REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 22915/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED: ✓

29.8.2018
DATE

SIGNATURE

In the matter between:

THE JOHANNESBURG SOCIETY OF ADVOCATES **Applicant**

and

TIRY, AYESHA **Respondent**

J U D G M E N T

LAMONT et MATOJANE JJ

[1] This is an application brought by the Johannesburg Society of Advocates, a voluntary association of advocates who practice as such in this division. The applicant seeks a striking off from the roll, alternatively the suspension from practice of the respondent. The respondent is a practising advocate who is a member of the applicant. She was admitted as an advocate during March 2000 and became a member of the applicant during July 2000. She has been practising as such for some 17 years and is regarded as a senior amongst the ranks of junior counsel.

[2] The applicant submits that the respondent has conducted herself improperly over an extended period by double briefing and overreaching in connection with certain litigation in which a statutory body, the Road Accident Fund (hereafter the RAF), is the defendant. The submission of the applicant is that the conduct of the respondent is unprofessional and that it demonstrates that she lacks both honesty and integrity. In consequence, so submits the applicant the respondent is no longer a fit and proper person to continue to practice as an advocate.

[3] The RAF is a defendant in a large percentage of the trial matters heard in this division. The reason is that it is a body which is obliged in certain circumstances to compensate a person for damages suffered as a result of bodily injuries caused to

that person in a motor collision. Large numbers of injured people on a regular basis sue the RAF which on a regular basis defends the actions. In consequence, there is a huge amount of litigation which comes to trial.

BACKGROUND

[4] The applicant became aware that a large number of its members who conducted practice acting either for or against the RAF were engaged in the practice of double briefing or overreaching. In consequence, the applicant made extensive investigations. The respondent was one of the advocates who was investigated. The investigations revealed that between March 2008 and October 2012 there were 106 instances in which the respondent held more than one trial brief and charged more than one trial fee on a single day. Each of these instances is set out in detail in the founding affidavit, in a diagrammatic representation attached to the replying affidavit and in the answering affidavit in particular in volume nine. Also, the applicant has prepared a chronology which in colour sets out the dates when there was overlapping of briefs held by the respondent both as to preparation consultation and trial date. The facts are common cause on this issue.

[5] The respondent's explanation is that she frequently received last minute instructions to take on an additional matter on trial after her initial trial brief had been completed. She stated that she was entitled to and did take a second trial brief as, at the time she took the second brief she would not become double briefed as the first brief had been finalised. She stated that it was evident from the practice notes which

she filed that certain matters in which she held a brief, that the first matter in which she was briefed could not and would not proceed to trial.

[6] The respondent's explanation as to overreaching was that she was briefed on trial and as the trial had collapsed virtually on the trial date, she was entitled to charge a separate trial fee in respect of each brief which she received. In particular, as the briefs were received consecutively and not concurrently, she was entitled to mark a trial fee in each matter, namely in both the collapsed trial and the trial which was to proceed.

[7] The respondent explained that she was able to determine through the preliminary assessment of a brief she had received whether or not the matter was capable of allocation for trial by the judge presiding at roll call. This is the judge who allocates matters for hearing. If it were incapable of allocation she would discuss this with her attorney and with the attorneys' consent would accept a further instruction. If she received a further instruction, there would be no double briefing because there was no prospect that she might be called upon to appear in a trial in the matter which she had decided was incapable of allocation. In addition frequently the matters in which she was briefed would settle before the day of the hearing as the parties would agree that the matters either could not or would not proceed on the day of trial.

[8] In these circumstances, the respondent regarded herself as being available and would hold herself available to accept a further brief as she was able, based on her judgment, to ensure that she was accepting briefs on trial sequentially. Notwithstanding that she on one day would appear in more than one matter at Roll Call she would not have been double briefed.

[9] The respondent stated that if she was unsure whether or not the matter in which she held the trial brief would be allocated for hearing, she would instruct a junior with the consent of her attorney. The junior would then be responsible for the matter and would run the trial if it was allocated for hearing. The junior, because RAF matters are capable of being finalised in a relatively short time, would be able to finalise the matter and appear without any prejudice to the client. In no case was there a complaint by the client or the instructing attorneys concerning the manner in which she conducted herself.

[10] The argument that there would be no prejudice to the client if an advocate was briefed to run a trial matter at a late stage was bolstered by the *General Council of the Bar of South Africa v Geach and Others ("Geach")*[1] judgment. The Supreme Court of Appeal in the matter of *Geach* stated that disputes in RAF litigation were generally confined to the apportionment of responsibility or to the amount of compensation to which the claimant was entitled, or both, and that for those who

[1] *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA)

were experienced in the field settling disputes of that kind was often relatively straightforward.[2]

[11] The respondent set out that she was not alone in this conduct and that this was a generally accepted practice amongst counsel who performed the type of work which she was performing. Both seniors and juniors were acting in much the same way as she was without demur.

THE RULES

[12] There are sets of rules governing the conduct of advocates which are of application. An advocate is entitled in terms of Rule 2.10 of the General Council of the Bar of South Africa: Uniform Rules of Professional Conduct ("the Rules") to receive briefs on trial and opposed matters on the same day in the circumstances set out below.

[13] Rule 2.10 reads:-

> "2.10 Briefs on trial and opposed matters on the same day
>
> 2.10.1 Save in the circumstances set out in 2.10.2 and 2.10.3 below, it is improper for a member:
>
> 2.10.1.1 to accept more than one brief on trial;

[2] Ibid, para 8

2.10.1.2 to accept a brief on trial and a brief to appear in any other opposed matter; for the same day.

2.10.2 It is not improper for a member to accept, in addition to a brief on trial, a brief to mention another matter at the call of the trial roll on the same day with a view to:

2.10.2.1 recording that the matter has been settled or to having a settlement agreement made an order of court or otherwise noted by the court;

2.10.2.2 seeking a postponement, provided that such postponement is by consent between all parties and is not opposed.

2.10.3 It is not improper for a member to accept in addition to a brief on trial, a brief for the same day:

2.10.3.1 to act for one or more of the other parties in the same matter, where it is otherwise proper to represent such other parties in the same trial;

2.10.3.2 to note judgment in a matter in which he or she has previously been engaged;

2.10.3.3 after the matter for which he or she has been brief for that day has been disposed of;

2.10.3.4 in any matter which has been arranged for hearing outside ordinary court hours;

2.10.3.5 to argue an application for leave to appeal in the same division where that argument will not interfere with the proper conduct of the trial."

[14] Rule 2.6 reads as follows:-

"2.6 It is improper for counsel

(I) to accept a brief unconditionally; or

(I I) to retain a brief previously accepted by him;

if the circumstances are such that he should reasonably foresee:

(i) that he will not be able to attend to the brief within a reasonable time; or,

(ii) that he would have to surrender the brief for whatever reason; and

(iii) that the surrender of such brief could cause inconvenience and/or embarrassment and/or prejudice to:

(a) his client and/or

(b) a colleague who is to succeed him in the brief; and/or

(c) instructing attorney."

APPLICANT'S NOTICES

[15] On 9 March 2007 the applicant distributed a notice to its members in which it recorded that it had received some complaints and queries from judges and

attorneys about the problem of double briefing. The applicant indicated that the Bar Council resolved to set out a policy on double briefing. The policy read as follows:-

"1 it is generally unprofessional to hold at the same time two (or more) briefs to appear on the same day, save:

1.1 in the motion court in one division, when appeals were joined roll to be heard by the same court on the same day;

1.2 with all but one brief requires only an appearance at Roll Call (for example for purposes of an agreed postponement, settlement or withdrawal);

1.3 where the attorney and client relating to the second brief are aware of and you consent to the risk of non-availability provided that the arrangement is not objectively prejudicial to the clients' interests are not inherently likely inconvenience the court;

1.4 when more than one counsel is on brief and the attorney and client unaware of and have consented to the risk of non-availability, provided that the arrangement is not objectively prejudicial to the client's interests and not inherently likely inconvenience."

[16] This policy clearly sets out that an advocate may hold only one brief for appearance a trial Roll Call together with another brief for an unopposed matter. It makes it clear that any arrangement between counsel and attorney and client concerning counsel's availability is subject to the prejudice of the client and the inherent likelihood of inconvenience to the court.

[17] On 30 January 2008, the applicant distributed a notice to its members. The notice referred to the appearance by members in more than one trial on the same day. The notice reads:-

"1 The manager of the Regional Litigation office of the Road Accident Fund in Johannesburg has brought a practice that is busy developing at the Johannesburg Magistrates Court in respect of Road Accident Fund matters, to the attention of the professional subcommittee. It is that certain attorneys for plaintiffs in RAF matters enrol large numbers of matters for trial on a given day. They appoint one or more counsel to appear on trial on behalf of all, or a substantial number, of the plaintiffs on that day. All of the matters have the potential to proceed to trial on that day. In the nature of things most, if not all of the matters will settle/postpone....

2. The professional subcommittee has considered the practice, sees it in a very serious light and has resolved to issue the following ruling:-

2.1 It is unprofessional for a member to hold more than one RAF trial in any one court or in different courts on the same day.

2.2 It is not unprofessional for a member to hold, apart of a brief on trial in any matter in any court, a brief to mention another matter at the call of the roll, to mention a settlement agreement to the presiding judge or magistrate or to have an agreement of settlement made an order of court or noted by the court or to seek, by way of agreement between

the parties, a postponement of another matter, as long as the postponement is not opposed."

[18] This notice distributed by the applicant to inter alia the respondent clearly sets out (particularly in regard to RAF matters) that only one brief on trial may be held in any one court on one day.

THE GEACH JUDGMENT

[19] The issue of double briefing was considered in the *Geach* judgment under paragraph 14 as follows

"[14] Accepting briefs to conduct more than one trial on the same day is generally prohibited by the rules of the bar for the obvious reason that an advocate is not capable of conducting trials simultaneously. The consequence of holding briefs to conduct two trials on one day is inevitably that if both trials proceed the advocate will find himself or herself compelled to overcome the dilemma by directing at least one case to settlement, perhaps against the interests of the client, or by postponing one so as to continue with the other, again against the interests of the client, or by surrendering the brief to an unprepared colleague (assuming a colleague was willing to accept it). It is not surprising then that the practice of accepting potentially conflicting briefs –

commonly called 'double-briefing' – is expressly prohibited by rule 2.6 of the Uniform Rules of the bar..."[3]

OVERREACHING

[20] Rule 7.1 of the Rules of Conduct unequivocally states that counsel is entitled to a reasonable fee for services rendered. In *Geach* the SCA explained the equally important prohibition against overreaching in the following terms:

"[15] No doubt there are cases in which settlement negotiations can be expected to be intense and protracted, calling for the advocate's full attention and time, but that will not always be so, particularly in road accident cases. Indeed, Rule 2.8 recognises that multiple briefs in such cases are not prohibited when it provides that '[it] is not improper for counsel to accept a brief to settle the matter, as opposed to a brief on trial'. And also in paragraph 16 the SCA explained.

"[16] An advocate to accept a brief to conduct a trial must hold himself or herself available to do so. Because the advocate has held himself or herself available he or she is generally entitled to a full day's fee if the case settles on the day or even shortly before that and the advocate has been left with no other income for the day. But if his or her instructions are to postpone a case when the roll is called, or to note that the case has been settled, or to negotiate a settlement of the claim, then the fee must be commensurate with that service. To charge a trial fee where the instructions are not to conduct a trial but instead to do something else is overreaching."

[3] *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) para 14

PERFORMANCE OF UNNECESSARY WORK

[21] An advocate is entitled to charge according to the skill and time which he is required to apply to the work. The nature of the work to be done will appear from the trial brief. Notwithstanding the description of the work which appears from the trial brief an advocate is not entitled to charge for work which he knows will not be done or is not required to achieve the result. The simple proposition is that

> "Where a person is employed in a work of skill the employer provides both his labour and his judgment; he ought not to undertake the work if it cannot succeed and he should know whether it will or not..."[4]

The consequence is that if an advocate knows that he is going to court briefed on trial but that no trial is going to ensue he may not charge as if a trial was going to ensue neither may he prepare on the basis of a trial ensuing.

[22] The rule is designed to compensate counsel for the loss of a fee which he otherwise would have earned had the trial continued if a trial settles. It is not designed to authorize counsel to work on and charge for a trial which he knows will never occur. The respondent is careful to state that she was briefed on trial and that only after the trial had collapsed, entitling her to a fee, did she accept another trial for the same day and go to court on the latter trial thereby being entitled to payment for that work as well. If this is true the respondent was working up a matter for trial even though the matter is never going to trial. If it is not true the respondent is simultaneously working on two matters.

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[4] *Duncan v Blundell*[4] (1820) 3 Stark 6. Also see Hudson's Building and Engineering Contracts 11th Edition at 526 to 527

[23] Wallis JA in the minority judgment provided

> "Advocates are only entitled to charge a reasonable fee, and if they charge an unreasonable fee they are guilty of overcharging... Overreaching involves an abuse of the person's status as an advocate, to take advantage for personal gain of the person who is paying them... For the advocate to take advantage of that situation by marking a fee knowing that it is not a proper fee, but one that is unreasonable and improperly marked under the rules, is an abuse of the advocate's position and amounts to overreaching. It is innately dishonest behaviour."[5]

THE FACTS

[24] It is common cause that the respondent on numerous occasions held multiple briefs for trials to be heard on the same day over the period 2008 to 2012. Over that period there are more than 100 instances of the respondent holding more than one trial brief and charging more than one trial fee on a single day. The additional fees charged by the respondent beyond the first trial fee total R 834,400. Multiple trial briefs were held eight times during 2008, fifty times during 2009, twenty five times during 2010, fifteen times during 2011 and eight times during 2012. The respondent held more than two trial briefs as follows; on one day during 2008 three briefs; on twelve days during 2009 three briefs; on one day during 2009 four briefs; on three days during 2009 five briefs; on two days during 2010 four briefs and on two days during 2011 three briefs.

[5] *Geach* note 4, para 131

[25] The respondent's evidence in respect of each matter was that in each matter she was briefed on trial, she was not briefed to settle a matter. On the face of it the respondent was double briefed. It is she who provides the explanation, documentation and has the personal knowledge of the circumstances. She has produced the relevant invoices and certain other documentation to establish her case. The facts set out above are distilled from her evidence.

[26] The respondent's evidence is that she accepted a further trial brief on the same day as the previous trial brief only after the first brief was incapable of being allocated (9/748). The acceptance of the brief in many cases was pursuant to a judgment decision made by her that the matter was not ripe for trial allocation. She would accordingly on her evidence peruse the matter decide that it would not proceed and then accept a further matter. (She claims that this took place with the consent of her attorney) (9/756/758). The respondent does not deal with the risk which she undertook that her judgment was incorrect or the possibility that her judgment was correct but her opponent did not agree with her and would not agree not to go to trial. The respondent's conduct did not remove the risk which the rule was designed to protect against, namely, that an advocate could be obliged to appear in two different courts simultaneously. The fact that the risk did not materialise does not mean that the risk did not exist. The double briefing rules are designed to remove the right of an advocate to determine whether the matter is likely to proceed or not. The rules prohibit the taking of two briefs on the same day whether or not the advocate believes only one of them will proceed. The rules are structured in this way for a good reason. If only one brief is taken on one day there is no risk that an advocate's judgment will be proven wrong. It is simply not a defence

to the double briefing charge that the respondent formed the opinion that a matter could not proceed.

[27] The respondent set out in detail how she dealt with each new brief which she received. Once it was received she would consider whether the relevant pre-trial conference had been held and the relevant documents had been furnished. Once she had done this assessment, she would be able to determine whether or not a matter was ripe for hearing and could be allocated for a trial. If she was able to form the view that the matter was not ripe for allocation and would accordingly not be allocated, she would discuss the matter with the attorney.

[28] If the attorney agreed with her, she would then accept a further brief. Her attorney would speak to the opposing attorney and she would speak to the opposing counsel if instructed to do so. Irrespective of whether the matter was capable of allocation or not she would work the brief up as comprehensively as possible. If the matter were capable of allocation, she would prepare for trial and if during the course of that preparation she formed the view that the matter would not proceed she would take another matter. Whether or not the matter was capable of allocation she would work on the brief comprehensively regarding both the issues of quantum and merits. The reason she did this was that all persons involved in RAF matters knew that it would be impossible for the trial to be allocated and would seek to resolve the dispute rather than to postpone the matter as this was the benefit of RAF.

[29] If she did not work on the matter, she would not be able to deal with the matter to see whether or not it could be settled and on what basis it should be settled. She stated that she was able to finalise RAF trials very quickly. (Her standard fee for working on a trial seems to be approximately five hours per trial irrespective of the matter and whether she believed it would go on.) This approach by the respondent to her trial matters resulted in her being able to charge a trial fee on each day when a matter was set down for trial as she worked on the matters continuously until she was informed the matter was not proceeding to trial, even if she knew long before that the trial would not run. This conduct has an impact on the fee charged as fees change depending on the time prior to the trial when the matter is known not to be a matter which will carry on. In addition, this conduct has an impact on the cost to the client of the work that is done.

[30] The work the respondent did on matters she decided were not going to trial was not done for purposes of the trial but for purposes of trying to achieve a settlement or other result. The work done may or may not be useful as it may or may not be done at a cost which the client, if it knew it was being done, would be prepared to pay. The client had no option to choose whether or not the work should be done and at what cost it should be done as the respondent simply did the work as if the matter was proceeding to trial.

[31] The respondent in volume ten of the record has set out a schedule reflecting what she worked on and what her charges were in various briefs over the period. It is apparent from an inspection of that schedule that in many matters the respondent

was consulting and preparing simultaneously on two or more matters due to be heard on the same day. For example;

31.1 the respondent was briefed in two trials on 17th March 2008 and consulted in both over the period 14th to 16th March 2008;

31.2 the respondent was briefed in three trials for 13th October 2008 and consulted in all three over the period 1st to 12th October 2008, 6th to 13th October 2008,

31.3 the respondent was briefed in two trials on 13 November 2008 and consulted on 11th to 12th November 2008 in one and 12th November 2008 in the other one.

31.4 the respondent was briefed in two trials due to be heard on 20th November 2008 and consulted in one from 1st November to 20th November and in the other from 16th October 2008 to 19th November 2008;

31.5 the respondent was briefed in two trials to be heard on 21st November 2008 and consulted on 18th to 20th November 2008 in the one and 30th October 2008 to 20 November 2008 in the other;

31.6 the respondent was briefed in two trials for 25th November 2008 and consulted in one on 24th November 2008 and in the other from 11th November 2008 to 24th November 2008;

31.7 the respondent was briefed for two trials on 2nd February 2009 and consulted in one from 30th January 2009 to 1st February 2009 and in the other 30th January 2009 to 1st February 2009;

31.8 the respondent was briefed for two trials on 5th February 2009 and consulted in one from 3rd to 5th February 2009 and on the other 29th January 2009 to 5th February 2009;

31.9 the respondent was briefed in three trials for 13th February 2009 and consulted in one from 9th January 2009 to 12th February 2009 in the second one from 9th February 2009 to 12th February 2009 and in the third one on 12 February 2009;

31.10 the respondent was briefed in two trials on 16th February 2009 and consulted in one from 13th to 15th February 2009 and the other from 13th to 15th February 2009;

31.11 the respondent was briefed for two trials on 5th March 2009 and consulted in one on 4th March 2009 and the other on 1st March to 5th March 2009; and

31.12 the respondent was briefed in two trials for 11th March 2009 and consulted in one from 3rd March 2009 to 11th March 2009 and the other from 23rd February2009 to 11th March 2009.

[32] I have set out data collected from the invoices rendered by the respondent in respect of matters over a period of approximately six months. In almost every matter the respondent charged for consultations and preparation in at least two matters. The significance of these charges is not just that the respondent claimed the payment of the money. The significance is that the respondent was working on both matters simultaneously. This means that the respondent's claim that she took

matters sequentially is not accurate. The evidence demonstrates quite clearly that the respondent was involved in numerous matters set for the same date and was preparing for all of them. The inescapable inference is that the respondent was double briefed and was charging multiple trial fees for the same day. She had not decided that one matter was not to proceed and then accepted another. She was actively working on both matters which were to proceed to trial on the same day. This conclusion is corroborated by the respondent's evidence that she was working up the matters with a view to settling them. If this is so the matters were so far from being settled but were alive and needing attention to either settle them or run the trial. In my view the respondent was involved in multiple matters simultaneously.

[33] There is simply no room for the suggestion that the respondent took briefs one after the other and that at the time the new brief was taken the old had been finalised. The respondent was actively and knowingly double briefing. The explanation of the respondent that she was preparing both matters in the hope that she would be able to settle at least one of them and hence knew that she was only briefed in one matter which would proceed does not explain which of the two was to proceed and why that one was to proceed as opposed to the other one. The fact is that she was facing a risk as to the possibility that she would be called upon to proceed simultaneously in both, either by way of appearance in court or by way of needing to deal with the opposition.

[34] I have not yet dealt with the fact that the respondent took briefs without regard for the time it would take to complete the trial of one before the next was due to

commence. There is a continuous roll in this division which is designed to keep judges hearing trials continuously. Advocates are required to be available immediately when a judge becomes available. If there is no gap between the briefs held by an advocate equivalent to at least the number of days the trial is anticipated to and does last, an advocate's ability to become available immediately is compromised. Accordingly an advocate must allow sufficient time between the start of matters to ensure that the one due to be heard first will finish before the next is due to start. The respondent failed to allow such time. This means that the respondent was, in any event double briefed as she had accepted the first trial which she could not abandon to enable her to immediately proceed with the second trial.

[35] During argument it became apparent that the respondent accepts that on the reasoning set out in the *Geach* matter her conduct constituted double briefing. She claimed not to have known at the time that her conduct was unprofessional. This claim of the respondent is not in line with her knowledge of the contents of the notices sent to her by the applicant and fails to take account of the fact that she must have known that the RAF wanted to pay a particular previously negotiated and set amount per day for counsel at a trial. If she held multiple trials that particular amount was to be multiplied by the number of trials held. Accordingly, if the respondent held three trials, she would charge three trial fees or three times the amount the RAF wished to pay an advocate for a day.

[36] The respondent regularly charged a fee for preparation based on spending five hours preparing and consulting. There are instances in the schedule showing

that if she spent five hours on several matters in one day and was appearing for a trial that she did not have time even to sleep. I do not accept, particularly, because the respondent states that she was able to decide quickly whether the matter would run or not; that the respondent genuinely spent the time she claims to have spent in preparing the matters. She may well have spent the time in some of the matters, but she seems to have routinely debited the same amount which is unusual.

[37] Volume 10/826 shows that on 19th May 2009 respondent charged fifteen hours for consulting on the same day (18 May 2009). On 22nd May 2009 the respondent charged five hours to consult and on 20th May 2009 the respondent charged five hours to consult on 20th and 21st May 2009. She was in court on 21st May 2009. This makes it difficult for her to have charged to have worked for ten hours. On 30th July 2009 the respondent was in court with two matters and both appear to have run. This shows that it is true that the risk which the respondent undertook by retaining briefs resulted in prejudice. On 26th and 27th August 2009, the respondent consulted for ten hours in two separate matters and was in court on one of the days on trial. On 14th October 2009 the respondent charged for three matters where she claimed to consult for five days, five hours in each on 13th October 2009.

[38] On 15th October 2009 the respondent charged for consulting and preparing in two matters on 14th October 2009 at five hours on each matter for some consulting on 14th October the period of which is not clear. It seems probable that the respondent was charging for work which she was not doing.

[39] The defence raised by the respondent that in her judgment the trial could not proceed is no defence in any event to the objection that she was charging a trial fee in the matter in which she knew she was not briefed to go to trial. If she genuinely held the belief that the matter was not one which would go to trial, then she could scarcely claim the right to prepare as if it was going to trial and to charge a trial fee.

[40] The respondent claims that she genuinely held the belief that the matter would not go to trial and was not as she refers to it "live". Even if the respondent held this belief, it was not a belief entitling her to take a further matter for the same day. One of the submissions made by the respondent is that on the day of trial even though there was no allocation, there would be discussions between the various advocates and attorneys to try resolve the matters.

[41] If the respondent was busy in some matters the advocates and attorneys and her attorneys would be inconvenienced while she travelled between the various matters dealing with them. In addition an advocate is not entitled in the division to charge waiting time which is the time experienced while matters are unallocated. If matters are unallocated, they are only such at the request of the advocates who request the presiding judge not to deal with the matter but to permit it to 'stand down' to enable settlement discussions to take place.

[42] If counsel is briefed on trial then it is unacceptable for that counsel to avoid the hearing of the trial/postponement/judge dealing with the matter by way of seeking that the trial remains in limbo unallocated. An advocate briefed on trial must proceed on trial to deal with the matter by way of court process, so that there is a resolution and the judge to whom the matter is allocated can hear the trial sent to him.

[43] On the probabilities, the respondent has made herself guilty of double briefing and over-reaching in her manner of practice. On 106 instances between 2008 and 2012 respondent held more than one trial brief on a single day. She charged excessive preparation and has charged trial fees where the brief was a brief on postponement or settlement. In *Geach*, the SCA noted that to charge a trial fee where the instructions are not to conduct a trial but instead to do something else is overreaching which of necessity implied dishonesty.[6]

[44] So far as the punishment aspect is concerned it must be emphasized that a finding of dishonesty does not necessarily lead to striking off. There must be exceptional circumstances that justify departure from the ordinary course that a striking should follow, as Harms JA said in *Malan v Law Society, Northern Provinces* [7] which was endorsed in *Geach:*

> "Obviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal"[8]

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[6] *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) para 131
[7] 2009 (1) SA 216 (SCA)
[8] Ibid, para 10

[45] Factors to be weighed in determining whether there are exceptional circumstances to justify departure from the ordinary course that striking should follow include the period of time the conduct was engaged in and the number of matters involved; the respondent's blameworthiness and the penalties that have been imposed previously for similar misconduct. In assessing each of these factors, the court focuses on the offence rather than the offender and considers the desirability of parity and proportionality in sanctions and the need for deterrence.

[46] The court also considered an array of aggravating and mitigating factors, many of which are relevant to the likelihood of recurrence. These aggravating and mitigating factors include respondent's prior disciplinary record, her reaction to the discipline process, the length of time the respondent has been in practice, and the respondent's general character.

[47] The respondent remained in practice since 2011 when the applicant first began its investigations into her misdemeanours. The applicant did not seek her urgent removal despite the gravity of the allegations against her. The applicant did not regard her conduct for the past seven years as showing that she is not fit and proper to continue practising. There has also been no suggestion that she has not conducted herself properly during that period. If these facts are taken into account, as I believe they should be, the respondent will by now have been rehabilitated and the dishonesty unlikely to occur. The exceptional circumstances of the case do not warrant her being barred from practice. The respondent should pay the financial

benefit she received to a fund which has been established by the applicant and should be suspended from practice for three years. The extent of her benefit is difficult to calculate it must be less than the R834 400.00 set out above. An appropriate amount is R500 000.00. The suspension itself will be partly suspended.

[48] The following order is made:

(a) The respondent is suspended from practising as an advocate for three years.

(b) Two years of the suspension referred to in (a) above is suspended for three years on condition:

(i) The respondent pays a fine of R500 000.00 in monthly instalments of R50 000.00 commencing on1st January 2019 into the special fund to assist impecunious pupils; and

(ii) The respondent is not found guilty of unprofessional, dishonourable or unworthy conduct during the period of suspension.

(c) The respondent shall pay the applicant's costs on the attorney client scale including the costs of senior and junior counsel where employed.

C G LAMONT

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

ppK. MATOJANE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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	ADV. K.D. ILES
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PLAINTIFF'S ATTORNEYS:	NORTON ROSE FULBRIGHT S.A. INC
COUNSEL FOR DEFENDANT:	ADV. V. SONI SC
	ADV. D. WATSON
DEFENDANT'S ATTORNEYS:	BICCARI BOLLO & MARIANO INC
DATE OF HEARING:	27 JUNE 2018
DATE OF JUDGMENT:	