REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 11844/2018

(1) REPORTABLE
(2) OF INTEREST TO OTHER JUDGES
(3) REVISED

15 April 2019 .....

In the matter between:

JOHANNESBURG SOCIETY OF ADVOCATES **APPLICANT**

and

CRAIG SNOYMAN **RESPONDENT**

JUDGMENT

VAN OOSTEN J

Introduction

[1] The applicant seeks an order for striking off the respondent's name from the roll of advocates, alternatively to suspend the respondent for a period deemed fit by this court. The matter originated by way of notice of motion and is opposed by the respondent. In the answering affidavit the respondent, a former member of the

applicant but presently practicing as an independent advocate, intimated that a request would be made for the matter to be referred for the hearing of oral evidence, in his own words 'as I wish to testify before this court and to submit myself to cross-examination'. The applicant, in its replying affidavit, agreed to a referral and simultaneously filed a notice of an interlocutory application for such referral, which was not opposed by the respondent. The interlocutory application came up for hearing before us, on 16 October 2018, and the respondent appeared in person. By agreement, Windell J made an order in essence referring the matter for the hearing of oral evidence on the issues as defined in the affidavits.

[2] At the commencement of the hearing before us, the respondent brought an application for the setting aside of the 16 October 2018 order, notice of which had been given in a notice of motion and founding affidavit deposed to by the respondent (the *in limine* application). The applicant although not having filed affidavits, opposed the application and the matter was argued before us. At the conclusion of the arguments, the application was dismissed with costs, including the costs of two counsel.

[3] The matter proceeded on the hearing of oral evidence. The applicant having duly subpoenaed its key witnesses, Elizabeth Monatisa, however, so counsel for the applicant informed us, faced the predicament that she was not present at court and the applicant's case was closed without adducing evidence. The respondent was the only witness called to testify on his behalf. In argument, counsel for the applicant fairly and in my view, correctly, conceded that a case for striking the respondent's name from the roll of advocates had not been made out. The main application was consequently dismissed with costs, including the costs of two counsel. What follows are briefly the reasons for the orders that were made.

Background facts

[4] On 11 March 2014 the respondent appeared in the matter of *Letty Mofokeng and Road Accident Fund*, on behalf of the defendant, which came on for trial before Opperman AJ (as she then was). In the cross-examination of the plaintiff in that matter, the respondent conveyed to the court that he had been in possession of a

statement of her employer, Elizabeth Monatisa, which at that very moment he was unable to lay his hands on. The respondent then proceeded to put to the plaintiff what Monatisa had telephonically conveyed to the defendant's attorney. In the exchange that followed between Opperman AJ and the respondent, he informed the court that Monatisa had been *subpoenaed* by the defendant to testify. Monatisa was the second witness to testify for the plaintiff and in cross-examination, the respondent put to her the exchange between her and his instructing attorney during the telephone conversation the previous day, indicating that he was present thereat and able to overhear part of it (the telephone conversation). Monatisa testified that she had only spoken to the plaintiff's legal representatives before being called to testify, but denied having spoken to the defendant's legal representatives.

[5] In her judgment, Opperman AJ expressed reservations concerning the conduct of the respondent in regard to the aspects I have dealt with, which the learned judge viewed as *prima facie* unprofessional, and referred the matter to the applicant for investigation.

[6] Having fully and properly investigated the respondent's conduct, the applicant launched the present application, which is premised on the grounds that the respondent *knowingly* misled the court in submitting that Monatisa had been *subpoenaed* and, furthermore, in informing the court that he was in possession of a *statement* of Monatisa. Based thereon, the applicant submitted that the respondent is not a fit and proper person to continue to practice as an advocate.

[7] It has by now become undisputed, firstly, that the use of the word *statement* by the respondent indeed was incorrect, and secondly, that a formal subpoena in respect of Monatisa had not been issued. I shall revert to the respondent's version concerning these aspects, later in the judgment.

The in limine application

[8] The *in limine* application was premised on the contention that the 16 October 2018 order was wrongly made as all the issues referred to therein, were either common cause or not disputed. In the absence of triable issues, so the argument went, a

referral to evidence, albeit initiated at the request of the respondent and expressly agreed upon by the parties, was not competent.

[9] The application was flawed in its premise: a clear and well defined dispute is readily apparent from the papers. It concerns the question whether the telephone conversation had been held. Monantisa, as I have alluded to, in the trial denied as much and it was for this very reason that she was to be called to testify in this matter. The absence of her evidence, indeed, has a significant if not decisive, effect on the assessment of the respondent's evidence as his version stands uncontested.

[10] The application, for another reason, was ill-conceived. The respondent requested the opportunity to explain and clarify his conduct, which he admitted right from the outset, was *prima facie* open to misunderstanding and criticism. The parties moreover agreed to a referral for oral evidence. The court, finally, in the exercise of its discretion, gave effect thereto in granting the order for referral. It was only shortly before the hearing, after senior counsel who appeared before us, was instructed, that the view was formed which gave rise to this application. The appropriateness of the application, against this background, in my view, is questionable but I prefer to deal with the application on the basis that the 16 October 2018 order was an interim order which by its nature is subject to re-consideration by the court, which is what this court is asked to do.

[11] I consider it necessary to delve more deeply into the nature of the discretion the court is vested with in referring for the hearing of oral evidence matters concerning the professional conduct of professionals, in this case a practising advocate.

[12] Applications for striking off are considered to be *sui generis* (*Jiba and Another v General Council of the Bar of South Africa and Another; Mrwebi v General Council of the Bar of South Africa* (141/17; 180/17) [2018] ZASCA 103; [2018] 3 All SA 622 (SCA); 2019 (1) SA 130 (SCA); 2019 (1) SACR 154 (SCA) (10 July 2018); *Law Society of the Free State v Majola* (4776/2015) [2016] ZAFSHC 145 (12 August 2016). They are proceedings of a disciplinary nature and not subject to the strict rules that govern ordinary civil proceedings (*Jiba* para [6]; *Hepple and Others v Law Society of the Northern Provinces* [2014] 3 All SA 408 SCA para [9]). In the light of the kind of

proceedings, the Supreme Court of Appeal confirmed the duty resting on an attorney (and likewise on an advocate [*Jiba* para [6]] in these kinds of proceedings, in the following *dictum* as follows (para [9]):

> 'It follows therefore that where allegations and evidence are presented against an attorney they cannot be met with mere denials by the attorney concerned. If allegations are made by the law society and underlying documents are provided which form the basis of the allegations, they cannot simply be brushed aside; the attorneys are expected to respond meaningfully to them and to furnish a proper explanation of the financial discrepancies as their failure to do so may count against them.'

(See also: *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA paras [27] - [28]). The *dictum* appears to be applicable to all allegations of misconduct.

[13] Where *prima facie* evidence of unprofessional conduct exists whether as alleged by the applicant or, more conclusively as in the present matter, admitted by the respondent, it is for the respondent to present the court with a satisfactory explanation of his conduct. The applicant's role in applications of this nature, as *custos morum* of the advocates' profession, is that of a *nuntius*: it is merely required to place facts relating to the alleged unprofessional conduct before the court for the court to exercise its discretion as to the appropriateness of the order sought (*Hassim v Incorporated Law Society of Natal* 1977 (2) SA 757 (AD) 767C - G).

[14] This brings me to the court's discretion in referring a matter for the hearing of oral evidence, assuming that no dispute of fact exists (within the meaning attributed thereto in the leading case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1163 and once again, recently confirmed in *Lombaard v Droprop CC* 2010 (5) SA 1 (SCA) para [26]). In that matter the overriding consideration in the exercise of the discretion, was held to be 'ensuring a just and expeditious decision' (para [29]).

[15] The explanation of *prima facie* unprofessional conduct involving the element of *dolus,* as is the case here, falls primarily within the personal knowledge of the respondent. The court accordingly, in such cases, even if no application for a referral

is made by either party, *mero motu* call for a *viva voce* explanation of such conduct from the respondent.

[16] Applied to the facts of the present matter, the respondent admitted that his conduct was open to doubt calling for an explanation and the court accordingly was entitled in the exercise of its discretion, even in the absence of genuine disputes of fact, to refer the matter for the hearing of oral evidence.

[17] It follows that upon re-consideration by this court, the 16 October 2018 order was properly made.

Assessment of the respondent's evidence

[18] The respondent testified in an open and forthright manner that his choice of the word *statement*, which undoubtedly bears a legally technical meaning, was incorrect and may have caused misunderstanding, which he explained probably resulted from inadvertence in the heat of conducting cross-examination of the witnesses. What he had meant to convey to the court was a reference to the notes he had made of the telephone conversation. From a careful reading of the respondent's cross-examination of the witnesses, ample support for his version is readily apparent.

[19] For all these reasons I am satisfied that the respondent's use of the word *statement* was nothing but a misnomer and in any event, not intended to mislead.

[20] Finally, as to the subpoena, it has been shown that a formal subpoena signed by the Registrar had not been issued but rather an informal document resembling a subpoena, merely in order to urgently secure the attendance of the witness at court in a pending trial. Although technically a mishap, I am unable to find that it constituted unprofessional conduct of any kind.

Costs

[21] Counsel for the applicant fairly conceded that the costs of the main application should follow the result.

Order

In the result the following order is made:

1. The application for dismissal of the main application is dismissed.
2. The respondent is to pay the costs of the application in para 1, such costs to include the costs consequent upon the employment of two counsel.
3. The main application is dismissed.
4. The applicant is to pay the costs of the main application, such costs to include the costs consequent upon the employment of two counsel.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

pp **L WINDELL**
JUDGE OF THE HIGH COURT

APPLICANT'S COUNSEL	***ADV M VAN WYK*** ***ADV E VENTER***
APPLICANT'S ATTORNEYS	***LANHAM-LOVE ATTORNEYS***
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RESPONDENT'S ATTORNEYS	***MOLEFE DLEPU ATTORNEYS***
DATE OF HEARING ***DATE OF ORDERS*** ***DATE OF REASONS***	***11 FEBRUARY 2019*** ***11 FEBRUARY 2019*** ***15 APRIL 2019***