyathi presented a sorry picture. He acknowledged that s 24(3) of the NPA Act required the agreement of Mr Mzinyathi in order for the charges to be withdrawn. He then attempted to say that he did reach such agreement with Mr Mzinyathi on 5 December 2011. Then he referred to this as a '50/50 agreement'. Thereafter he referred to it as 'substantial' agreement. However, earlier in his evidence he said that at their meeting, on 5 December 2011, Mr Mzinyathi had expressed the view that there was a *prima facie* case against Mr Mdluli. Mr Mrwebi eventually conceded that Mr Mzinyathi did not agree to stop the prosecution at all.

[62] This part of the evidence reads as follows:

'ADV TRENGOVE: He did not agree to stop the prosecution at all. Correct?
ADV MRWEBI: No, in respect of certain issues.
ADV TRENGOVE: He did not agree to stop the prosecution at all.
ADV MRWEBI: In respect of certain issues.
ADV TRENGOVE: What do you mean by that?
ADV MRWEBI: He identified, he agreed with me in terms of the problems that there were that . . .
ADV TRENGOVE: Did he agree to stop the prosecution?
ADV MRWEBI: The decision was mine.
ADV TRENGOVE: Did he agree to stop the prosecution?
ADV MRWEBI: Okay let's say he did not agree to stop the prosecution.
CHAIRPERSON: Is that your answer?
ADV MRWEBI: That's my final answer.'

Notwithstanding this, Mr Mrwebi thereafter recanted by saying that he believed that he had reached substantial agreement with Mr Mzinyathi on 5 December 2011. This prompted counsel to say that he would submit to the chairperson of the enquiry that this evidence was patently dishonest. That would indeed be a proper description of his evidence.

[63] By then Mr Mrwebi must have realised that his decision would not withstand scrutiny. As an officer of court he should have conceded this. But Mr Mrwebi persisted in opposing the relief claimed in respect of his decision in the *FUL* matter. In his answering affidavit in that matter he glossed over his conversation with Mr Mzinyathi on 5 December 2011. He then said that at his subsequent meeting with Mr Mzinyathi and Ms Breytenbach, on 9 December 2011, they both agreed with him that there was a serious defect in the case against Mr Mdluli on the merits. This was not only irrelevant, as the decision to withdraw the charges had been taken on 5 December 2011, but was emphatically shown to be untrue by the evidence of Mr Mzinyathi and the conduct of Ms Breytenbach.

[64] In his answering affidavit in the present application, Mr Mrwebi repeatedly said that on 5 December 2011 he had been under the impression that he was only required to speak to Mr Mzinyathi in order to comply with s 24(3) of the NPA Act, and that it had not been necessary to obtain his approval. This directly contradicted his evidence at the disciplinary hearing.

[65] It is quite astonishing that a Special Director of Public Prosecutions could have held the view that the investigation of fraud and corruption charges relating to motor vehicle transactions fell within the functions of the IGI. When Mr Mzinyathi and Ms Breytenbach questioned this during their meeting with Mr Mrwebi on 9 December 2011 (they had spoken to the legal advisor of the

IGI on the previous day), Mr Mrwebi intimated that his withdrawal of the charges on 5 December 2011 should be regarded as provisional, pending further investigation.

[66] On 26 March 2012 a letter from the office of the IGI to the Acting National Commissioner of the SAPS, dated 19 March 2012, was handed to Mr Mrwebi. This letter conveyed the following clear position:

'1. We refer to your letter of the 22 February 2012 wherein you requested an opinion on the reasons advanced by the National Prosecuting Authority for the withdrawal of the criminal charges against Lt General Mdluli.

2. In response to the Memorandum of Adv Mrwebi of the 4 December 2011 we advise as follows:

2.1 The Inspector- General of Intelligence (IGI) derives her mandate from the Constitution of the Republic of South Africa, 1996 and the Intelligence Services Oversight Act, 1994 (Act 40 of 1994) which provides for the monitoring of the intelligence and counter- intelligence activities of the Intelligence Services,

2.2 Any investigation conducted by the Inspector-General is for the purposes of intelligence oversight which must result in a report containing findings and recommendations;

2.3 The mandate of the IGI does not extend to criminal investigations which are court driven and neither can IGI assist the police in conducting criminal investigations. The mandate of criminal investigations rests solely with the Police;

As such we are of the opinion the reasons advanced by the NPA in support of the withdrawal of the criminal charges are inaccurate and legally flawed. We therefore recommend that this matter be referred back to the NPA for the institution of the criminal charges.'

[67] Without any further investigation or engagement, Mr Mrwebi responded in writing to General Dramat of the SAPS on 30 March 2012 ‘that my decision to instruct the withdrawal of the charges still stands and that the matter is closed’. His subsequent explanation of this conduct, namely that it had been agreed on 9 December 2011 that there was a serious defect in the case and that nothing changed thereafter, has been shown to be false. The inference is irresistible that Mr Mrwebi had throughout used his senior position in the prosecutorial service to advantage Mr Mdluli and to ensure that he not be prosecuted.

[68] As already set out, Mr Mrwebi lied about the events of both 5 and 9 December 2011 and abused his position. Not only has Mr Mrwebi shown himself to be seriously lacking in integrity, but has failed in these proceedings to have taken the court into his confidence and fully explained his actions. All of this hallmarks him as a person unfit to practice as an advocate, particularly in the light of the authorities already referred to when dealing with Mr Jiba. I have no hesitation in endorsing the order of the court a quo that Mr Mrwebi should be struck from the roll of advocates.

Cross appeal

[69] The GCB cross appeals against the following order of the court a quo:

‘The case against Mzinyathi (third respondent) is hereby dismissed with costs, such costs to include the costs of two counsel up to the stage when the applicant (GCB) indicated that it will not persist against the third respondent.’

The GCB submits that no order should have been made in respect of the costs of Mr Mzinyathi.

[70] In the *FUL* matter, Murphy J made findings in respect of the credibility of Mr Mzinyathi that required serious consideration of whether he was a fit and proper person to continue to practice as an advocate. Murphy J *inter alia* said:

'Taking account of how it was placed before the court by Mzinyathi, after FUL's heads of argument were filed, without explanation for its lateness, and its inconsistency with his testimony at the disciplinary hearing, that he was presented with a *fait accompli* and was unable to influence the decision because Mrwebi claimed to be *functus officio*, this evidence of the DPP of North Gauteng, to the effect that he ultimately concurred, must regrettably be rejected as un-creditworthy. The affidavit is a belated, transparent and unconvincing attempt to re-write the script to avoid the charge of unlawfulness.'

These findings formed the heart of the complaint against Mr Mzinyathi in the present application.

[71] In his answering affidavit in the present application, Mr Mzinyathi explained the circumstances of his involvement and the context of his affidavit in the *FUL* matter. In the result, the GCB did not engage with the answering affidavit in its replying affidavit and at the hearing in the court a quo declared that it left the matter of Mr Mzinyathi in the hands of the court.

[72] The GCB is the *custos morum* of the profession of advocates, in the public interest, in much the same manner that the Law Societies act as the guardians of the attorneys' profession. As such it brings matters of alleged misconduct of advocates to the attention of the court. The nature of an application by the GCB to strike an advocate from the roll of advocates is a disciplinary enquiry conducted by the court. In these *sui generis* proceedings the GCB is therefore not in the position of an ordinary litigant. See *Society of Advocates of South Africa (Wits Division) v Edeling* 1998 (2) SA 852 (W) at 859G-I. For these reasons our courts have over many decades recognised the principle that unless the GCB had acted irresponsibly in bringing a disciplinary matter to the attention of the court, the GCB should not be mulcted in costs,

even if the court decides that the practitioner should not be struck from the roll or suspended. See the remarks of Tindall J in *Incorporated Law Society v Taute* 1931 TPD 12 at 17, approved by this court in *Botha v Law Society, Northern Provinces* [2008] ZASCA 106; 2009 (1) SA 227 (SCA) para 22.

[73] It was with explicit recognition of this principle that counsel for Ms Jiba submitted that no order as to costs should be made in the event of her appeal being successful. The court a quo was not alive to this principle and therefore misdirected itself. The GCB cannot be faulted for bringing the findings of Murphy J to the attention of the court. It was its duty to do so. Even though the answering affidavit of Mr Mzinyathi in the present application appeared to contain an acceptable explanation of the criticisms of Murphy J, it was not for the GCB to assume the function of the court and determine that the proceedings in respect of Mr Mzinyathi should terminate. Its decision to leave the matter in the hands of the court, was principled and responsible. In my judgment the GCB should therefore not have been ordered to pay Mr Mzinyathi's costs.

[74] I would therefore make the following order:

1 The appeal of the first appellant (Ms Jiba) and the second appellant (Mr Mrwebi) are dismissed, and they are in each instance to pay the costs of the respective appeal, such costs to include the costs of two counsel.

2 The cross appeal of the GCB in the case of the third respondent a quo, Mr Mzinyathi, is upheld with costs of two counsel, and para 1 of the order of the court a quo is altered to read as follows:

'The case against Mzinyathi (third respondent) is dismissed with no order as to costs.'

C H G Van der Merwe

Judge of Appeal

Appearances

For the First Appellant:	N Arendse SC (with him T Masuku and S Fergus) Instructed by: Majavu Inc. Attorneys, Johannesburg; Rampai Attorneys, Bloemfontein.
For the Second Appellant:	M Rip SC (with him R Ramawele SC) Instructed by: A M Vilakazi Tau Attorneys, Pretoria; Lovius-Block, Bloemfontein
For the Appellant and Respondent in Cross-Appeal:	S Burger SC (with him N T Mayosi) Instructed by: Magaga Inc. Attorneys, Pretoria; Honey attorneys, Bloemfontein.
For the Respondent in Cross-Appeal:	D B Ntsebeza SC (with him S X Mapoma) Instructed by: Bernhard van der Hoven Attorneys, Pretoria; Rosendorff Reitz Barry, Bloemfontein.