REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 35095/2018

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

_____ _____
DATE SIGNATURE

In the matter between:

THE JOHANNESBURG SOCIETY OF ADVOCATES **APPLICANT**

And

KAJEE HASSAN EBRAHIM **RESPONDENT**

J U D G M E N T

MOKGOATLHENG J

[1] In this urgent application the applicant seeks an order to suspend the respondent from practicing as an advocate pending the final outcome of:

(i) an enquiry into the respondent's professional conduct in the case of Kunene v Minister of Police and Others, case number 2015/32422

(ii) an enquiry into the fees raised by the respondent in respect of work performed for the office of the State Attorney over the period 1 April 2017 to 21 September 2018 and such other periods as may be included;

(iii) an enquiry into the relationship between the respondent and the State Attorney Johannesburg, existing over the period 1 April 2017 to 21 September 2018 and such other periods as may be included, and the respondent's conduct in matters handled on behalf of the State Attorney over these periods;

(iv) an application to have the respondent's name struck off the roll of advocates flowing from (i),(ii) and (iii) above.

[2] This application's genesis stems from a judgment by Mudau J in *Kunene v MIniste of Police* handed down on 15 August 2018. In that matter the court dealt with an application to stay a writ of execution issued against Minister of Police pursuant to orders granted by Tsoka J and Matojane J in respect of the purported agreements between the parties allegedly in settlement of the merits of a claim instituted by Kunene in respect of assault, unlawful arrest and detention and on a purported stated case in terms of which damages were awarded to *Kunene* damages in the amount of R34,077,000.00. Further The Minister's Chief Litigation Officer alleges that although the respondent was purportedly only instructed on 30 August 2018 when the matter was allegedly settled, the respondent charged a combined fee of

R392.375.00 over the period 1 April 2017 to 21 September 2018 in respect of the Kunene matter.

[3] In the said application, the Minister alleges that the merits and quantum in the Kunene matter were settled contrary to his instructions to the State Attorney to defend the claim. Further, the respondent and the State Attorney tendered a statement of agreed facts which concluded that the Minister had tendered the aforesaid amount when in fact that was not the case. Mudau J rescinded these two orders and because of the serious allegations raised against both the respondent and the state attorney Lekabe in the said application he referred his judgment to the applicant to investigate the conduct of the respondent.

[4] On 6 September 2018 the applicant addressed a letter to the respondent wherein it referred to the judgment of Mudau J in Minister of Police v AI Kunene, NG Lekabe, Minister of Police and Correctional Service, Adv. H E Kajee and the Sheriff of Pretoria Central. In that application before Mudau J, the respondent was personally cited as the 4th respondent but despite the serious allegations levelled against him, he did not oppose the application nor did he file an Answering Affidavit contesting these serious allegations raised against him. Mudau J made certain findings against the respondent amongst which are:

"[8] The applicant is equally concerned that, clearly, the first respondent only received written instructions on 14 February 2018, some two weeks prior to the trial date of 28 February 2018, as supported by the instruction letter marked "FA22". However, if one has regard to the invoice billed to the state attorney by the fourth respondent, he commenced to charge for more than 60 days in succession, from 18 December 2017, for his perusal and opinion at rate of R2500 per hour under circumstances where he clearly did not consult the members of the SAPS who were in attendance at court when the matter was settled";

"[16] The allegations made by the applicant in support of its application, are not only serious, but are made against officers of the court. The underlying causa of the judgment debt is vehemently contested by the applicant. The deafening silence of the second and fourth respondents in the face of these

damning allegations to my mind speaks volumes. Importantly, this involves allegations of apparent collusion or fraudulent conduct involving millions of public monies. I purposefully refrain from commenting on the merits or otherwise of the pending rescission application since I am not seized with matter. However, in my prima facie view, the applicant has prospects of success";

"In paragraph 5.1. of the latter the applicant state' First, the finding by the Learned Judge that you charged for more than sixty days in succession for your perusal and opinion at a rate of R2,500.00 per hour in circumstances where you only received written instructions some two weeks before the trial date;

5.2. Second, the requirements of chapter 6.14 of the practice manual in relation to orders of court being made by consent were not satisfied, otherwise the Minister of Police would not have launched the application in which Mr Justice Mudau handed down judgment on the 15 August 2018."

5.3 Third, the fact that the application brought by the Minister of Police was not opposed by yourself, with the result that you did not contest the allegations against you;

5.4 Fourth, the suggestions that there may have been collusion or fraudulent conduct involving millions of rands of public monies."

6." You are hereby requested to provide, as soon as possible, but in any event not later than 16h00 on Monday 10 September 2018, an explanation to the Professional and Fees Committee regarding the following;

6.1 The finding made by Mr Justice Mudau regarding the fees charged by you in the matter;

6.2 Your failure to oppose the application brought by the Minister of Police, and your failure to challenge the allegations made by the Minister;

6.3 Your apparent failure to comply with the provisions of the practice manual, quoted above;

6.4 On what authority the order made on the 02 March 2018 was consented to."

7." In addition to the explanation required, you are requested to furnish a formal, written undertaking to the Bar Council by no later than 16h00 on Monday 10 September 2018 that you will refrain from practicing as an advocate, pending the finalisation of an inquiry in to your conduct as counsel in the matter of Kunene v The Minister of Police.

8. Should you fail to furnish the required undertaking, The Johannesburg Society of Advocates reserves the right to apply to Court on an urgent basis for an order suspending you from practice pending finalisation of an enquiry into your conduct".

[5] On 7 September 2018 the respondent acknowledged receipt of the applicant's letter dated 6 September 2018 and requested a postponement until 14 September 2018 to respond thereto. On 14 September 2018, the respondent in response to the applicant's queries stated that he did not oppose *Part A* of the application of the *Kunene v The Minister of Police* matter because in essence the application sought a stay of the writ of execution; he stated that he will oppose *Part B* of the application. However, because the respondent did not enter a notice of intention to oppose either Part A or Part B of the said application he is consequently in default which means that the serious allegations raised against the respondent remain undisputed.

[6] The applicant also contends that the fees raised by the respondent from the state attorney in the Kunene v Minister of Police matter from 18 December 2017 to 22 February 2018 total an extraordinary amount of R935 000.00 at an excessive rate of R2500-00 per hour which is a rate in excess of the rate normally charged by experienced senior counsel in respect of work performed for the state attorney. Further the invoices raised by the respondent, which the state attorney allowed the respondent to charge and the speedy payment within three days of submitting same are clearly indicative of an unusual collusive relationship between the respondent and the state attorney.

<u>Urgency</u>

[7] The applicant contends that having regard to the irregular astronomical payment of R34.392 375-00to the respondent with the collusion of the state attorney over a period from 1 April 2017 to 30 August 2018 which implies that the respondent raised an amount of R66,522,96 as fees per day for 517 consecutive days which translates to 26.6 hours per day, the matter is manifestly urgent and the possibility of the continuing utilisation of the same *modus operandi* in the five other below referred to matters wherein there is a possibility of irregularly settling same without the Minister of Police's instructions as in the Kunene matter, also the refusal by the State Attorney to terminate the respondent's brief in the case of *Mbetheni v Minister of Police case no: 41428/2016*, the only inference is that the State Attorney and the respondent are intent on perpetrating further fraud on the State and Fiscus in pursuance of their fraudulent *modus operandi* which would result in the public and the advocate's profession suffering irreparable prejudice should the respondent be permitted to continue to practice as an advocate before the outcome of the applicant's enquiry into the conduct of the respondent and the possible sanction flowing therefrom. The applicant contends that the matter is urgent because should interim relief not be granted, the nature of the respondent's conduct is such that it could recur or would recur and would: *"Tarnish the legal profession, impede the administration of justice, the public interest and bring he justice system and trust therein into disrepute, expose the public fiscus to irreparable harm, flowing from the fraudulent and dishonest conduct of the respondent."*

[8] The respondent did not dispute that this application is urgent in fact he conceded urgency. Because of the urgency of this matter the applicant's Notice of Motion was issued on 21st September 2018.Therein the applicant afforded the respondent until 25 September 2018 to file his Notice of Intention to Oppose by 26 September 2018 at 12h00 to file his answering affidavit and the applicant to file a replying affidavit if any by 12h00 the 27 September 2018. The hearing was set down on 2 October 2018 at 10h00. At this hearing the respondent acquiesed that an order suspending him from practising as an advocate should be authorised by the court

[9] The respondent did not file an answering affidavit in terms of these time frames, instead on 26 September 2018, he tendered his resignation as a member of the applicant with immediate effect. On 28 September 2018, the applicant delivered an amended Notice of Motion incorporating an order to compel the respondent to deliver his original fee book, invoices rendered to the State Attorney, bank statements and other relevant documents.

[10] On 1 October 2016, the respondent launched an application for a postponement. On the same day the respondent filed a Notice of Intention to oppose, and answering affidavit. In his postponement application, the respondent pleaded to be granted a 20 days postponement to file his answering affidavit .The applicant opposed the respondent's application for a postponement on 2 October 2018, the applicant appeared in person to argue the postponement application. He pleaded for 20 days for file an answering affidavit. The court was not amenable to his request for an extended time period of 20 days for several reasons. The application was brought on an urgent basis and was served on the respondent on the 21 September 2018. The respondent had 10 days to file his answering affidavit by the 1st October 2018. Twenty days would have relegated this urgent application into an ordinary application as it would have afforded the respondent the normal time to file opposing papers under circumstances where he has not provided any satisfactory explanation why he needed an extended period of time to file his answering affidavit.

[11] In his founding affidavit the respondent has not proffered a full account of his efforts towards preparing opposing papers since been served with the application on 21 September 2018. The respondent was aware of the pending investigation as early as 6 September 2018 when the applicant called on him to respond to the serious allegations raised in the judgment of Mudau J. The respondent's bald explanation that he is facing serious allegations and that due to the recess period he has not been able to obtain legal advice was not accepted by the court under these circumstances as it had no merit. We sympathise with the respondent regarding the death of his mother on the 14 September 2018 but his mother's passing cannot by itself serve as a decisive

reason for the respondent not to comply with the court's order that he should file his answering affidavit on 4th October 2018.

[12] On 2 October 2018 in court the respondent consented to an order for his immediate suspension to practice as an advocate. This aspect is later addressed in this judgment. The respondent, however would not consent to an order compelling him to surrender his fee book, invoices rendered to the state or his bank statements because according to him, he had resigned as a member of the applicant on the 27 September 2018 and therefor the applicant no longer had jurisdiction over him consequently he had no obligation to surrender the requested documents to the applicant.

[13] Despite opposition by the applicant against the respondent's application for a postponement, given that the Amended Notice of Motion was only served on the respondent on 28 September 2018, the court acceded to the respondent's request for a postponement to Friday 5 October 2018 in order to allow the respondent to file his Answering Affidavit by 16h00 on Thursday 4 October 2018. The respondent did not comply with this court's order. When the court resumed on 5 October 2018, he persisted with his plea for more time without proffering any substantive, cogent or satisfactory reasons to be afforded a postponement indulgence.

[14] When the court postponed the application to 5 October 2018 to allow the respondent time to file an answering affidavit it was pertinently clear from the applicant's attitude that he had no intention to comply with the court's directive. He kept the applicant's attorney and counsel waiting for his answering affidavit on 4 October 2018. It was only when the applicant's attorney called him that he informed him that he would not be filing his answering affidavit as directed by the court. He did not have to wait until 4pm to inform the applicant's attorney of his intentions because he knew much earlier that he would not be complying with the court's directive.

[15] A court has discretion whether it should grant an application for a postponement or not. An applicant must show good cause that is, he or she must furnish a full and satisfactory explanation for the circumstances predicating the application and must also show that his or her ungreediness to

proceed with the case is *bona fide* and not due to, delaying tactics and tactical manoeuvring or for purpose of gaining and advantage which he or she is not legitimately entitled to. The respondent has had adequate time to prepare and settle an answering affidavit to place his version before court. But because of unsubstantiated or unexplained reasons the respondent has failed to proffer full, cogent and satisfactory reasons why he should be granted a postponement. Because of the potential prejudice which could be caused by such an unmotivated postponement application there is a possibility that the administration of justice, the interest of the profession and the public interests would be brought into disrepute

[16] A litigant should not benefit from his own intransigence, deception, carelessness or negligent unexplained stratagems in seeking a postponement especially where the interests of the public, and the advocate's profession is affected. On the 5th October 2018 the respondent failed to give any satisfactory explanation why he did not comply with the court's directive but instead informed the court that he deserves more time. Consequently the application for the postponement was dismissed. Effectively, the remainder of the interim relief sought by the applicant remains unopposed. Counsel for the applicant made submissions in respect of the compelling order to which the respondent did not respond despite having been afforded sufficient time and opportunity to do so from the bar.

[17] *Section 7(d) of the Admission of Advocates Act 74 of 1964* empowers this court to suspend any person practising 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 practise as an advocate."* It is the applicant's role to bring evidence of a practitioner's misconduct to the court's attention because it was the court which admitted the practitioner as an advocate after it was satisfied that such person was a fit and proper person to practice as an advocate. Consequently, the court exercises its disciplinary powers for the protection of the profession and the public interest depending on the gravity of the misconduct. See *Society of Advocates of South Africa (Witwatersrand Division) v Edeleng 1998 (2) SA 852 at 859 and Van der Berg*

v General Council of the Bar of South Africa [2007] 2 ALL SA 499 (SCA) at paragraph 50.

[17A] 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 practising as an advocate or to apply for an order to strike off the respondent's name from the roll.

Further the respondent's resignation does not imply that the applicant cannot launch any enquiry into the respondent's professional misconduct, the fees the respondent charged or the relationship between the respondent and the State Attorney Johannesburg. See *De Freitas and Another v Society of Advocates Natal and Another 2001(6)BCLR 531SCA at paragraph 5* which states: "*the court has inherent disciplinary power over practitioners in cases of misconduct. The court's interference is clearly justified where there has been gross non discharge or dishonest of professional duty per Innes C J De Villiers and Another v Mc Luintyre NO 1920 AD 425 at 435.* Consequently the applicant's role also in such an instance even through the respondent is not bound by the rules of the applicant is to bring these proceedings not as an ordinary adversarial litigant but rather to bring evidence of a practitioner's misconduct to the attention of the court in the interest of the profession and the public at large to enable the court to exercise its disciplinary powers. The applicant has the *locus standi* to request further documentation from the respondent to ensure a proper enquiry and investigations of the issues to be determined by this court

[18] "These proceedings are instituted by the applicant in terms of *section 7(2) of the Admission of Advocate's Act 74 of 1964* pursuant to a resolution of the applicant's Bar Council adopted on 11 September 2018. The applicant has approached this court as the *co-custos morum* of the profession and the public at large. The applicant has the jurisdiction to investigate complaints relating to professional misconduct by its members and also in general regarding the advocate's profession at large and to bring such evidence to this court in order that it should exercise its disciplinary powers against any advocate who has committed misconduct. Further these proceedings are

those of this court which has the inherent right to exercise, control and discipline over advocates practising within its jurisdiction. These proceedings are sui generis and are a statutory process of a disciplinary nature and are strictly speaking not civil proceedings and are not subject to all strict rules of the adversarial processes."

[19] 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 practising as an advocate or to apply for an order to strike off the respondent's name from the roll.

Further the respondent's resignation does not imply that the applicant cannot launch any enquiry into the respondent's professional misconduct, the fees the respondent charged or the relationship between the respondent and the State Attorney Johannesburg. See *De Freitas and Another v Society of Advocates Natal and Another 2001(6)BCRL 531 SCA at paragraph 5* which states: "*the court has inherent disciplinary power over practitioners in cases of misconduct and the court's interference is clearly justified where there has been gross non discharge or dishonest of professional duty per Innes CJ De Villiers and Another v Mc Luintyre NO 1920 AD 425 at 435.*

[20] Consequently the applicant's role also in such an instance even through the respondent is not bound by the rules of the applicant is to bring these proceedings not as an ordinary adversarial litigant but rather to bring evidence of a practitioner's misconduct to the attention of the court in the interest of the profession and the public at large to enable the court to exercise its disciplinary powers. The applicant has the *locus standi* to request further documentation from the respondent to ensure a proper enquiry and investigations of the issues to be determined by this court.

See General Council of The Bar of South Africa v Geach and others 2013 (2) SA 52 (SCA)

[21] The allegations facing the respondent are of a very serious nature involving large sums of public money, fraudulent, disgraceful and deceitful conduct. The

respondent and the state attorney are alleged to be inextricably involved in the fraud , the deception and misleading of judges Tsoka and Matojane to issue fraudulent court orders. The applicant contends that; "*The papers before court sets out prima facie evidence of gross dishonesty, unprofessional conduct, over reaching and over charging and that consequently, the respondent is prima facie not fit to practice as an advocate pending an application to have his name struck of the roll of advocates.* The respondent *has not put up a version to these serious allegations. He initially did not give an undertaking to refrain from practicing as an advocate pending an investigation into his conduct only to consent to an order suspending him from practice in court. On the eve of the hearing of the urgent application the respondent resigned as a member of the applicant with immediate effect, a move calculated to frustrate the applicant's jurisdiction over him and consequently to thwart the pending investigation.*

[22] The applicant also contends that it is evident that the invoices rendered to the state attorney by the respondent do not constitute tax invoices which suggests that the respondent is not registered as Value Added Tax vendor in terms of *section 23(1) of the Value Added Tax Act 89 of 1991 and* which also is indicative that the respondent does not pay Value Added Tax. The applicant states that the respondents conduct in this regard constitutes a criminal offence pursuant to *section 58 (C) of the Vat Added Tax Act* because the respondent's fees are accordingly VAT inclusive but he does not account to the South African Revenue Services regarding the vat collected because of non-registration to avoid the payment of VAT to SARS and this constitutes criminal and dishonest conduct.

[23] What is disquieting according to the applicant is that the respondent and State Attorney Lekabe on the 27 February 2017 did not have the authority to concede the liability claim on the merits in the case of *Kunene v The Minister of Police* on the 7 February 2017 due to the fact that express instructions were given to the State Attorney to defend the claim of Kunene because the Minister of Police had a valid and *bona fide* defence based on the merits of the claim in respect of the shooting incident and the alleged claim for unlawful arrest and detention and malicious prosecution. Yet despite these valid defence against Kunene's claim the respondent and State Attorney Lekabe

purportedly representing the Minister of Police conceded the merits and quantum before Judges Tsoka and Matojane in direct conflict of the written instructions given by the Minister of Police's Chief State Litigation Officer that this claim had to be defended.

[24] In the following paragraphs the applicant sets out the chronology of the alleged transgressions ascribed to the respondent's alleged professional misdemeanours and misconduct. I can do no better but repeat the litany of the respondent's alleged misconduct *"On 13 September 2018 Adv. Green SC on behalf of applicant met with the Chief State Litigation Officer Beukes and was furnished with report of a list of payments made by the State Attorney Lekabe to the respondent from the 1 April 2017 to 30 August 2018. The payee in each instance was reflected as the respondent at an account held with the First National Bank at the Fordsburg Branch and over the same period a total amount of R34 211 875.00 was paid into the respondent's account by the state. The invoices were captured and authorised for payment on the same day, which is indicative of an irregular fraudulent conduct at play. Reduced to payment per day, it shows that the respondent was paid R66 522.96 per day every day for 517 consecutive days inclusive of weekends and public holidays. The only reasonable conclusion is that there exists a corrupt and collusive relationship between the respondent and the State Attorney Johannesburg.*

[24] The Brigadier Beukes states that she has discovered five other matters where the quantum is a R1000 000.00 and above in which the respondent has been briefed by the State Attorney, these are namely,

(1) Ndudla v Minister of Police Case Number 17176/2015.

(R2405 000.00)

(2) Mbetheni v Minister of Police Case Number 41428/2016 (R4 152.000.00)

(3) Mbhele v Minister of Police Case Number 14459/2015 (R1 230 000.00)

(4) Mohlala v Minister of Police Case Number 44365/2014 (R1000 000.00)

(5) Morule v Minister of Police Case Number 4160/2014 (R2 760 800.00)

[25] The applicant states that in all these matters the modus operandi is the same as in the Kunene matter, where a memorandum motivating a proposed settlement is handed in shortly before the trial or on the day of the trial thus not affording the Minister of Police sufficient time to consider the settlement proposal which would be made an order of court despite the CHIEF LITIGATION OFFICER'S instructions to the contrary;

[26] the Minister's founding affidavit demonstrates that, firstly, the merits of the claim was conceded contrary to the instructions furnished by the Minister whereafter, despite having no instructions to this effect, the respondent and the State Attorney agreed a statement of agreed facts which concluded that the Minister tendered the said amount to the plaintiff, which amount was acceptable to the plaintiff; and

[27] based on the statement of agreed facts, a draft order was prepared which was ultimately made an order of court in terms of which the Minister was rendered liable for a sum in excess of R34 million.

[28] The respondent was given an opportunity to respond to the concerns raised by Mudau J. The respondent's responses were however unsatisfactory. It has since transpired 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 are party.

[29] The same modus operandi was followed by the respondent, in conjunction with the State Attorney, in at least five (5) other matters:

(29.1) Shortly before the trial of a matter, the State Attorney that had been dealing with the matter up to that point, would be replaced;

(29.2) The respondent would be placed on brief a couple of days before the trial;

(29.3) The respondent would, at the eleventh hour, furnish a memorandum motivating a settlement of the matter;

(29.4) The memorandum would be sent either shortly before the trial or on the day of the trial, affording insufficient time to consider the content thereof;

(29.5) Despite instructions to the contrary, settlement would be concluded.

[30] The dishonesty and impropriety in the respondent's conduct is manifest.Despite having had the opportunity, on at least five occasions, of providing answers to these serious allegations raised against him, the respondent has failed to do so.

[31] The evidential material needed by the respondent in order to rebut the allegations against him, and the material facts relevant thereto, fall within his peculiar knowledge. Despite this,the respondent has refused and refrained from disclosing his version in an answering affidavit to this court.

[32] The respondent has not in essence disputed the applicant's assertions that he has exhibited dishonest professional conduct for which he has not offered any explanation thereof.

[33] On the 21 September 2018, the applicant addressed a letter to the respondent requesting that in terms of Uniform Rules of Professional Conduct Rule 7.4, which decrees that counsel is obliged to keep fee books, showing a record of the fees earned, the briefing attorneys and sufficient detail to identify the matter and the nature of the work performed, the respondent was requested to hand over and make available his fee book and invoices from the period 1 January 2017 to 31 August 2018 by the 26 September 2018.

[34] On 26 September 2018, in response, the respondent addressed an email to the applicant advising of his forthwith resignation as a member of the applicant effective as at 16h00. The respondent did not address the issue of handing over his fee book and invoices to the applicant by the 26 September 2018 as requested. On 2 October 2018, the respondent filed an application seeking a postponement to file an Answering Affidavit.

The Applicant's Supplementary Affidavit

[35] According to the applicant the amendment of its Notice of Motion is predicated on the discovery of further invoices raised by the respondent to the State Attorney Johannesburg in respect of the matters of *Sithole Minister of Health Case…42101/2016 and Besil Read v Minister of Police Case Number 23007/2017.* The timeframes of the invoices rendered in that matter and the *Kunene v the Minister of Police* matter overlap and they also with the *Sithole v Minister of Police* matter. The fees charged in respect of each matter are duplicated in the other three matters namely, *Kunene & Sithole & Basil Read* matters and vice versa, which conduct demonstrates that the respondent is guilty of overcharging.

[36] The respondent has refused to surrender his fee book and invoices even before he resigned as a member of the applicant which prompted the applicant to amend the relief sought and in addition to include an order seeking the respondent's suspension pending the full outcome of an application to strike off the respondent's name from the roll of advocates and the delivery of the respondent's fee book, invoices and copies of bank statements for the period 1 January 2015 to 26 September 2018. The applicant submitted that based on the facts contained in the Founding Affidavit and the Supplementary Affidavit the respondent is *prima facie* guilty of gross dishonesty, overreaching and serious unprofessional misconduct and is *prima facie* not fit and proper person to continue to practice as an advocate pending the application to strike his name from the roll of advocates. Effectively the remainder of the interim relief sought remains unopposed. The amended relief, will enable the applicant to place all relevant facts before the court when is seized with the application to strike the respondent's name off the roll. The application for the amendment of the Notice of Motion was consequently granted

[37] The respondent has had five opportunities to answer the serious allegations raised against him and to place his version before court through an answering affidavit but he has refused to do despite being accorded ample opportunity to do so consequently there is only the applicant's version before court from

which it has to conduct an enquiry to determine pursuant thereto whether the respondent is not a fit and proper person to continue to practise as an advocate.

[38] There are three stages into the enquiry whether such action should be taken:

1. First is whether the impugned conduct has been established;

2. Second is whether the individual is fit and proper to continue to practice as an advocate and if not;

3. Third whether the individual is to be removed from the roll of advocates or be suspended from practising as an advocate.

[39] In the determination of these three stages of enquiry whether such action to either suspend or strike off an advocate from the roll, the court is obliged to properly exercise its discretion judiciously and the exercise of this discretion involves two enquiries; firstly it is to determine whether the material facts have been established, secondly, it is to evaluate those facts and apply them towards the correct objective.

See Kekana v Society of Advocates of South Africa 1998(4) SA 649 (SCA)

[40] The court is obliged to protect the public and the interests of justice and the advocate's profession and where an advocate exhibits dishonesty and palpable fraudulent misconduct, the inference may be reasonable and irresistible that to allow such a tainted advocate to continue to practice, the possibility cannot be excluded that such fraudulent conduct or dishonesty attributable to such tainted advocate would recur, which misconduct would place the administration of justice and the advocate's profession and public interest into disrepute.

[41] Consequently, if the court is satisfied that the material facts are established, then the court has to evaluate those facts towards the correct objective, which is to protect the profession, the public interest and the administration of justice and if after evaluating the material facts and the possibility that if such tainted advocate is allowed to practice the impugned misconduct may recur, only in that possibility or because of that reasonable possibility is this court obliged

ordinarily to bar such tainted advocate from continuing to practice. See *General Council of the Bar of SA v Geach and Others 2013 (2) SA 52 (SCA).*

[42] In the present matter the respondent was accorded ample opportunity to respond to the serious allegations of fraudulent misconduct raised against him by Modau J, the applicant on oath through senior advocates Green and Rossouw, and also by the Chief Ligation Official Beukes in the office of the Minister of Police. The respondent has not disputed those allegations of overcharging, of fraudulently settling the Kunene matter without a mandate, and 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.

[43] But most crucially the respondent is accused of fraudulently misleading Judges Tsoka and Matojane by submitting fraudulent settlement agreements to the detriment of the Fiscus, the Minister of Police, the advocate's profession and the interests of justice. This brazen deception of the court and the misrepresentation of the facts by the respondent to the Judges infringe the tenets and core of the advocate's profession which is predicated on integrity, truthfulness and honesty. The abiding tenant of an advocate's word his or her badge of honour and the court has to implicitly rely thereon because an advocate as an officer of court, his or her conduct must at all times be clothed with an unblemished and irreproachable reputation and character because of the fact that the advocate's profession is predicated on strict ethical rules, absolute integrity,scrupulous honesty and demeanour.

[44] The SCA in dealing with a recalcitrant and obstructive advocate who was not prepared to surrender his fee book ,invoices and bank statements, its admonition of such an advocate as applied in the case of Kekana also applies in equal measure in the present matter where the SCA stated " in respect of the misconduct the respondent is accused of refusing to surrender his books and invoices because in the absence of proper work that was done as the case may be, there is no foundation for determining whether the fees were reasonable. In terms of court, it is incumbent upon an advocate who is alleged to have charged excessive fees to provide sufficient detail of the work that was performed to enable the fee to be assessed and in appropriate

cases, cross examination might be called for to establish the true facts, further Nugent J remarked at paragraph 45

"Turning to the appeal of Bezuidenhout, unlike the seven advocates I have death with; he was uncooperative, even obstructive in dealing with allegations against him. He denied the evidence of Ellis SC and at the flatly refused to produce his records but that denial can be summarily dismissed. He was one of those who claimed their right to privacy when they became aware that Bar Counsel was once more in search of the books which is hardly consistent with an intention to disclose his books. Moreover, the court below recorded that he failed to comply with a request by the bat council to place certain of his records before the court. When he was compelled to do so by the court they reflected that his transgressions were continuing, obliging the court to order his suspension until the outcome of the application".

SEE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA v GEACH AND OTHERS 2013 (2) SA 52 (SCA)

[45] The respondent's concession or acquiescence to accede to be suspended from practising as an advocate pending the finalisation of the investigation into his alleged misconduct is of no moment and is not decisively indicative of his *bona fide* to co-operate with the intended investigation because it is negated by his refusal to surrender his fee books, invoices and bank statements for the period stipulated to the applicant.

[46] The suspension of an advocate from practising is inherently a power which reposes in the court and is not delegatable either to the applicant or to the respondent who mero motu offered to suspend himself from practicing as an advocate without admitting the serious allegations raised against him albeit from the bar because of his failure to file his answering affidavit. The court cannot suspend an advocate from practising if there is no prima facie proof of misconduct established in the material facts pertaining to such an impugned advocate, it is only if there are established material facts of misconduct proven against an impugned advocate that

the court would, only then because of the irrefutable and satisfactory proven material facts either suspend the impugned advocate from practicing alternatively strike the said tainted advocate's name from the roll.

[47] The allegations of fraud, theft, overreaching and deceit and the misleading of judges to grant fraudulent orders are substantiated under oath and by documentary evidence. Although the respondent elected not to file an answering affidavit, it is patent that he has read the serious allegations raised against him and same remain undisputed and are consequently *accepted as established* material evidence of misconduct proven against the respondent, which irrespective of his gesture in acquiescing to the order of suspension from practicing as an advocate, in our view such unsolicited concession to be suspended from practising as an advocate ineluctably confirms the truthfulness and irrefutability of the said serious allegations of misconduct raised against the respondent . Consequently this court endorses the respondent's suspension predicated on the undisputed established material facts.

[48] The suspension of an advocate is not for the asking the court despite the respondent's concession to an order suspending him from practicing as an advocate, still has to bring its unbiased objective analytical mind and exercise its discretion judiciously in order to determine the veracity and authenticity of these established material facts impugning the character and person of the respondent and determine whether these established material facts thereafter justify the characterisation of the respondent's conduct as inimical to that of a person who is said to be a fit and proper person entitled to practice as an advocate. The court having considered all the material established facts and after objectively and judiciously applying its mind and exercising its discretion, irrevocably finds that it has been established that the respondent is not a fit and proper person to continue to practise as an advocate.

In the premises the following order is made:

1. The order issued in suspending the respondent form practising as an advocate pending the final outcome of an investigation into his professional misconduct and or the application to have the respondent's name struck off the roll of advocates 2nd of October 2018 is confirmed.
2. The respondent is ordered to forthwith furnish the applicant with the following documents:

2.1 The respondent's original fee book for the period 1 January 2015 to 26 September 2018;

2.2 The respondent's invoices (or true or duplicate original copies thereof) for the period 1 January 2015 to 26 September 2018;

2.3 True copies of bank statements in respect of the current account held with First National Bank, Fordsburg Branch, under account number […]55 for the period 1 January 2015 to 26 September 2018;

2.4 The details of any other bank accounts in which the respondent received deposits form 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.

2.5 The respondent shall pay the applicant's costs of this application, limited to the costs incurred by the applicant incurred in respect of services rendered by its attorneys of record.

3. The Registrar is ordered to furnish a copy of this judgement with immediate effect to:

3.1 The Commissioner of South African Revenue Service;

3.2 The Commissioner of the South African Police Service;

3.3 The Chairperson of the Law Society of the Northern Provinces.

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

APPEARENCES:

Counsel for the Applicant:	Adv Wessels SC
Instructed by:	LANHAM-LOVE ATTORNEYS

Counsel for the Respondent: In person

Date of Hearing: 05 October 2018

Date of Judgment: 24 October 2018

MODIBA, J:

[1] I agree to the order proposed by my brother Mokgoatlheng J but for different reasons. My reasons for the order are set out hereunder.

[2] The applicant initially sought an urgent interim order suspending the respondent from practice as an advocate, pending an investigation into his conduct in the matter of *Kunene v The Minister of Police*[1], an enquiry into the fees he raised in respect of work performed for the state attorney, his relationship with the state attorney, as well as an application to have his name struck off the roll of advocates.

[3] All references to the state attorney in this judgment are to the state attorney, Johannesburg.

[1] Case Number: 25544/2018

[4] The relief initially sought by the applicant was overtaken by events, prompting the applicant to file an amended notice of motion, persisting with the suspension order pending the outcome of an application to have the respondent's name struck off the roll of advocates but seeking a final order compelling the respondent to furnish the applicant with his accounting records. The said events are:

[4.1] the applicant obtained a report from the state attorney in respect of the respondent's invoices to the state attorney and payments made on such invoices; and

[4.2] the respondent's resignation from the applicant's membership.

I elaborate on these events in paragraph 8 and 11 below.

[5] This application stems from a judgment by Mudau J in *Kunene,* handed down on 15 August 2018. There the court dealt with an application to set aside a writ of execution issued in respect of the quantum order in *Kunene,* pending an application for the rescission of both the order in respect of the merits and quantum. In the application to set aside the writ, the Minister of Police ("the Minister") alleged that the merits in respect of unlawful assault and unlawful arrest and detention were settled contrary to his instructions to defend the matter. Further, the respondent and the state attorney tendered a statement of agreed facts which concluded that the Minister tendered an amount of R34, 077,000.00 in settlement of Kunene's claim when that was not so.

[6] Mudau J rescinded these two orders and expressed concerns in respect of the propriety of the relationship between the respondent and the state attorney. For

that reason, Mudau J referred the judgement to the applicant to investigate the respondent's conduct in *Kunene.*

[7] According to the applicant, Mudau J's judgment was considered by the applicant's Professional and Fees Subcommittee on 5 September 2018. The subcommittee resolved to call on the respondent to provide an explanation in respect of the concerns raised by Mudau J and to give an undertaking that the respondent will refrain from practicing as an advocate pending an investigation into his conduct. On 6 September 2018, the applicant sent a letter to this effect to the respondent giving him until 10 September 2018 to respond. The respondent sought and was granted an extension until 14 September 2018 due to the ill-health of his mother. On 11 September 2018, the applicant resolved to bring this application.

[8] On 13 September 2018, the applicant addressed a request to the state attorney for a report on payments by the latter to the respondent from 1 April 2017 to 30 August 2018. On 20 September 2018 the state attorney furnished the said report to the applicant. It reflects that during this period, the state attorney made payments in the amount of R34, 392,875 to the respondent in respect of fees. Invoices relating to these payments were captured and paid promptly when generally, the state attorney does not promptly honour payments to practitioners. The report also reflects that the state attorney paid the respondent R935, 000 in respect of his fees in *Kunene* for the period 18 December 2017 to 22 February 2018. From this report the applicant contends that the following conclusions ought to be drawn:

[8.1] a corrupt and collusive relationship exists between the respondent and the state attorney;

[8.2] the respondent may be guilty of overreaching and over charging or dishonesty and theft in that he charged for work that was not performed or overcharged in that his fees translate to R66,522.96 per day inclusive of weekends and public holidays or R97,428.82 per day exclusive of weekends and public holidays. Given that according to invoices he rendered to the state attorney, the respondent charged R2, 500 per hour; to charge the said fees, he would have worked 517 consecutive days for 26.6 hours a day in the former scenario or 38.9 hours per day in the latter scenario, which is impossible.

[8.3] the respondent's invoices to the state attorney do not constitute Value Added Tax ("VAT") invoices, apparently because he is not registered as a VAT vendor as required in terms of the VAT Act[2], a punishable offence.

[9] On 14 September 2018, the respondent provided an explanation which the applicant found unsatisfactory.

[10] The applicant's first notice of motion in respect of this application is dated 21 September 2018. It was issued on the same date. Therein the applicant afforded the respondent until 25 September 2018 to file the notice of intention to oppose and until 12h00 on 26 September 2018 to file his answering affidavit to allow the applicant time to file a reply if any and to paginate and index the papers by 12h00 on 27 September 2018 ahead of the hearing on 2 October 2018.

[2] Act 89 of 1991.

[11] The respondent did not file opposing papers by these timeframes. Instead on 27 September 2018, he tendered his resignation as a member of the applicant with immediate effect. This prompted the applicant on 28 September 2018 to deliver an amended notice of motion incorporating an order to compel the respondent to deliver the following documents for the period 1 January 2015 to 26 September 2018: his original fee book, invoices rendered to the state attorney, bank statements and details of other bank accounts in which he received deposits from the state attorney as well as bank statements in respect of the said bank accounts.

[12] On 1 October, the respondent filed a notice of intention to oppose as an annexure to a postponement application. In the postponement application, he pleaded for more time to file his answering affidavit. The applicant filed an answering affidavit to this application on the same day.

[13] On 2 October 2018, the respondent appeared in person. Only then did he concede to an order for his suspension from practice as an advocate. He also made submissions in respect of the postponement of the remainder of the relief sought by the applicant. He pleaded for twenty days to file an answering affidavit. The court was not amenable to his request for several reasons. The application was brought on an urgent basis. Twenty days would relegate the application to an ordinary application as it would give the respondent the normal time to file opposing papers under circumstances where he did not oppose the urgency of the application and failed to provide a satisfactory explanation why he needs an extended time.

[14] In the postponement application, he did not account for his efforts towards preparing opposing papers since he was served with the application. He has been aware of the pending investigation as early as 6 September 2018 when the applicant called on him to account for his conduct. His bald explanation that he is facing serious allegations and that due to the recess period he has not been able to obtain legal advice was not accepted by the court under these circumstances. So is his attempt to use his mother's illness and subsequent passing as the reason why he has not filed opposing papers. The court also found this reason to be bald and unsubstantiated.

[15] Given that the amended notice of motion was only delivered on 28 September 2018 and further that it did not set out timeframes for the filing of opposing papers, the court stood the matter down until Friday 5 October 2018 to allow the respondent to file his answering affidavit by 16h00 on Thursday 4 October 2018. The respondent again did not comply with this directive. When the court resumed on 5 October 2018, he persisted with his plea for more time. The court granted an order dismissing his postponement application.

[16] Effectively, the application brought by the applicant served before this court unopposed. Counsel for the applicant made submissions in respect of the compelling order to which the respondent did not respond, despite being afforded an opportunity to do so.

[17] The allegations facing the respondent are of a serious nature involving large sums of public money. Two officers of the court namely the respondent and the state

attorney are implicated. I am very concerned about how the respondent responded to these allegations starting from the proceedings before Mudau J. His response does not reflect a cooperative attitude. He rather displays an elusive and dilatory attitude as well as disregard for the Uniforms Rules of Court and the directives of this court.

[18] Despite the fact that the basis for the application to set aside the writ in *Kunene* cast him in a negative light, he did not respond to the application by filing opposing papers or if he did not wish to oppose it, by filing a notice to abide and/ or an affidavit placing his version before the court. When the present application was argued, he had still not filed any papers in respect of part B for the rescission of the orders in respect of the merits and quantum in *Kunene.*

[19] In his letter of 14 September 2018, he insubstantially denied any wrongdoing in *Kunene* and expressed his intention to oppose part B of the application that served before Mudau J. Notably, there too he is out of time for filing opposing papers. He refused to give an undertaking to refrain from practicing as an advocate pending an investigation into his conduct. He contended that it is inappropriate for him to give such an undertaking given that Kunene has applied for leave to appeal Mudau J's order. As already stated, on the eve of the hearing of the present application, he resigned from the applicant's membership with immediate effect, a move probably calculated to frustrate the applicant's jurisdiction over him and consequently to thwart the prospects of an application to have his name struck off the roll of advocates.

[20] When this application was heard, as already stated he had still not placed a version before this court because he had not filed an answering affidavit. He rather opted to devote time to prepare a substantive postponement application. He filed his notice of intention to oppose late and sought no condonation its late filing. His purported reasons for not filing an answering affidavit if valid, would not justify why he failed to file this simple notice timeously.

[21] When the court stood the matter down until 5 October 2018 to allow him time to file an answer, it was pertinent from his attitude that he had no intention to comply with the court's directive. He continued to argue for more time after the directive was given. He kept the applicant's attorney and counsel waiting for his answering affidavit on 4 October 2018. It was only when the applicant's attorney called him that he informed him that he would not be filing his answering affidavit as directed by the court. He did not have to wait until 4pm to inform the applicant's legal representatives of his intentions because he knew much earlier that he would not be complying with the court's directive. The two presiding judges were also waiting for his answering affidavit. He afforded them no courtesy to let them know that he would not be filing it.

[22] On 5 October 2018 he again failed to give satisfactory reasons why he did not comply with the court's directive but instead informed the court that he deserves more time. His disregard for court rules and court directives as set out above is alarming given his status as an officer of this court of over twenty years standing.

[23] The only issue that remained to be determined when the application was ultimately argued on 5 October 2018 is whether the applicant has made out a case for an order compelling the respondent to furnish his accounting records. On the said date the respondent sought to place urgency in dispute. In my view he was clutching at straws. He took no issue with urgency in respect of the order for his suspension from practice as an advocate. The basis for that order is the serious allegations set out in the applicant's papers, which raise serious questions about his fitness and propriety to continue practicing as an advocate. As I demonstrate below, the urgency of the order for his suspension is inseparable from the urgency of the order compelling the respondent to furnish his accounting records.

[24] Although the applicant's papers in respect of the order to compel accounting records address an interim order, the amended notice of motion is not only couched in final terms, if granted the order to compel will be final in its effect. The requirements for this relief are: (a) a clear right, (b) an injury committed or reasonably apprehended and (c) the absence of a satisfactory alternative remedy. I am satisfied that the applicant meets these requirements.

[25] It is trite that in applications of this nature, to succeed the applicant is not required to establish a *prima facie* right because it is not asserting a right in terms of the Admission of Advocates Act[3]. Its role is to bring the applicant's conduct to the attention of the court to enable the court to exercise its disciplinary powers. This is well within the applicant's duty as the *custos morum* of the advocates' profession.

[3] 74 of 1964.

[26] The respondent has a professional duty to keep the records sought by the applicant and to furnish them on request. He has failed to do so. Mokgoatlheng J deals at length with the respondent's duty to furnish the applicant with these records at paragraphs 17 to 19 of his judgment. I align myself to the contents of these paragraphs. That he has resigned as a member of the applicant does not absolve him from this duty. It is common cause that he was a member of the applicant when he perpetrated the alleged conduct. Hence the probability expressed in paragraph 19 above, that his resignation may be inspired by an attempt to avoid accounting for his alleged conduct.

[27] His failure to furnish records would in any event frustrate the applicant's exercise of its role as the *custos morum* of the advocates' profession. This role extends beyond the applicant's membership. Without access to the respondent's accounting records even as a non-member of the applicant, the applicant's efforts to place facts before this court to determine whether the respondent continues to be a fit and proper person to practice as an advocate would be futile. He has consented to an order for his suspension. The suspension order is interim in nature, pending an application to have the respondent's name struck off the roll of advocates. Without the compelling order, the applicant would lack the necessary information to prepare the application to have the respondent's name struck off the roll of advocates. It would therefore render the respondent's suspension nugatory. It is for this reason that the urgency in respect of the suspension order and the compelling order are intertwined.

[28] If the applicant did not take the measures it took following the judgment by Mudau J, the respondent would still be practicing as an advocate without accounting for his alleged conduct. He would have probably continued to settle other matters in a manner prejudicial to the fiscus as he is alleged to have done in *Kunene* and other matters. Further, he would have probably continued to charge fees as he is alleged to have done in Kunene and other matters to the prejudice of the fiscus.

[29] In this application the applicant sets out five other matters in respect of which it alleges that the respondent together with the state attorney used a similar strategy used in *Kunene* to finalize matters between various plaintiffs and the Minister. The alleged strategy is as follows: shortly before trial, the official in the office of the state attorney who has been dealing with the matter is replaced. The respondent would be briefed shortly before the trial. He would prepare a memorandum motivating the settlement of the merits and quantum. It would be sent to the Minister shortly before the trial denying him sufficient time to consider its contents. Contrary to the Minister's instruction the matter would be settled as was done in *Kunene*.

[30] The applicant also alleges that in the pending matter between *Mbetheni v the Minister of Police and the National Director of Public Prosecutions*[4] where the plaintiff is claiming R4, 152, 000, the respondent is on brief. The Minister has requested the state attorney to debrief him. The state attorney has not acceded to this request. For this reason, the applicant alleges that if the respondent is not suspended from practice, the matter may be disposed of using the same strategy used in *Kunene* and other matters.

[4] Case number: 41428/2016.

[30] *Prima facie*:

[30.1] the respondent's conduct in respect of the manner in which the merits and quantum were settled in *Kunene* as alleged by the applicant and in respect of which Mudau J expressed concerns as well as a *prima facie* view;[5]

[30.2] the applicant's allegations against the respondent in respect of the manner in which the merits and quantum were settled in other similar matters referred to above;

[30.3] the applicant's allegations against the respondent in respect of fees paid by the state attorney to the respondent in *Kunene* as well as in other matters -

establish harm to the fiscus. The application for leave to appeal the judgment in *Kunene* does not neutralize the allegations referred to in paragraph 30.1 above because these allegations remain subject to the rescission application which is still pending.

[31] Further the applicant's allegations against the respondent in *Mbetheni* establish an apprehension of further harm to the fiscus.

[32] It is in the interest of the public and the advocates' profession that the applicant has expeditious access to the respondent's accounting records, lest the purpose for which the order suspending the respondent from practice as an advocate, is rendered ineffective.

[5] See paragraph 16 of the judgment in Kunene.

[33] The applicant does not have another suitable remedy. The respondent has an obligation to maintain a fee book and to make it available to the applicant on request. As already stated, this obligation relates to the period of the respondent's membership with the applicant and is not negated by his resignation. The applicant's role as *custos morum* is not affected by the respondent's resignation from the applicant's membership. For that reason, its role as *custos morum* would be frustrated by lack of access to the respondent's accounting records. The applicant has no other means of obtaining the respondent's fee book.

[34] As far as invoices to the state attorney and the respondent's bank statements are concerned, although the applicant may obtain these documents from third parties, such a resort would not be a suitable remedy. The documents are personal to the respondent and are in his possession. Bank records are confidential by nature. The bank is unlikely to make them available to the applicant without a court order. There is no reason why the applicant should go through the process of obtaining another court order to obtain the respondent's bank statements. Although nothing precludes the applicant from obtaining the respondent's invoices to the state attorney from that office, there is also no reason why the applicant should endure the trouble of approaching that office when the respondent has a professional duty to account to the applicant in respect of his conduct during his period of membership with the applicant. Putting the applicant in this position would essentially deny it satisfactory redress.

[35] In the premises, I agree to the order as proposed by Mokgoatlheng J.

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