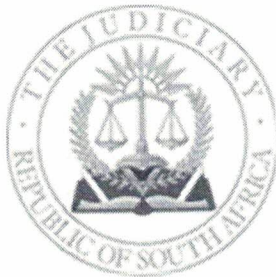


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2018/40335

DELETE WHICHEVER IS NOT APPLICABLE

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

06/06/2023

DATE

SIGNATURE

In the application of:

THE JOHANNESBURG SOCIETY OF ADVOCATES

Applicant

And

HASSAN EBRAHIM KAJEE

Respondent

Neutral citation: *The Johannesburg Society of Advocates v Hassan Ebrahim Kajee*
(Case No: 40335/2018) [2023] ZAGPJHC 645 (6 June 2023)

This judgment is made an Order of Court by the Judges whose names are reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judges or secretaries. The date of this Order is deemed to be April 2023.

Summary: Advocate – overcharging fees. Enquiry into conduct sui generis. Serious misconduct. Only appropriate sanction is striking from the roll of advocates.

JUDGEMENT

Makume J et Wepener J:

[1] This application was brought by the applicant to this court for it to consider striking the name of the respondent off the roll of advocates. The respondent was admitted to practice as an advocate of the High Court of South Africa by the Natal Provincial Division of the High Court on the 29th May 1995. He became a member of the Johannesburg Society of Advocates on the 1st May 2006.

[2] These proceedings are sui generis and of a disciplinary nature being proceedings of the court and not of the parties. See *Edeling*¹ where reliance was placed on *Solomon v Law Society of the Cape of Good Hope*² where the following was said:

“It is difficult to place this kind of application in a particular legal docket. The proceedings are statutory and *sui generis*, and are no more than a request to the court by the *custos morum* of the profession to use its disciplinary powers over and officer of the court who has misconducted himself.”

[3] The learned judges in the *Edeling* matter referred to a number of authorities in support of this dictum.³ In *Edeling* the learned judges continued to state:⁴

¹ *Society of Advocates of South Africa (Witwatersrand Local Division) v Edeling* 1998 (2) SA 852 (W) at 859I.

² 1934 AD 401 at 408.

³ See also *Hassim (also known as Essack) v Incorporated Law Society of Natal* 1977 (2) SA 757 (A) at 767C--D; *Cirota and Another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 187G--H; *Hurter and Another v Hough* 1987 (1) SA 380 (C) at 383H; *Society of Advocates of South Africa (Witwatersrand B Division) v Rottanburg* 1984 (4) SA 35 (T) at 38E; *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 393D--E and *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 854F.

⁴ At 860B – 861F.

“Proceedings of this nature are those of the Court and not of the parties. It was the Court in the first instance who admitted a person as an advocate when it was satisfied that such a person was a fit and proper person to be allowed to practise as an advocate. The Court exercises its inherent right to control and discipline the practitioners who practise within its jurisdiction in applications of this nature. See *De Villiers and Another v McIntyre* NO 1921 AD 425 at 428--9 and *Society of Advocates of South Africa (Witwatersrand Division) D v Cigler* 1976 (4) SA 350 (T) at 351B--D. In *Society of Advocates of Natal and Another v Knox and Others* 1954 (2) SA 246 (N) at 247G-H the following was stated by Broome JP:

'Notwithstanding the absence of any express statutory provision, there is no doubt that this Court has an inherent disciplinary jurisdiction over practitioners. In *De Villiers and Another v McIntyre* NO 1921 AD 425 at 435, Solomon JA said that the Courts have inherent disciplinary powers over practitioners in cases of misconduct or unprofessional conduct. The judgment of this Court in *Ex parte Stuart and Geerdts* 1936 NPD 57 at 81 is to the same effect. Prior to the incorporation of the various Law Societies, the Courts asserted a similar inherent jurisdiction in regard to attorneys, eg *Natal Law Society v Button* 3 NLR 36 at 67; *Re Cairncross* 1877 Buch 122; *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 409. The jurisdiction of this Court to make the order which is claimed is therefore beyond doubt.'

See also the judgment at 248F-G, where the Court observed that it had the power to act *mero motu* in regard to misconduct by a practitioner.

The plaintiff in an application such as the present approaches the Court as *custos morum* of the profession. Its role is merely to bring evidence of a practitioner's misconduct to the attention of the Court for the latter to exercise its disciplinary powers. The plaintiff acts in the interests of the Court, the profession and the public at large. It is under a duty to do so.

See in this respect *Vereniging van Advokate van Suid-Afrika (Witwatersrand Afdeling) v Theunissen* 1979 (2) SA 218 (T) at 222F-G:

'Die Wet op Toelating van Advokate 74 van 1964, in art 7, erken die status van die Vereniging van Advokate en bepaal ook dat die Hof mero motu nie 'n advokaat van die rol kan skrap nie, gaan verder en bepaal dat die Vereniging van Advokate locus standi het om so op te tree. Dit is duidelik en dit word ook so besef deur die Advokaatsorde dat 'n plig op hom as dissiplinerende liggaam rus om in openbare belang op te tree, en behoorlik op te tree, in terme van die Wet.'⁵

See also *Society of Advocates of SA v Rottanburg* 1984 (4) SA 35 (T) at 39I-40C, where the following was stated:

'The Bar Council, as the *custos morum* of the profession, investigates complaints against its members and, if it deems it necessary, brings to the notice of the Court such facts as it possesses with regard to unprofessional conduct and asks the Court to deal with them by suspending them or striking them off the roll, or in such a way as the Court thinks fit. The Bar Council is thus to a large extent responsible for the proper investigation of the complaints which are ultimately brought to the attention of the Court. The enquiry held and the findings made after the enquiry was held really form part and parcel of the investigation of the complaints which enable the Bar Council to bring the facts relating to the complaints to the notice of the Court. The Bar Council is entitled to move the Court for disciplinary steps against the respondent, and its counsel invariably presents argument in support of such disciplinary steps. In the end it is the Court, and exclusively the Court, that has to be satisfied - on the facts placed before it - that the respondent is not a fit and proper person to continue to practise as an advocate.'

⁵ Loosely translated: The Admission of Advocates Act 74 of 1964 in section 7, acknowledges the status of the Society of Advocates and determines also that the court cannot strike an advocate from the roll mero motu, and goes further and enacts what the Society of Advocates has locus standi to act against an advocate. It is clear and is also so understood by the Society that it has a duty as disciplinary authority, to act in the public interests in terms of the Act.

The following was also said by the Court in *Algemene Balieraad van Suid-Afrika v Burger en 'n Ander* 1993 (4) SA 510 (T) at 516G-H:

'Daardie subartikel gee myns insiens statutêre beslag aan die behoefte en inherente reg wat die Hof gehad het om, in die uitvoering van sy toesig oor regspraktisyns, iemand te hê wat die gegewens en bewysmateriaal voor hom sal plaas, ingeval daar 'n vraagteken ontstaan oor 'n regspraktisyn se geskiktheid om langer op die rol te bly.'⁶

See also *Solomon v Law Society of the Cape of Good Hope* (supra at 408-9).

In *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 853G-H it was emphasised that the proceedings are sui generis. The Court then went on to say:

'Uit die aard van die dissiplinêre verrigtinge vloei voort dat van 'n respondent verwag word om mee te werk en die nodige toeligting te verskaf waar nodig ten einde die volle feite voor die Hof te plaas sodat 'n korrekte en regverdigde beoordeling van die geval kan plaasvind. Blote breë ontkennings, ontwykings en obstruksionisme hoort nie tuis by dissiplinêre verrigtinge nie.'⁷

[4] The nature of these proceedings and the approach by the court are thus settled law and we have not been favoured with any contrary precedent or argument. The role of the applicant is thus being a nominal applicant that places evidence before the court for it to consider the matter.

⁶ Loosely translated: That section is the statutory basis for the inherent requirement and right which the court has, in the exercise of its oversight duty over legal practitioners, for a party that can place the information and evidential material before the court, in the case where doubt arises as to a legal practitioner's fitness to remain on the roll.

⁷ Loosely translated: From the nature of the disciplinary proceedings it flows that it can be expected that a respondent must co-operate and furnish information where necessary in order to place the full facts before the court so that a correct and just consideration can be made. Vague denials, eluding issues and obstructionism have no place in disciplinary proceedings.

[5] This application is brought in terms of section 7(1)⁸ of the Admission of Advocates Act ("Advocates Act").⁹ It is common cause that the Legal Practice Council, who now plays an important role regarding legal practitioners, elected to rely on section 116(2) of the Legal Practice Act (LPA)¹⁰ and decided not to actively participate in these proceedings. This application was initiated prior to the promulgation of the LPA, which repealed the Advocates Act, and is properly before this court.

[6] Although not foreshadowed in the affidavits filed in this matter, the respondent elected to raise a number of points in *limine*, eleven in all. Significantly, none of the points were raised at the time when the respondent attended court and agreed to his suspension from practice. We shall deal with these points at the outset.

THE FIRST POINT IN LIMINE

⁸ "Suspension of advocates from practise and the removal of their names from the roll of advocates

(1) 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—

(a) in the case of a person who was admitted to practise from the roll as an advocate in terms of subsection (1) of section 3 or is deemed to have been so admitted—

(i) if he has ceased to be a South African citizen; or

(ii) in the case of a person who is not a South African citizen, other than a person contemplated in subparagraph (iii), if he has failed to obtain a certificate of naturalisation in terms of the South African Citizenship Act, 1949 (Act 44 of 1949), within a period of six years from the date upon which before or after the commencement of this subparagraph he was admitted to the Republic for permanent residence therein or within such further period as the court either before or after the expiration of the said period for good cause may allow; or

[S 7(1)(a)(ii) subs by s 2(a) of Act 60 of 1984.]

(iii) ...

[S 7(1)(a)(iii) ins by s 2(b) of Act 60 of 1984; rep by s 3(a) of Act 55 of 1994.]

(b) ...

[S 7(1)(b) subs by s 2 of Act 73 of 1965; rep by s 2 of Act 33 of 1995.]

(c) in the case of a person who was admitted to practise as an advocate in terms of section 5, if it appears to the court that he has ceased to reside or to practise as an advocate in the designated country or territory in which he resided and practised at the time of his admission to practise as an advocate of the Supreme Court or that that country or territory has ceased to be a designated country or territory for the purposes of the said section; or

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

(e) on his own application."

⁹ Act 74 of 1964.

¹⁰ Act 28 of 2014: "(2) Any proceedings in respect of the suspension of any person from practice as an advocate, attorney, conveyancer or notary or in respect of the removal of the name of any person from the roll of advocates, attorneys, conveyancers or notaries which have been instituted in terms of any law repealed by this Act, and which have not been concluded at the date referred to in section 120(4), must be continued and concluded as if that law had not been repealed, and for that purpose a reference in the provisions relating to such suspension or removal, to the General Council of the Bar of South Africa, any Bar Council, any Society of Advocates, any society or the State Attorney must be construed as a reference to the Council."

LOCUS STANDI AND ULTRA VIRES ACTS AND NON-COMPLIANCE WITH THE APPLICANT'S CONSTITUTION

[7] The respondent complains that the applicant failed to act in accordance with its own constitution and thus acted ultra vires resulting in its resolutions to bring this application being “void *abinitio* and therefore pro non scripto”. The respondent goes on to attack the validity of the resolutions, two of which formed the basis of an urgent application brought for the suspension of the respondent from practice.¹¹ We immediately note that any complaint of the sufficiency or otherwise of the papers in the urgent application is not on appeal before us and we cannot be called upon to revisit the matter that served before another court and which was, ostensibly, properly decided and finalised.

[8] The resolutions, the respondent submitted, were pro non scripto. It is said that these resolutions suffer from certain defects. On the basis that they do, and we make no finding in this regard, the argument misses the fact that the applicant's participation in these proceedings are merely incidental and, in effect, at the invitation of this court. It can and should place all evidence available to it before this court as a consequence of its duty to this court. It is the contents of the affidavits that are filed that matters not whether the applicant's controlling body authorised someone to do so. We find that the complaint that the affidavits so filed lack authority to ‘act against the respondent’ is misplaced and does not appreciate the nature of these proceedings. We indicated to counsel during the hearing that the constitution of the applicant, parts of which were quoted in the heads of argument on behalf of the applicant was not proved by evidence and that it would be dangerous to rely on excerpts contained in heads of argument only. This is so as this this court can, due to its own experience, confidently say that constitution of the applicant is

¹¹ The applicant brought an urgent application to this court under a different case number in which it sought the respondent's suspension from practice pending either an enquiry to be held by the applicants professional committee or an application to this court to strike the applicant's name off the roll of advocates. The order was granted on 2 October 2018. It is of some importance to note that the order suspending the respondent from practice was issued after the respondent, who was personally present at court, had agreed to the order. The order issued on 2 October 2018 also required the respondent to make certain documents regarding his fees and accounts available to the legal applicant forthwith. We shall deal with the relevance hereof later.

a dynamic document and is adapted in various respects from time to time. The need to prove the correct version by way of affidavit is evident. The constitution of any association is not something which this court can take judicial notice of and particularly not of portions quoted in heads of argument. It requires proof before it can form the basis of any findings. In the absence of such proof the submission that the resolutions in this matter fall foul of the applicant's constitution is flawed. It was further submitted that three of the resolutions were not signed by the applicant's secretaries and thus the signature of the chair of the applicant was insufficient. Nowhere in the 'constitutional provisions' quoted by the respondent in the heads of argument, is there a reference to a requirement that the secretaries of the applicant are the authorised signatories of resolutions. This highlights the danger to rely on the portions of a 'constitution' referred to in the heads of argument and which constitution was not proved on the papers before this court. The submission regarding the resolutions was developed so that it was said that because the resolutions were *pro non scripto* the applicant cannot act as a party before this court and could not properly appear before the court in the urgent proceedings. We have shown the fallacy of the submission both regarding the previous urgent application where the respondent agreed to an order, and the reliance on the constitutional provisions which were not proved nor were the applicant's afforded an opportunity to deal with the allegations regarding its alleged *ultra vires* conduct.

[9] The point in *limine* relating to the applicant's lack of jurisdiction over the respondent was effectively dealt with in the judgment by Mokgoathheng J during the suspension application when he¹² said the following:

"The Respondent's resignation from the Applicant does not affect the Applicant's locus standi to launch an application for the Respondent's suspension from practicing as an advocate or to apply for an order to strike off the Respondent's name from the roll."

¹² At para 17A.

for the respondent did not answer and persisted that, to lawfully obtain the information, it must be after compliance with the PAIA prescribed procedures. In this matter there was no refusal by these officials to furnish the information. They furnished it voluntarily as they, or their departments, voluntarily disclosed the information in their possession which would be used either at an enquiry by the applicant or by this court. PAIA itself provides for instances where information may be shared without its provisions being followed. In this regard there are at least two sections: i.e. section 7 and 15 which allows for such disclosure. It has not been shown that the voluntary production of documents is in any way unlawful because the procedures provided for by PAIA were not followed. PAIA does not provide that by failing to follow the prescribed procedures, the handing over of information would be unlawful and that a party may not obtain documents on a voluntary basis. The scheme of the Act, save for the mandatory protection of records, is to enable a party to obtain information that is not readily available. The mandatory protection of information did not feature in the submissions before us. We are of the view that there is no merit in this point in *limine*.

THIRD POINT IN LIMINE

ULTRA VIRES ACTIONS OF THE STATE OFFICIALS.

[15] The gravamen of this submission is that officials of the state did not have the necessary authority to depose to affidavits and they thus acted ultra vires and their evidence should be rejected and excluded from the papers. The misconception in this submission is apparent. No witness needs authority to testify unless it can be shown there is a legal bar against such witness testifying without authority from its superior. We have found no such law. Indeed as far back as 1992, Fleming DJP held in *Eskom v Soweto City Council*¹⁴ as follows:

¹⁴ 1992 (2) SA 703 (W) at 706.

“The evidence of Roussouw cannot be ignored because he is not ‘authorised’. If attorney Bennet has authority to act on the respondent’s behalf, he may use any witness who in his opinion advances respondent’s application. A witness, also when a deponent, may testify even if he has no authority to bring, withdraw or otherwise deal with application itself.”¹⁵

The point in *limine* fails.

FOURTH POINT IN LIMINE

NON-COMPLIANCE WITH SECTION 33(1) OF THE CONSTITUTION READ WITH SECTION 3(1) OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT (PAJA)¹⁶

[16] The respondent sets out several facts and submitted that the applicant acted in procedurally unfair manner when deciding to suspend the respondent. The submission misses the fact that the applicant decided to ask the court to rule whether to suspend the respondent, based on the available evidence. There was thus no administrative action taken by the applicant other than to place relevant evidence before the court. The respondent now seeks this court to set the suspension ordered by another court aside due to the applicant’s alleged non-compliance with section 3 of PAJA. Again, this issue was not raised in the papers and the applicant could not deal with it any affidavit. Nevertheless, the submission that the applicant took a decision to suspend the respondent is flawed. Even if the applicant did not afford the respondent a fair administrative opportunity (which we do not find) the matter is now before this court with powers as provided for in the Advocates Act. The decision by the applicant to refer the matter to this court is not administrative action for purposes of PAJA. PAJA defines ‘decision’ as

¹⁵ See also *Barclays National Bank Limited v Love* 1975 (2) SA 514 (D).

¹⁶ Act 3 of 2000.

“ . . . any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision including a decision relating to -

- (a) making, suspending, revoking or refusing to make an order, award or determination;
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
 - (c) issuing, suspending, revoking or refusing to issue a licence, authority or 50 other instrument;
 - (d) imposing a condition or restriction;
 - (e) making a declaration, demand or requirement;
 - (f) retaining, or refusing to deliver up, an article; or
 - (g) doing or refusing to do any other act or thing of an administrative nature,
- and a reference to a failure to take a decision must be construed accordingly. . . .”

[17] The submission is unfortunately somewhat convoluted.¹⁷ It does not set out clearly what decision was taken unfairly. It seems that the applicant is referring to a “decision to

¹⁷4.7 On 25 September 2018, after launching the urgent application the applicant sent an email requesting the respondent to furnish his fee book, and invoices.

4.8 What becomes evident from the above is that apart from not following its own constitution the applicant ignored the Promotion of Administrative Justice Act, No.3 of 2000 in that it was not compliant in relation to Section 3 (1) of the said Act which reads as follows: -

3. Procedurally fair administrative affecting any person

(1) Administrative action which materially and adversely affects the rights of legitimate expectations of any person must be procedurally fair.

4.9 The language used is peremptory and leaves no grounds for compromise to the section nor any room for discretion.

4.10 It is manifestly clear that the applicant ignored the fact that its decision would materially and adversely affect the right of legitimate expectation apropos the respondent as the respondent was never given a procedurally fair hearing and a decision to suspend the respondent was taken even before the respondent was given an opportunity to reply to the applicant's letter of the 6 September 2018.

4.11 Given the fact that it was not procedurally fair in terms of Section (3) of PAJA No. 3 of 2000, it stands to reason that the procedural unfairness should be grounds enough to have this application and the suspension application brought under case number 35095/2018 dismissed by the powers given to this Honourable Court has inherent power in terms of Section 172 (1) (a) (b) (i) & (b) (ii) of the Constitution.

4.12. In light of the foregoing, it is respectfully submitted that the applicant's breach of Section 3(1) of the PAJA No. 3 of 2000, which is meant to give effect to Section 33(1) Of the Constitution of the RSA (supra) renders both this application, as well as, the suspension application, legal nullities.

suspend the respondent". No such decision was taken by the applicant. The further submission is that the applicant should have exhausted its own internal remedies, by holding an enquiry before approaching the court. The submission fails to appreciate the true nature of this application or the role of the applicant in these proceedings. Its own intended hearing has no bearing on the powers of the court. Nor has it been shown that the applicant could exercise any power over the respondent after the respondent resigned his membership of the applicant. Relying on *Hewetson*,¹⁸ it was submitted that the matter should be sent back to the applicant to first have a disciplinary enquiry before these proceedings can take place. The submission is based on an incorrect reading of *Hewetson*. There the court referred the matter back to the court of first instance for it to receive evidence and to consider whether a striking off or suspension was justified. It has nothing to do with exhausting of internal remedies. The entire argument, consequently, fails.

FIFTH POINT IN LIMINE (AS READ TOGETHER WITH THE EIGHTH POINT IN LIMINE)
CLAUSE 40 OF THE MAGNA CARTA – JUSTICE DELAYED IS JUSTICE DENIED

[18] Again, the respondent did not afford the applicant an opportunity to deal with this issue in its affidavits. The respondent sets out certain facts:

- 1) There was an urgent application and the respondent was suspended on 24 October 2018.
- 2) On 31 October 2018 the applicant brought an application to strike the name of the applicant off the roll.
- 3) The answering affidavit was filed on 20 November 2018.
- 4) A reply was filed late.

¹⁸ *Hewetson v The Law Society of the Free State* 9948/2018) ZASCA 49 (5 May 2020).

Despite several other references in the heads of argument that do not bolster this ground, the respondent fails to set and refer to all the appeals that followed to both to the Supreme Court of Appeal and the Constitutional Court. There was also an application for rescission. With all these matters in progress there can be no criticism that the applicant did not press the striking off application whilst the rescission and appeal matters were in the process of being dealt with. The applicant resumed this application for the striking off of the respondent after all the interlocutory matters were dealt with.

[19] There is no merit in the complaint that there was undue delay by the applicant in furthering this present application.

SIXTH POINT IN LIMINE

NON-JOINDER

[20] The respondent submitted that several persons had an interest in the striking off application and should have been joined in the matter. They are the Minister of Police, the Minister of Justice and Constitutional Development, the State Attorney Johannesburg and the Director of Public Prosecutions.

[21] The non-joinder was said to render the application fatally defective. It was further submitted that a judgment of this court may affect those persons prejudicially. The immediate problem with this submission is that the respondent confuses witness statements given by representatives of the witnesses and the possibility of prejudice that may occur as a result of any judgment. No such prejudice to the ministers and officials has been shown and it is no more than an allegation in heads of argument. It is further stated that the State Attorney and the National Director of Public Prosecutions are required to be joined because of a legal and substantial interest, and more particularly

because a member of the South African Police Services volunteered documents relating to information “from both the Minister of Police and the Director of Public Prosecutions”. Again, the respondent confuses a witness and a party with a substantial interest that could suffer prejudice. No such interest nor perceived prejudice has been disclosed. The respondent only concludes that there is such interest or prejudice without any primary facts in support thereof. The point has no merit.

SEVENTH POINT IN LIMINE

JURISDICTION OF THE APPLICANT

[22] This submission is, again, based on the unproven constitution of the applicant. It is said that the applicant is not entitled to “invoke further sanctions . . . before this court” until such time that it completes an intended disciplinary enquiry. The submission is plainly wrong. The respondent resigned his membership of the applicant and has not shown that the applicant retained residual competence to have a disciplinary enquiry regarding his conduct after his resignation. Secondly, we have set out the powers and duties of this court regarding the conduct of an advocate which may require investigation by the court itself. This enquiry is, consequently, not hampered by any conduct that the applicant may or may not have followed. The point in *limine* must fail.

NINTH POINT IN LIMINE

NON-COMPLIANCE WITH THE JUSTICE OF THE PEACE AND COMMISSIONER OF OATHS ACT¹⁹

[23] The respondent submitted that the affidavits in the urgent application that led to his suspension, and in this application, were not properly commissioned. The complaint regarding the urgent matter was abandoned. The complaint in this matter relates to two

¹⁹ Act 16 of 1963.

affidavits of two past chairs of the applicant. There are two answers to this complaint. The first is that a court has a discretion to allow affidavits despite shortcomings in the commissioning of the affidavits. In *Christodoulos v Jacobs*, Meyer J (as he then was) said:²⁰

“Mr Christodoulos argues that the designation of the commissioners of oaths, the offices held by them and whether the deponents are male or female are not stated in the affidavits of Messrs Stapelberg, HJ Jacobs and JA Jacobs and of Ms Otter. It is settled law that the court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether there has been substantial compliance with the regulations. In *Lohman v Vaal Ontwikkeling* 1979 (3) SA 391 (T) at 398G-399A, Nestadt J said the following:

‘It is now settled (at least in the Transvaal) that the requirements as contained in regs 1,2,3 and 4 are not peremptory but merely directory; the Court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with them has been proved or not (*S v Msibi* 1974 (4) SA 821 (T)). In *Ladybrand Hotels v Stellenbosch Farmers’ Winery* (supra) [1974 (1) SA 490 (O)] a similar conclusion was arrived at. In that case the admissibility of an affidavit was attacked on the basis that the certification did not state that the deponents had signed it in the presence of the commissioner of oaths. It was held that the *maxim omnia praesumuntur rite esse acta* applied, that there was an onus on the person who disputes the validity of the affidavit to prove by evidence the failure to comply with the prescribed formalities and that in the absence of such evidence the objection taken failed. In any event, it was held that if the affidavit was defective it should be condoned.’

It is of course a question of fact in each case whether there has been substantial compliance or not.”

²⁰ At para 14.

[24] In addition, both the deponents filed further affidavits properly commissioned in which they confirm the facts that are set out in the original affidavits. The evidence of the deponents is therefore properly before the us and, in so far as it may be necessary, the shortcomings are condoned. In the circumstances, the point in *limine* must fail.

TENTH POINT IN LIMINE

NON-COMPLIANCE WITH SECTION 3(1) OF THE LAW OF EVIDENCE AMENDMENT ACT²¹

[25] The complaint was that certain persons who furnished evidence or documents did not confirm the facts on affidavit. The complaint missed that the witness Isaacs did indeed file a confirmatory affidavit. The witness Beukes is not required to file an affidavit as the documents handed over by that witness is available before the court and the respondent is in a position to comment on it, if he so wishes. In the circumstances the complaint has not merit.

ELEVENTH POINT IN LIMINE

URGENCY

²¹ Act 45 of 1988: "3(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."

[26] The point suggested that the urgent application which was launched and resulted in the agreed order of suspension of the respondent, should not have been treated as an urgent matter and that matter was thus void *abinitio*. After some debate, counsel for the respondent conceded that point has not place in this application.

[27] We consequently conclude that none of the points in *limine* have any merit and they should not hamper the consideration of the matter.

BACKGROUND FACTS

[28] On the 15th August 2018 Mudau J, under case number 25544/2018 in the matter between the Minister of Police vs Ayanda Irvin Kunene (first Respondent), Kgosi Gustav Lekabe (second Respondent), Minister of Correctional Services (third Respondent), Hussan Ebrahim Kajee (fourth Respondent), being an application to stay a writ of execution, made certain findings against the respondent whose conduct amounted to collusive, corrupt and fraudulent dealings between him and Lekabe, the State Attorney.

[29] On the 21st September 2018 the applicant addressed a letter to the respondent in which reference to the Mudau J finding was made. Paragraph 5 of the letter reads as follows:

“You are requested to make available to the Professional Fees Committee of the Bar Council your fee book and invoices (or copies thereof) for the period January 2012 to 31st August 2018.”

[30] Instead of complying with the request respondent resigned as a member of the applicant in a letter dated the 26th September 2018.

[31] On the 2nd October 2018 in the urgent court under case number 35095/2018, Justices Mokgoathheng and Modiba granted an interim order suspending the respondent from practicing as an advocate.

[32] The respondent filed his answering affidavit opposing the final granting of the order. In his answering affidavit, filed out of time, he states the following:

- (i) He denies he has made himself guilty of misconduct and dishonestly relating to overreaching;
- (ii) That he resigned as a member of the applicant on 26 September 2018 and, accordingly that the applicant has no power or jurisdiction and authority to discipline him or bring an application for his suspension or striking off;
- (iii) That, because of him having resigned the Johannesburg Society of Advocates, the applicant has no right to access his books of account;
- (iv) Section 7(2) and (3) of the Advocates Admissions Act does not grant the applicant locus standi;
- (v) The Kunene matter is sub-judice and a court would get an opportunity to look into his conduct in that matter;
- (vi) He criticises the findings by Mudau J and says that the judge simply regurgitated the untested version of the police. However, he later says that Lekabe actually set the record straight in his answering affidavit;
- (vii) Lekabe instructed him to deal with the Kunene matter as a stated case. It was not his decision;
- (viii) He denies that the practice directive required that the minister had to be made aware of the settlement;

- (ix) The fees that he has been charging all along are fair and reasonable. Secondly, Mr Lekgabe was never his instructing attorney, it was others who reported to him;
- (x) With reference to the opposing affidavit filed by Lekabe it seems that blame is placed on one Mphephu, who was an attorney reporting to Lekabe as his senior in the office of the State Attorney Johannesburg.

[33] On the 19th October 2018 Mokgoatlheng J, sitting with Modiba J, issued the following order against the respondent:

- i) The Respondent was suspended from practising as an advocate pending the final outcome of an investigation into his profound misconduct and or to have his name struck off the roll of advocates;
- ii) The respondent was ordered to forthwith furnish the applicant with the following documents:
 - The respondent's original fee book for the period 1 January 2015 to 26 September 2018;
 - The invoices or true copies or duplicate original copies thereof for the period 1 January 2015 to 26 September 2018;
 - True copies of bank statements in respect of the current account held with First National Bank Fordsburg Branch under account number 622 084 25155 for the period 1 January 2015 to 26 September 2018;
 - Details of any other bank accounts in which the respondent received deposits from the Johannesburg State Attorney and true copies of bank statements in respect of such additional bank accounts for the period 1 January 2015 to 26 September 2018.

[34] The order of suspension finds its origin in the serious allegations of fraudulent misconduct by the respondent raised against him by Mudau J, who had accepted the evidence under oath by senior advocate's Green and Rossouw, as well as from the Chief Litigation Officer, Beukes, of the office of the Minister of Police.

[35] The respondent had in the matter before Mudau J disputed the allegation of overcharging and of fraudulently settling the Kunene matter without a mandate and also of fraudulently raising invoices against the State Attorney in the amount of about R34.4 million for the period 18 December 2017 to February 2018.

THE STRIKING APPLICATION

[36] The respondent failed to comply with the terms of the suspension order. It is this that led to the applicant launching this application to strike the respondent off the roll of advocates. The application was launched on 30 October 2018.

[37] The Advocates Act provides for the admission of persons to practice as advocates of the High Court of South Africa and for matters incidental thereto, including suspension of advocates from practice and the removal of their names from the roll of advocates.

[38] It is common cause that pursuant to the judgment by Mudau J in staying the writ of execution, the Minister proceeded to file an application rescinding the judgment granted against the Minister of Police. In a scathing judgment Mudau J remarked as follows:²²

²² At para 4.

“The above court orders are subject of a pending rescission application (Part B) to be heard on 27 August 2018. According to the Minister of Police their instructing lawyer (Lekabe) and council (Kajee) did not have any authority to concede the liability claim regarding the merits on 7 February 2017.”

[39] Mudau J commented further as follows:²³

“The underlying causa of the judgment debt is vehemently contested by the applicant. The silence of the second and fourth respondents in the face of these damning allegations to my mind is telling. Importantly, this involves allegations of apparent collusion and fraudulent conduct involving millions of public monies. . . .”

[40] The rescission application was head and granted by Keightley J on the 18th October 2019. In her judgment Keightley J did not spare the respondent and also made scathing remarks about his collusive and fraudulent conduct with the office of the State Attorney.

[41] In the judgment by Keightley J the following is noted:²⁴

“ . . . For the present it is necessary only to explain that both Mr Lekabe and Mr Kajee face serious investigations by different authorities regarding allegations of unprofessional, fraudulent and corrupt conduct on their part. The investigations arose from the manner in which it is alleged they dealt with, the Plaintiff’s case, but the allegations extend to what is alleged to be similar conduct on their part in other matters involving, among others, the Minister.”

²³ At para 14.

²⁴ At para 8.

[42] Further, the judge said²⁵ the following about the relationship between Lekabe, the State Attorney, and the respondent:

“What lends further credence to this submission is the broader context of the relationship between Mr Lekabe and Mr Kajee and their actions subsequent to the concession on the merits. As I briefly explained earlier, Mr Kajee started invoicing the State Attorney for work on the Plaintiff’s defence of the quantum issue in December 2017. Both he and Mr Lekabe contend that he was briefed on 15 December 2017. What is alarming is the fact that the letter of instruction from the State Attorney briefing Mr Kajee is dated 14 February 2018. Furthermore, the Register of Counsel briefed in matter for February 2018 also records, in Mr Lekabe’s handwriting, that Mr Kajee and his junior counsel were briefed in the matters on 14 February 2018. At the very least, this gives rise to an inference that the relationship between Lekabe and Mr Kajee was such that Mr Kajee could invoice for work done on, and would be paid for, matters in respect of which he had not yet received his brief. . . .”

[43] The nub of the complaint against the respondent is captured in paras 13-17 of the founding affidavit deposed to by the chairperson of the applicant, advocate Ian Green. In brief he says that from documents presented to him including the judgments by Madau J and Keightley J, the respondent has made himself guilty of serious misconduct in that:

22.1 He received payment from the State Attorney in the sum of R34 211 875.00 as fees for the period 1st April 2017 to 24 August 2018;

22.2 When the respondent was asked from comment his evasive response was that the fees were fair and reasonable without justifying how he arrived at such exorbitant fees and refused to give permission to the Bar Council to investigate the complaint;

²⁵ At para 68 to 69.

22.3 The respondent at some point conceded that there had been instances of overreaching but that it was not deliberate. Despite such concession the respondent steadfastly maintained that the applicant was not entitled to have access to his “fees notes”, his fee book as well as record over that period;

22.4 In para 16 adv Green points out that the amount R34 211 875.00 charged to the State Attorney by the respondent equals to an amount of R66 950.83 per day every calendar day over a period of 511 days. He says that this is impossible for any counsel whose highest hourly rate over that period was R2 500.00 per hour and R25 000.00 per day;

22.5 The full and comprehensive list of payments made to the respondent appears on annexure FA 24.

[44] In his answering affidavit the respondent does not deny having received payments as set out in Annexure FA 24. He however denies that all the amounts that appear on Annexure FA 24 were authorised by the office of the State Attorney. He does not tell the Court then who could have done so if it was not the State Attorneys, who were his instructing attorneys.

[45] The respondent continues on this trajectory of denial without substantiating facts when he says that the allegations still had to be proved in the rescission application under case number 25544/2018. The position is that the judgment by Keightley J re-emphasized what Mudau J had already found about the collusive and fraudulent association between Lekabe, the State Attorney, and the respondent.

[46] What makes it worse is that the respondent was requested by the applicant to submit his fee book and fee notes. He refused and instead decided to resign. Despite his

resignation he was ordered by Mokgoathleng J and Modiba J in the urgent suspension application to submit his books to the Bar Council. He refused and told the Court that the Bar Council has no jurisdiction over him.

[47] Section 7(1)(d) of the Advocates Act allows a Court to suspend any person from practice as an advocate or to order that his or her name be struck off the roll of advocates if the Court is satisfied that he or she is not a fit and proper person to continue to practice as an advocate. Nugent JA, in *General Council of the Bar of SA v Geach and Others*,²⁶ writes as follows:

“It is trite that there are three steps in the enquiry whether such action should be taken. In *Malan and Another v Law Society, Northern Provinces* this court said, in the context of the comparable provision of the Attorneys Act²⁷ relying upon what has been said to similar effect in *Jassat v Natal Law Society*:

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

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 judgement.

And third, the court must enquire 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.”

[48] In *Johannesburg Society of Advocates and Another v Nthai and Others*²⁸ Ponnann JA, writing for the Court, reiterated that:

²⁶ 2013 (2) SA 52 (SCA) at 68E-H.

²⁷ Act 53 of 1979.

²⁸ 2021 (2) SA 343 (SCA).

- Advocates are required to be of complete honesty, reliability and integrity;
- The need for absolute honesty and integrity applies both in relation to the duties owed to their clients as well as to the Court;
- The profession has strict ethical rules to protect malfeasance;
- Officers of the Court like advocates serve a necessary role in the proper administration of justice and given the unique position that they occupy the profession has strict ethical rules.

[49] In *Van der Berg vs General Council of the Bar of SA*²⁹ it was held that:

“... The enquiry before a Court that is called upon to exercise its disciplinary powers is not what constitutes an appropriate punishment for a past transgression but rather what is required for the protection of the public in the future. Some cases will require nothing less than the removal of the advocate from the roll forthwith. In other cases, where a court is satisfied that a period of suspension will be sufficiently corrective to avoid a re-occurrence, an order of suspension might suffice.”

DOES THE CONDUCT OF THE RESPONDENT AMOUNT TO A JUSTIFIED STRIKING FROM THE ROLL?

[50] This question, in our view, has been answered in the judgment of this court by Mudau J, Mokgoathleng J and Modiba J as well as Keightley J. All three judgments were ad idem that the respondent made himself guilty of fraudulent conduct together with the State Attorney. This in our view amounts to nothing short of unprofessional conduct justifying a striking from the roll.

²⁹ [2007] 2 All SA 499 (SCA) para 50.

[51] In the rescission application the founding affidavit by the Minister of Police sets out clear incidents where settlement in various matters involving the Department of Police where no instruction had been sourced or agreed to by the Department. The Minister alluded to the fact that the respondent utilised an almost “stock standard” memorandum titled “Memorandum on quantum and advice on settlement thereof” to motivate the conclusion of settlement agreements in matters in which the Minister and other organs of State were parties, and the model of concluding or contriving unauthorised settlement agreements was also followed in a number of other matters.

[52] The list of payments made to the respondent over the period 1st April 2017 to 30 August 2018 clearly indicates a sustained pattern of overreaching. The court in *Geach* held that advocates are only entitled to charge a reasonable fee and, if they charge an unreasonable fee they are guilty of overreaching.

[53] We are satisfied that the offending conduct of dishonesty and overreaching, coupled with settling matters without a client’s mandate, have been proved on a balance of probabilities and this, on its own, makes the respondent an unfit person to continue to practice as an advocate of this court. The payment of the sum of R34 million to him by the office of the State Attorney resulted from a corrupt relationship between the respondent and the State Attorney. He, amongst others, charged for work he had not performed. That is fraud.

[54] In the founding affidavit³⁰ the applicant makes mention of a serious issue about the fact that the invoices submitted by the respondent to the State Attorney for payment do not constitute tax invoices which fact makes it clear that the respondent was not registered as a vendor in terms of the Value Added Tax Act³¹ and based on the amount

³⁰ At para 110 to 113.

³¹ Act 89 of 1991.

of fees written by him in a two-month period in the Kunene matter alone, he is a vendor as defined in section 1 of the Value Added Tax Act.

[55] The respondent did not offer any explanation in his answering affidavit. That statement in the founding affidavit remains uncontested. That means that he withheld payment of value added tax to the South African Revenue Services (SARS), which effectively means he stole money from SARS.

[56] The Supreme Court of Appeal in the appeal of the judgment of Keightley J, confirmed the serious findings by Keightley J pertaining to the respondent's dishonest conduct. It found that the respondent's acts, perpetrated in concert with the State Attorneys (Lekabe), were illegal.³²

APPROPRIATE RELIEF

[57] The last question is whether the respondent's conduct deserves striking off or a suspension. The respondent has exhibited a serious flaw in that he clearly shows no remorse, and worse, he is still insisting that the Bar Council has no jurisdiction over him now that he has resigned. He crowned this by flatly disobeying the order by Mokogoathleng J and Modiba J after he had been ordered to submit his books of accounts to the Professional Ethics Committee of the Bar Council. He is counsel of many years, and it was rather surprising for him to argue that there was no obligation on him to submit himself to the enquiry by his own profession body.

[58] The test to determine whether a person is a fit and proper is also well established.³³ The first enquiry is to determine whether the offending conduct has been proven on a

³² At para 35.

³³ *General Council of the Bar of South Africa v Jiba and Others* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) para 20. *Jiba and Another v General Council of the Bar of South Africa and Another, Mrwebi v General Council of the Bar of*

balance of probabilities. Once this is shown, the second enquiry is to determine whether the person is fit and proper taking into account the proven misconduct. The final enquiry is to determine whether the person concerned should be suspended from practice of a further period or should be struck off the roll.³⁴

[59] in terms of section 7 of the Advocates Act this court may suspend and advocate or order that the name of the advocate be struck off the roll of advocates. There was some debate by counsel on behalf of the respondent that, if the court finds that his conduct is of such a nature that it requires a sanction, that a further suspension of the respondent from practice would be an appropriate sanction. It is so that section 7 provides also for a suspension from practice, but it is clear that if a court is satisfied that such a person is not a fit and proper person to continue to practice as an advocate, the only sanction would be a striking off. In this regard, we may mention that both the attorneys' and advocates' profession have strict ethical rules aimed at preventing their members from becoming parties to any untoward conduct. For this reason, absolute personal integrity and scrupulous honesty are demanded of each legal practitioner and practitioners who lack these qualities cannot be expected to play their part in preserving the high standards of professional ethics.³⁵ The need for absolute honesty and integrity applies both in relation to advocates' duties to their clients and duties to the courts.³⁶ These qualities of honesty and integrity must continue to be displayed throughout and an advocate's practice and conduct by an advocate in the course of his or her practice that demonstrates a lack of honest or integrity has been repeatedly held to lead to the conclusion that they are no longer fit and proper persons to continue to practice as advocates.³⁷ See *Van der Berg*.³⁸

South Africa [2018] ZASCA 103; [2018] 3 All SA 622 (SCA); 2019 (1) SA 130 (SCA); 2019 (1) SACR 154 (SCA) para 6. *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); [2009] 1 All SA 133 (SCA) para 4. *General Council of the Bar of South Africa v Geach and Others, Pillay and Others v Pretoria Society of Advocates and Another, Bezuidenhout v Pretoria Society of Advocates* [2012] ZASCA 175; [2013] 1 All SA 393 (SCA); 2013 (2) SA 52 (SCA) para 50. *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); [2000] 2 All SA 310 (SCA) para 10.

³⁴ *Hewetson* para 4.

³⁵ *Kekana v The Society of Advocates of South Africa* 1998 (4) 649 (SCA) at 655I – 656B.

³⁶ *General Council of the Bar of South Africa v Geach* 2013 (2) SA 52 (SCA) para 126.

³⁷ *Geach* at 127.

³⁸ *Supra*.

[60] In *Van der Berg*³⁹ it was made clear that the enquiry does not turn on what constitutes an appropriate punishment for past transgressions but rather what is required from the protection of the public in the future. It is this need to protect the public that may justify an order for the striking off of an advocate.

[61] In the light of the respondent's dishonest conduct exhibited thus far, the public, the fiscus and organs of state exposed to the respondent's conduct should be protected from practitioners such as the respondent. The state attorney paid over in excess of R34,4 million to the respondent in a seventeen-month period. This is over and above the losses resulting from unauthorised settlements. There is no indication that the respondent's dishonesty will not reoccur. He has shown no contrition nor placed facts before this court that would ameliorate his conduct. Indeed, his refusal to give his cooperation indicates the contrary. This was not a singular or isolated instance or a lapse of judgment that can be condoned. His conduct amounts to a considered effort over a prolonged period to irregularly obtain funds from the fiscus. As explained by Nugent JA in *Geach*:⁴⁰

"It was said in *Malan v Law Society, Northern Provinces* (footnote 57) 2009 (1) SA 216 (SCA) that 'if a court finds dishonesty the circumstances must be exceptional before a court will order a suspension instead of a removal'. That does not purport to lay down a rule of law but expresses what follows naturally from a finding of dishonesty. Once an advocate has exhibited dishonesty it might be inferred that the dishonesty will recur and for that reason he or she should ordinarily be barred from practice. What was said in *Malan* means only that when the person concerned has been shown to need been dishonest a court will need to be satisfied that circumstances of the case are such that that inference, exceptionally, need not be drawn, and thus that striking off need not follow. . . ."

[62] There were no exceptional circumstances placed before this court that can justify the exercise of a discretion in the respondent's favour for an order that the respondent should be further suspended.

³⁹ Supra at para 50.

⁴⁰ At para 69.

[63] In our view the respondent's dishonest conduct that forms the basis of the application effectively stands uncontested and has therefore been established on preponderance of probability.⁴¹

[64] The nature and extent of the respondent's misconduct can lead to no other conclusion than that the respondent is not a fit and proper person to continue to practice as an advocate.

[65] The applicant sought the costs of the attorney who assisted the applicant with this application. There was no contrary submission, and we are of the view that such costs order is justified.

[66] We express our appreciation to Mr Wessels, SC and Mr Mostert of the Johannesburg Society of Advocates who appeared for the applicant, *pro bono*.

[67] In the circumstances, we issue the following order:

1. The name of Hassan Ebrahim Kajee (the respondent) is struck from the roll of advocates.
2. The respondent shall pay the applicants costs of this application limited to the costs incurred by the applicant in respect of the services rendered by its attorney or record (Langam Love Galbraith-Van Reenen Attorneys) on a scale as between attorney and client.

⁴¹ *Kekana v Society of Advocates* 1998 (4) SA 649 (SCA) at 654C-E.



M. A. MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG



W. L. WEPENER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES:

DATE OF HEARING : 13 APRIL 2023
DATE OF JUDGMENT : 06 JUNE 2023

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