

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **12379/2021**

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

Date: 8 August 2023

In the matter between:

LEGAL PRACTICE COUNCIL

Applicant

and

KGETSEPE REVENGE KGAPHOLA

First Respondent

KGAPHOLA INCORPORATED ATTORNEYS

Second Respondent

JUDGMENT

DE VOS AJ

- [1] This is an application for leave to appeal against the order of the honourable Mngqibisa-Thusi J and Nqumse AJ of 22 July 2022. The order dismissed the Legal

Practice Council's ("the LPC") application to have Mr Kgaphola struck from the roll of attorneys. Honourable Mngqibisa-Thusi J and Nqumse AJ are unavailable to hear the application for leave to appeal. The present Bench has been reconstituted to hear the application for leave to appeal. The parties have not objected to the reconstitution of the Bench.

- [2] The Court a quo was confronted with several alleged breaches of the Legal Practice Act and its Rules. The Court a quo found that most of these breaches were not, in fact, breaches but instead categorised the non-compliance as belated compliance. The Court a quo also did not find many of the breaches as having been established or severe enough to attract a suspension or striking from the roll.
- [3] The LPC seeks leave to appeal to the Supreme Court of Appeal in terms of sections 16(1)(a) read with section 17 of the Superior Courts Act, 10 of 2013 ("the Act").¹ The LPC seeks to leave on two grounds. Firstly, they contend the appeal holds reasonable prospects of success on appeal. Secondly, this matter presents compelling reasons for an appeal to be granted under section 17(1)(a)(ii) of the Superior Courts Act.
- [4] At its core, the LPC contends that Mr Kgaphola committed severe breaches of the Legal Practice Council Act and its Rules. The appropriate sanction in these matters, especially when viewed cumulatively, is to strike Mr Kgaphola from the roll. Or, at a minimum, to suspend him from practice. The serious allegations the LPC refer to are that Mr Kgaphola practised without a Fidelity Fund Certificate, failed to pay membership fees, failed to comply with the mandatory management course, failed to respond to correspondence from the LPC, failed to inform the LPC of the opening of a bank account, opening a bank account in another province (as where Mr Kgaphola was practising in) and non-compliance with FICA. The LPC also pointed to how Mr Kgaphola had approached these proceedings as indicative of him not being fit and proper.

¹ In terms of Section 17 Act:

(1)(a) Leave to appeal may only be given where the judge or judges concerned are of the opinion that —

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration...

- [5] The LPC contends that the Court a quo failed to make findings concerning each of these alleged transgressions and also failed to view these breaches as serious breaches.
- [6] Mr Kgaphola, in turn, submits this Court that there is a discretion to be exercised by a court when deciding whether or not to discipline a member. And in that discretion is very little room to interfere with the finding of a court. This Court is invited to consider the limited grounds of interference combined with the stricter leave to appeal. Relying on a combination of these principles, Mr Kgaphola submits that leave to appeal should not be granted.
- [7] We have considered the papers and the submissions and believe the matter justifies the attention of the Supreme Court of Appeal. In what follows we set out our reasons.
- [8] We are persuaded that another Court would come to different factual conclusions whether Mr Kgaphola practised without a Fidelity Fund Certificate from 9 October 2020 to 31 December 2020, 1 January 2021 to 15 March 2021, and from 30 April 2021 onwards. Similarly, we conclude that the LPC's submissions that Mr Kgaphola breached Rule 43 by failing to respond to communications from the LPC, failed to open a bank account in the province of his practice and failed to inform the LPC of the opening of this account timeously, bears reasonable prospects of success. It appears that Mr Kgaphola did not dispute much of these allegations and that the Court a quo did not make factual findings in relation to all of these alleged contraventions.
- [9] In addition to these factual findings, there are reasonable prospects of success that another Court would come to a different conclusion regarding Court a quo's approach to whether Mr Kgaphola's conduct fell short of a fit and proper person. The Court a quo was to compare Mr Kgaphola's conduct to that expected of a practitioner. There are prospects that another Court would come to a different conclusion in its approach and application of the test.
- [10] Having weighed these considerations, leave to appeal ought to be granted as the application bears reasonable prospects of success.
- [11] In addition, leave to appeal ought to be granted because the alleged existence of conflict in jurisprudence is a compelling reason to grant leave to appeal. The conflict is that our courts have held that from the instant a practice is opened, all of the

consequences for being in practice follow.² The requirement of immediate compliance, is the consistent position adopted in this Division for which other legal practitioners are regularly sanctioned. The Court a quo factually found instances of non-compliance with the rules but accepted these as mild and held that Mr Kgaphola was only delayed in his compliance. The dissonance between these judgments requires a resolution from the Supreme Court of Appeal.

[12] The LPC also contends that the honourable Court a quo's judgment leads to an inconsistency between judgements that have held similar conduct was serious. In particular, in *Law Society of the Northern Provinces v Mamatho*³ it was held that not having a fidelity fund certificate alone is considered a serious offence. The approach of this Court in this matter is opposed to this finding. Furthermore, in *Hewetson v Law Society of the Free State*⁴ it was held that the failure to respond to correspondence is considered a serious offence. The LPC contends that this dissonance requires an authoritative position from the Supreme Court of Appeal.

[13] For all these reasons, the application for leave to appeal deserves the attention of the Supreme Court of Appeal.

Order

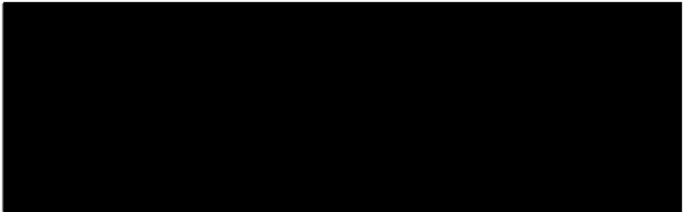
[14] In the result, the following order is granted:

- a) Leave to appeal is granted to the Supreme Court of Appeal.
- b) The costs of the application for leave to appeal are in the appeal.

² See examples of this in: *South African Legal Practice Council v Siphesihle Mchunu* (unreported) 66711/2020; and *South African Legal Practice Council v Tarquin Jonathan Bishop & Another* 417/2021 (unreported) (this judgment is also the subject of an application for leave to appeal.

³ *Law Society of the Northern Provinces v Mamatho* 2003 (6) SA 467 (SCA) par 1

⁴ *Hewetson v Law Society of the Free State* 2020 (5) SA 86 (SCA) par 50.



I de Vos

Acting Judge of the High Court



AP Ledwaba DJP

Deputy Judge President

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the appellant:

Mr Maphutha

Instructed by:

Rapetsa Attorneys Inc

Counsel for the Respondent:

L Groome

Instructed by:

RW Attorneys

Date of the hearing:

3 August 2023

Date of judgment:

8 August 2023