IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR 313/2020

In the matter between:

HEMELENE CHETTY **APPELLANT**

and

SARAS PERUMAUL **RESPONDENT**

ORDER

On appeal from: Pietermaritzburg Regional Court (sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Mossop AJ and Seegobin J:

Introduction

'Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands:
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.'

[1] These are the words of Iago in Act 3 of Scene 3 in *Othello* by William Shakespeare. They are apposite to this matter, which concerns an alleged instance of defamation. In the court below, the appellant was found to have defamed the respondent and was directed to pay her the amount of R70 000 as a consequence. It is against this judgment that she appeals.

Background

[2] The respondent is a senior attorney with 25 years' experience in the legal profession at the time of the trial that has led to this appeal. She complained in the court below that her good name had been tarnished by the conduct of the appellant in publishing allegedly defamatory comments about her.

[3] In the performance of her duties as an attorney, the respondent was professionally consulted by the appellant's mother on 16 January 2012. The appellant's mother wanted her to administer the estate of the appellant's grandmother, who had passed away during October 2011. After considering the will presented to her by the appellant's mother, the respondent informed her that the will was invalid but that the estate should be reported and administered as an intestate estate.

[4] It is important to note that the appellant was at no stage present when the consultation with the respondent occurred: she resides in Cape Town and the consultation occurred in Durban. All that the appellant knows of the consultation with the respondent is what she was subsequently told by her mother.

[5] For reasons not relevant to this appeal, the respondent was never instructed to report or administer the intestate estate of the appellant's grandmother. In due course, the respondent delivered a statement of account to the appellant's mother for payment in respect of the work that she did prior to her mandate being terminated. When the account was not paid, the respondent contacted the appellant's mother telephonically to ascertain when it would be paid. It is at this juncture that the appellant became directly involved in matters.

The defamatory material

[6] On 3 February 2012, the appellant telephoned the respondent about the statement of account that her mother had received. She recorded this telephone conversation without the respondent's knowledge. During the telephone conversation, the appellant sought to find out details of the bill that had been presented to her mother. The respondent declined to disclose that information to the appellant. The appellant instructed the respondent not to telephone her mother again, which instruction was dismissed by the respondent. Dissatisfied with the outcome of the telephone conversation, the appellant thereafter lodged a complaint against the respondent with the erstwhile KwaZulu-Natal Law Society (the Law Society). The form of the initial complaint was an affidavit (the founding affidavit). After the respondent had delivered her answering affidavit to the founding affidavit, the appellant delivered a replying affidavit to the Law Society (the replying affidavit). The content of the replying affidavit contains the allegedly defamatory material complained of by the respondent.

[7] Amongst other things, the following is to be found in the replying affidavit:

'From Mrs Perumaul's response it seems that she is trying to get favour with your office painting a picture that my mother is a cold-hearted, gold digging, shrewd, racist woman, who doesn't care about her husband, siblings or children in favour of money. I can assure you that whether or not you believe it, it is not the case. My mother had nothing to do with this complaint, I lodged it because after speaking to Mrs Perumaul and doing a little "investigation" of my own, I believe that Mrs Perumaul is "scamming" for lack of a better word, the people in the community, she preys on poor, uneducated people in their time of grief and they are losing property and families are breaking up because of her influence.

The R3500.00 for me is not an issue, my mother has been through a lot and there is not any amount of money that I would not spend for or on her, I also do have legal aid so if I wanted to dispute this amount I would have done it through my attorney. The reason I wrote to you is to bring to your attention what Mrs Perumaul is doing in the community, I don't have any proof of most things but I believe that if you conducted an investigation you may uncover things far worse than what I am speaking of. My siblings and I are here to fight on my mother's behalf, there are many people who don't have that someone and they are being cheated. People respect Mrs Perumaul and look to her as a professional person.'

The pleadings

[8] In her particulars of claim, the respondent pleaded that the above-mentioned extract was per se defamatory of her and did not plead, or allege, any secondary meaning to the words of which complaint was made. In her amended plea, the appellant denied that the words were defamatory of the respondent and pleaded, further, that the admitted publication of the words took place in the context of a privileged occasion.

Onus

[9] The question of onus is an important consideration in this matter. In *Yazbek v Seymour*,[1] the court dealt with the question of the onus where justificatory defences were raised to a complaint of defamation. The court held that a defendant had a full onus to establish the justificatory defences relied upon. Thus the court concluded that the appellant in that matter had to prove the publication of the defamatory statement, the respondent had to prove the fair comment or that the comment was published on a privileged occasion and the appellant had to prove that the respondent was actuated by malice.[2] It seems to us that the same approach must be adopted in this matter. Thus:

(a) the respondent was required to prove the publication of the defamatory statement about which she complained;

(b) the appellant had to prove that the statement was not defamatory, alternatively was published on a privileged occasion; and

(c) if the respondent wished to overcome any privilege that might attach to the publication, she had to prove that the appellant was actuated by malice.

[10] It is necessary to clarify an aspect of the appellant's plea. Counsel for the appellant, Mr Ender, stated in his opening address in the court a quo that the first leg of the appellant's defence was that the comments complained of were not defamatory and were truthfully made. The first part of that submission is correct: the second part, the allegation that the comments were truthfully made, is not. The appellant's pleaded

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[1] *Yazbek v Seymour* 2001 (3) SA 695 (E).
[2] *Yazbek v Seymour*, supra, at 702E-H.

defence never included an allegation of truthfulness. It was solely predicated on the words not being defamatory alternatively that they were published in circumstances where privilege attached.

The delict of defamation

[11] The delict of defamation is defined as the unlawful publication, *animo injuriandi*, of a defamatory statement concerning another. Defamatory statements include statements which injure the reputation of the person concerned in his or her character, trade, business profession or office or which exposes the person to enmity, ridicule or contempt.[3] It is trite that once a plaintiff establishes that the defendant has published a defamatory statement about him or her, it is presumed that the publication was made both unlawfully and intentionally.

The assessment of written defamatory material

[12] When considering the content of a written defamatory statement, as in this matter, a court should give the article complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once:

'Hypothetical reasonable readers should not be treated as either naïve or unduly suspicious. They should be treated as capable of reading between the lines and engaging in some loose-thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or an accountant would analyse documents or accounts. Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made upon the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task.'[4]

The complaint

[13] The gravamen of the appellant's complaint to the Law Society, as contained in the founding affidavit, appears to be that the appellant had telephoned the respondent

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[3] *Featherby v Zulu* [2021] ZAKZDHC 2 paras 4 and 5.
[4] *Tsedu and others v Lekota and another* 2009 (4) SA 372 (SCA) para 13 quoting Simon Brown LJ in *Mark v Associated Newspapers Ltd* 2002 E M L R 38 para 11.

and, inter alia, asked for a breakdown of the fees that the respondent had charged her mother. The respondent had allegedly then become very rude and agitated, according to the appellant. The respondent told the appellant that it was none of her business. When the appellant indicated that she wanted to discuss the fees raised by the respondent, the respondent replied that she would never discuss that with the appellant.

[14] The refusal of the respondent to discuss the matter was interpreted by the appellant to be rudeness on the part of the respondent. That the respondent was correct in not discussing the affairs of her client with the appellant brooks of no dispute, as such matters are confidential.[5] The appellant was not the respondent's client and she had no right to seek the details that she sought from the respondent and the respondent was not at liberty to disclose such information without the appellant's mother's consent.

[15] The respondent replied under oath to the founding affidavit in a detailed answering affidavit. She addressed each paragraph of the complaint and gave extensive detail pertaining to the events in question. There was nothing, in our view, that was objectionable or inflammatory in the respondent's answer. Indeed, many of the facts adduced in that affidavit were confirmed by the appellant's mother when she testified at the trial.

[16] Central to the matter is the statement of account. It totals in value approximately R3 600. The statement of account extends just over two pages in length and is detailed in its content. Each item of work performed by the respondent is identified, fully narrated and described and quantified, from receiving and perusing the identity document of the appellant's late grandmother at a charge of R25, to drawing an inventory of four pages at R85 per page, to consulting with the appellant's mother at a charge of R1 065. The account is unremarkable in its content and in the amount charged by the respondent. It is little surprise then that the Law Society ultimately

[5] 'Confidentiality' refers to the duty of an attorney to preserve the confidentiality of all communications between himself or herself and the client (Willem de Klerk *et al Clinical Law in SA* 2 ed (2006) at 42).

determined that there was no evidence of unprofessional conduct on the part of the respondent.

Assessment of the words about which complaint is made

[17] The words complained of by the respondent in the replying affidavit delivered to the Law Society are the following:

(a) 'I believe that Mrs Perumaul is "scamming" for lack of a better word, the people in the community':

The meaning of the word 'scam' is 'an illegal plan for making money, especially one that involves tricking people'.[6] To use that word, or derivatives thereof, is to impute dishonesty and deviousness. The complaint made out in the founding affidavit was confined solely to the alleged conduct of the respondent in relation to the appellant and her mother. The reference to the community in the replying affidavit expanded the complaint beyond the confines of the founding affidavit. No evidence of a scam was adduced at all at trial. Indeed, it was put to the appellant under cross examination that her mother had been given an initial quotation of R3 500 by the respondent to do the work requested of her. Ultimately, she was sent a bill for approximately R3 600. Asked where the scam in these facts were the appellant's answer was

'There is no scamming there.'

No other evidence which could be construed as a scam was forthcoming. The replying affidavit, in any event, stated that the amount of R3 500 was not an issue for the appellant. Had it been, so she said, she would have disputed it through her attorney. In other words, there was no dispute over what had been billed for by the respondent. It was also admitted that the disputed bill had never been paid, whether by the appellant or her mother or her mother's brother who was also mentioned in the evidence. Accepting that as being correct, it is difficult to understand where the allegation of scamming originated from. In addition thereto, there was no admissible evidence adduced at all by the defence about the respondent's conduct in relation to the community in general;

(b) '… she preys on poor, uneducated people in their time of grief …':

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[6] The Cambridge On-Line Dictionary, available at https://dictionary.cambridge.org/dictionary/english/scam, accessed 16 September 2021.

A prey is an animal that is hunted down or seized for food, usually by a carnivorous animal. The use of such words creates a mental image of a rapacious person who exploits other weaker people for her own benefit. There was no evidence of such conduct on the part of the respondent either. The appellant's mother initiated the contact between herself and the respondent. She went to the respondent's offices to consult with her. In the course of that consultation, the appellant's mother was given legal advice by the respondent. It was not the position that the appellant's mother was charged for something that she did not receive. It can also hardly be said that the appellant's mother was in the height of her grief either: her mother had passed away approximately three months before the consultation;

(c) '… they are losing property and families are breaking up because of her influence':

What the influence complained of was never identified or defined. No proof of any of the allegations made in this regard was adduced at trial. In response to a question as to what families had suffered this fate, the appellant indicated that her family had broken up over the incident. Evidence was led that the appellant's mother and brother no longer communicated with each other after the consultation with the respondent. The reason for this was, however, not any of the respondent's doing – it arose from an internal dispute in the appellant's family over who was to pay the respondent's bill. The allegations are thus unfounded, crass and unworthy;

(d) '. . . I believe that if you conducted an investigation you may uncover things far worse than what I am speaking of':

What was being referred to in this regard was not definitively spelt out nor was the basis upon which the appellant entertained this belief. It appears to have been a gratuitous slur intended to cast the respondent in an unfavourable light;

(e) 'My siblings and I are here to fight on my mother's behalf, there are many people who don't have that someone and they are being cheated':

The implication here was that the person doing the cheating was the respondent. Given that the bill presented by the respondent was not disputed by the appellant, it is not clear what the basis is for the allegation that anyone was cheated, let alone the appellant's mother.

[18] Viewed as a whole, the words utilised by the appellant impugn the reputation and integrity of the respondent and were designed to do so. They point to unconscionable conduct on the part of the respondent without providing any foundation for that conclusion.

[19] We are satisfied that the statements made by the appellant of the respondent, at the very least, informs the reader of the replying affidavit that the plaintiff was guilty of dishonest, unprofessional, or unethical conduct as an attorney and was not a person to be trusted. The statements are clearly defamatory of the respondent.[7]

[20] The respondent has established that the words of which complaint is made were defamatory and were published. Accordingly, the plea that the words complained of are not defamatory of the respondent must fail. The regional court magistrate was accordingly correct in our estimation when she found accordingly.

Privilege

[21] The further defence pleaded by the appellant was that the words complained of were published in the circumstances of a privileged occasion. It was pleaded that publication was made by the appellant in the discharge of a duty, alternatively the protection of a legitimate interest, to the Law Society, which had a similar duty or interest in receiving the publication. Such, so it was pleaded, did not ground a claim for defamation.

[22] It is not clear from the plea whether the appellant pleaded absolute privilege or qualified privilege. Both defences accordingly need to be considered.

[23] Where circumstances of absolute privilege find traction, the defendant is protected absolutely as liability for defamatory comments is completely excused. Absolute privilege, however, can only be created by statute.[8] No evidence

[7] *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) paras 10-12.
[8] *Katz v Welz and another* [2021] ZAWCHC 76 para 35.

whatsoever was adduced to establish the existence of absolute privilege and it is therefore not a defence that is available to the appellant.

[24] Where qualified privilege is raised as a defence, such privilege does not afford absolute immunity to the publisher of a defamatory statement. The protection conferred by this defence is provisional and the publication will be wrongful if the publisher acted with an improper motive. The rationale behind this is that there can be no legal, moral or social duty to publish matters for malicious reasons.[9]

[25] In *National Education, Health and Allied Workers Union and another v Tsatsi*,[10] the Supreme Court of Appeal recognised that one of the occasions that enjoys the benefit of the defence of qualified privilege is an occasion where the statements were published in the discharge of a duty or the exercise of a right. Qualified privilege thus exists where someone has a right or duty to make, or an interest in making, specific defamatory assertions and the person or people to whom the assertions are published have a corresponding right or duty to learn of such assertions.[11] This is precisely what the appellant pleaded in this matter.

[26] The defence of qualified privilege was considered in *Yazbek,*[12] to which reference has previously been made, where the court reasoned that such a defence was

‘'not concerned with the truthfulness or otherwise of the publication, though proof that the defendant did not believe that the facts stated by him were true may give rise to the inference that he was actuated by express malice . . . But the truthfulness or otherwise of the statements has no bearing on whether they were germane to the occasion or not.’ [13] (reference omitted)

The court went on to explain that the reason for this stems from the fact that it is the occasion and not the statement that is privileged.

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[9] *Katz v Welz and another*, supra, para 38.
[10] *National Education, Health and Allied Workers Union and another v Tsatsi* [2006] 1 All SA 583 (SCA), para 11.
[11] *Chalom v Wright and another* [2015] ZAGPJHC 105 (4 June 2015) para 23.
[12] *Yazbek v Seymour* 2001 (3) SA 695 (E).
[13] *Yazbek v Seymour*, supra, at page 701H-I.

[27] In our view, the purpose of permitting members of the public to deliver complaints to a body such as the Law Society is predicated upon encouraging members of the public to speak up when they believe that legal practitioners have conducted themselves in an unacceptable manner. It is a mechanism through which the Law Society comes to know about the conduct of their members. It thus assists the Law Society in regulating the conduct of its members, thereby helping to maintain standards. It also, obviously, allows steps to be taken against those members in respect of whom complaints have been upheld. Members of the public who believe that they are the victims of unacceptable or unprofessional conduct by a legal practitioner have the right to report their experiences and substantiate their complaint. In inviting such reports to be made to it, the Law Society clearly has an interest in receiving such reports and the complainant has a right to deliver such complaint.

[28] The matter of *Gishen v Babu*[14] involved, as in this case, a complaint made to a law society. The body in that matter was the Law Society of the Northern Province. As in this case, the defamatory material was contained in the complaint made to that body. In considering the question of qualified privilege, which was also raised as a defence in that matter, the court stated that

'There can be no doubt that an occasion where a member of the public lays a complaint before the professional body representing attorneys is a privileged one. The privilege is a qualified one.'[15]

[29] We are in agreement with the reasoning adopted in *Gishen's* matter and we find that the appellant delivered her complaint in circumstances of qualified privilege. Having failed to establish that the words used were not defamatory of the respondent, the appellant did establish the existence of circumstances of qualified privilege. The regional magistrate was correct in arriving at the same conclusion. It is now necessary to consider the issues of relevance and malice.

[14] *Gishen v Babu* [2007] ZAGPHC 391.
[15] *Gishen v Babu*, supra, at para 13.

Relevance

[30] A party pleading qualified privilege must show that the statement published, and about which complaint is made, was relevant and germane to the matter.[16] Relevance in the context of qualified privilege is not to be equated with relevance in a strict evidential sense. What is logically irrelevant may not necessarily be irrelevant in relation to privilege and the test is not as rigid as with the evidentiary test. Smallberger JA, in *Van den Berg v Coopers and Lybrand Trust*[17] said that

'While the public interest undoubtedly requires that the approach to relevance in relation to privilege should not be too strict or rigid lest witnesses or deponents to affidavits be unduly restricted or fettered in their testimony or depositions, thereby detracting from their right to freedom of speech . . . too liberal or wide an approach to relevance could effectively undermine or negate a defamed person's right to the protection of his or her dignity. An allied consideration is that a more generous approach to relevance may be justified in the case of a witness who makes a defamatory statement while giving viva voce evidence than where that is done by a deponent to an affidavit, bearing in mind that the latter situation would normally allow opportunity for reflection and advice.'[18] (reference omitted)

[31] The distinction to be drawn between oral defamatory matter and written defamatory matter alluded to in the extract above applies in this matter. The defamatory matter was in writing in this matter. The founding affidavit submitted to the Law Society contained no material about which complaint could be made. The respondent delivered her answering affidavit at the end of June 2012. Thereafter, the appellant had two months to formulate the terms of her replying affidavit, which is dated 31 August 2012. Under cross examination at the trial, the appellant stated that:

'The essence, the main point of my complaint to The Law Society was twofold:

1. The unprofessional behaviour from Miss Perumal [sic] in dealing with my mother and myself.
2. The information that I became aware of, but I thought The Law Society would want to become aware of, if they had to investigate it further.'

[32] This was in contra-distinction to the version that was put to the respondent by the appellant's counsel, namely that the purpose behind the complaint was the manner

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[16] *Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and others* 2001 (2) SA 242 (SCA).
[17] *Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and others*, supra.
[18] *Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and others*, supra, para 24.

in which the appellant's mother had been invoiced. The second part of the appellant's answer referred to above could not have been correct. At the date of the lodging of the complaint, 24 February 2012, the appellant could not have known, if she ever did know, of the matters that she mentioned in her replying affidavit. On her own version, she performed her 'investigation' after the founding affidavit was delivered. The fact of the matter is that what was said in the replying affidavit was new material that was not germane to the initial complaint lodged. In our view, the appellant has not established that her subsequent comments in the replying affidavit were relevant or germane to the complaint that she delivered to the Law Society and she is accordingly not protected by the qualified privilege that she has established.

[33] In the event that we are wrong on that score, we now consider the issue of malice.

Malice

[34] While circumstances of quasi-privilege may afford some form of protection to a person making defamatory comments, a privileged occasion cannot be misused. It is misused when the making of the defamatory comments is actuated by malice.

[35] Malice means more than spite or ill-will. Any motive that does not originate from a 'sense of duty or the desire to protect an interest gives rise to improper motive or malice'.[19]

[36] In *Basner v Trigger*,[20] the court found that where a defamatory statement was made on a privileged occasion, the party making the statement would not be liable unless malice in making the statement was proved. In *Naylor and another v Jansen*,[21] the court found that

'In the event of it being shown that the statement was made with knowledge of its untruthfulness, the inference that would arise, in the absence of any indication to the contrary, would be that the statement was actuated by malice.'[22]

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[19] *Chalom v Wright and another* [2015] ZAGPJHC 105 para 30.
[20] *Basner v Trigger* 1946 AD 83.
[21] *Naylor and another v Jansen* [2005] 4 All SA 26 (C).
[22] *Naylor and another v Jansen*, supra, at para 11.

[37] Similar sentiments were expressed in *Borgin v De Villiers and another*,[23] where the court found that proof that the defendant did not believe that the facts stated by him were true may give rise to the inference that he was actuated by express malice.

[38] In her evidence under cross examination, the appellant denied that she had been actuated by malice. She said

'There was not any malice. It was not a personal attack against Ms Perumal [sic]'

We are not able to agree with this. The words were, without question, a personal attack upon the respondent.

[39] In the replying affidavit of the appellant there is, in our view, evidence of malice on the part of the appellant:

(a) The first indication is to be found in the statement of the appellant that 'I believe that if you conducted an investigation you may uncover things far worse than what I am speaking of.' There was no attempt made to advance any evidence that might support such a conclusion or to explain what was intended by these words. There was no need to mention this at all as it did not correlate with the complaint in its original form. That these words were used seems to be nothing more than a malicious attempt to stir up trouble for the respondent and influence the Law Society to look beyond the scope of the complaint made by the appellant and to find fault, any fault, with the respondent's conduct;

(b) The second indication is to be found in the statement of the appellant that 'I don't have any proof of most things.' The appellant thus had no evidence for 'most things'. The allegations made appear therefore to have been made gratuitously, as the regional magistrate found. The result is that the appellant could not herself have genuinely believed any of the objectional things that she communicated to the Law Society as she, on her own admission, had no proof of them. Reference has already been made to authorities that indicate that a lack of belief in the comments made may constitute evidence of malice. In *Featherby*,[24] the defendant stated that he had no factual foundation for a number of the allegations that he made about the plaintiff. He

[23] *Borgin v De Villiers and another* 1980 (3) SA 556 (A) at 578H.
[24] *Featherby v Zulu* [2021] ZAKZDHC 2 para 22.

was found liable to the plaintiff. In our view, such is the case in this matter. The appellant is liable to the respondent for her act of defamation, as the regional magistrate found; and

(c) Whilst the appellant claimed to have performed her own investigation, she did not name any of the people who allegedly provided her with information. No attempt was made to call these persons at the trial. Admittedly one of the persons apparently consulted by the appellant had died, but the other (it appears she only spoke to two people) was alive, but was not called.

[40] We are satisfied that the regional magistrate correctly found that the respondent had established that the appellant acted with malice and that as a consequence the defence of qualified privilege could not be sustained.

Quantum

[41] A successful plaintiff in a defamation action is entitled to an award of general damages as a *solatium* to compensate him or her for the injury to his or her dignity and reputation. A court has a wide discretion in determining the award of general damages. There is no precise formula that can be applied to determine the amount awarded. It is, however, important to note that

'Our Courts have not been generous in their awards of solatia. An action for defamation has been seen as the method whereby a plaintiff vindicates his reputation, and not as a road to riches.' [25]

[42] The regional magistrate was well aware of this. She carefully surveyed a number of cases before determining the amount that she decided to award. The amount that she ultimately awarded falls within a broad range of awards granted by various courts over the years.

[43] The regional magistrate also, correctly in our view, considered the attitude of the appellant when arriving at her award. The following interaction in the evidence in chief of the appellant at trial no doubt influenced the regional magistrate:

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[25] *Argus Printing & Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) 590E-F.

'Ms Perumal, in terms of this letter, The Law Society states that the attorney has not acted unprofessionally. You say, in your statement, that you will apologise to Mrs Perumal if nothing is found. Have you apologised to her? --- I have not

Why do you refuse to apologise to her? --- Because I said in my statement, to The Law Society, that I am asking them to conduct an investigation. If they investigate and find that she has done nothing wrong, then I will apologise. But it is according to me, they have not investigated.'

[44] This extract illuminates the mind-set of the appellant. The Law Society had investigated her complaint. It had rendered its decision. It found no evidence of unprofessional conduct. There was no basis for the appellant to hold the view that no investigation had taken place. The extract further demonstrates her lack of contrition for what she had said, knowing on her own version that she did not have proof of most of what she said. The regional magistrate was correct in our view when she found that the appellant was impenitent.

[45] The regional magistrate further correctly found that there had been limited publication of the defamatory comments. That being said, the words of Holmes AJA in *Gelb v Hawkins*[26] still ring true:

' . . . it is a grave and ugly thing falsely to say of an attorney that he deliberately deceived the Court, and to that end was a party to the leading of perjured testimony. It is worse when it is said of an attorney who, according to the evidence, was trained in the strict observance of professional ethics, and for thirty years has jealously guarded his good name.'[27]

[46] We accept that the facts are different in the matter under appeal, but impugning the good name of an attorney remains a serious matter. The most valuable assets that a legal practitioner possesses is repute and integrity. Once either is lost it is seldom recovered.

[47] We have considered the reasoning of the regional magistrate and we cannot

[26] *Gelb v Hawkins* 1960 (3) SA 687 (A).
[27] *Gelb v Hawkins*, supra, at 693F-G.

find fault with it. For this appeal to succeed, material misdirections by the regional magistrate would need to be demonstrated to exist.[28] We are unable to discern any.

The conduct of legal practitioners

[47] Before concluding this judgment, we feel compelled to make some comments about the manner in which this trial was conducted before the learned regional magistrate in the court below. While neither counsel conducted themselves in a manner of which they can be proud, the conduct of the appellant's counsel must enjoy particular scrutiny. The record indicates that from the outset of the proceedings, and for reasons known only to himself, the appellant's counsel appeared to have adopted a rather hostile attitude towards the respondent and her legal representative.

[48] The record is replete with instances where the appellant's counsel was openly hostile and discourteous to the respondent in the manner in which he was cross-examining her. He often cut her off in mid-sentence; he interrupted her continuously making it extremely difficult for her to provide a meaningful response to the question posed and at times he ridiculed her by simply laughing at her for no apparent reason. This type of behaviour resulted in an atmosphere that was unduly tense and completely unnecessary.

[49] This conduct was not lost on the learned regional magistrate who, on several occasions, cautioned the parties to behave themselves and to 'cool down' or else she would leave the court-room. At page 286 of the record the learned regional magistrate had the following to say:

'COURT: I am going to adjourn this case and allow you people to cool down and deal with it when we can proceed. Just…… Ms Perumaul, just try and be coolheaded here because we want to get to the bottom of this. I have already appealed to you people to conduct this in the manner that it is supposed to be conducted. You ask questions and you give her a chance to respond. Do not have this dialogue…… Otherwise I will have to adjourn for the day so that next time when we come maybe you people would have cool down for us to proceed. ……'

[28] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 144.

[50] In spite of the above warning by the learned regional magistrate the disruptive and unruly conduct continued unabated thereby forcing the learned regional magistrate to adjourn her court.[29]

[51] Unfortunately, the further proceedings were marred by similar disruptions and disrespectful behaviour. At some stage, the appellant's counsel even went to the extent of clarifying the issues with his client (the appellant) notwithstanding the fact that she was being cross-examined by the respondent's legal representative at that stage.

[52] That the proceedings before the learned regional magistrate were allowed to degenerate into this kind of chaos is a matter of deep concern. This of course has nothing to do with the learned regional magistrate who tried her utmost to maintain the integrity of her court in the administration of justice. Rather, it has everything to do with the duties of a legal representative both in relation to his/her client as well as to the court. Not surprisingly, in argument before us the appellant's counsel admitted that he may have been a little over-zealous in the manner in which he pursued his client's case and that on mature reflection there were many aspects of this trial that he would have handled differently. These admissions were well made and he is thanked therefore.

[53] However, the manner in which this trial was conducted fills us with a sense of disquiet. That the learned regional magistrate was able to finalise the proceedings in a calm and rational manner is without doubt a testament to her patience and tolerance. We consider, however, that no judicial officer should be placed in a position where he/she is forced to adjourn their court simply because of the abhorrent behaviour of the legal representatives appearing in that court.

[54] What this case demonstrates is a complete lack of respect for the court and its role in the proper administration of justice. It also demonstrates just how far some legal representatives will go in pursuing their client's case without paying any heed to their

[29] Page 289 of the record.

overriding duty, which is to the court. Some legal practitioners tend to forget for a moment that they are officers of the court and that their ultimate duty is to the court and no one else. It is perhaps convenient at this juncture to remind legal representatives of this duty and their role in the proper administration of justice. The cases cited hereunder illustrate the point quite adequately. The reference to 'advocates' in these cases would in our view apply equally to the role of attorneys as well.

[55] In *S v Khathutshelo and another*[30] the court held as follows, after highlighting the exchange between counsel and the presiding magistrate

'[20] The words used by counsel were both unnecessary and unfortunate. They demonstrated acute lack of respect for the court and its role in the administration of justice. Judges and magistrates alike have been entrusted with the most difficult job: to find the truth and administer justice between man and man. They are fallible like all others and, in recognition of this weakness, there is a hierarchy of courts so that mistakes can be corrected on appeal or review. It does not serve any purpose for a practitioner to be theatrical and make demands which he knows the court is not in a position to accede to.

[21] The ethics of the legal profession say an advocate is an officer of the court. As an officer of the court he is required to assist the court in the administration of justice. Inasmuch as counsel has a duty to advance his/her client's case with zeal, vigour and determination, he should always remember that his primary duty is to the court. His role in court is not only to push his or her client's interests in the adversarial process . . .

[22] It is axiomatic therefore that an advocate should in the execution of his duties act with integrity and professionalism. He should always measure his words and be of good temperament. He should understand that he makes submissions to court with a view to persuading it to find in his client's favour. He does not make demands. Once the court has made a ruling, it becomes his duty as a person trained in law to advise a client on the remedies available to correct what he may regard as an error of fact, law or procedure.

[23] He should always maintain the decorum of the court and protect its legitimacy in the eyes of the public, so that its confidence is not eroded in their eyes. More than 100 years ago, in the winter of 1908, Chief Justice Innes said the following about practitioners:

"Now practitioners, in the conduct of cases, play an important part in the administration of justice. Without importing, any knowledge or opinion of their own . . . they present the case

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[30] *S v Khathutshelo and another* 2019 (1) SACR 480 (LT) paras 20, 21, 22, 23 and 24.

of their clients by urging everything both in fact and in law, which can honourably and properly be said on his behalf."

See *Incorporated Law Society v Bevan* 1908 TS 724 at 731.

[24] The paramountcy of the duty to the court is of the utmost importance to the effective functioning of the legal system. It is imperative that lawyers, clients and the public understand this. The integrity of the rule of law and the public interest in the administration of justice depend upon it. When lawyers fail to ensure that their duty to the court is at the forefront of their minds, they do a disservice to their clients, the profession and the public as a whole.'

[56] In *Van der Berg v General Council of the Bar of SA*[31] the court held that:

'[14] Advocacy fulfils a necessary role in the proper administration of justice. (What is said in this judgment applies equally to attorneys to the extent that they play an equivalent role but for convenience I have referred to advocates). It is through the availability of the knowledge and skills of an advocate that a litigant is able to realise the right of every person to have a dispute resolved by a court of law. Its function in the administration of justice at the same time defines the duties of those who practise it. The right of every person to have a dispute resolved by a court of law would be seriously compromised if an advocate were to be required to believe the evidence of his client before being permitted to present it. That would mean that the rights of the litigant would be determined by the advocate rather than by the court. As David Pannick QC observes (in his book entitled Advocates) an advocate is required:

"to keep his personal opinions of the merits of the case (legal or otherwise) to himself and not make them the subject of his submissions. The advocate's duty to his client authorises and obliges the advocate to say all that the client would say for himself (were he able to do so) . . . He has no right to 'set himself up as a judge of his client's case' and should not 'forsake [his] client on any mere suspicion of [his] own or any view [he] might take as to the client's chances of ultimate success'. As Baron Bramwell explained in 1871, a 'man's rights are to be determined by the Court, not by his [solicitor] or counsel . . . A client is entitled to say to his counsel, I want your advocacy, not your judgment; I prefer that of the Court."' (footnotes omitted)

[57] In a speech titled '*The Duty Owed to the Court - Sometimes Forgotten*' delivered by the Honourable Marilyn Warren AC at the Judicial Conference of Australia

[31] *Van der Berg v General Council of the Bar of SA* [2007] 2 All SA 499 (SCA) para14.

– Colloquium, Melbourne on 9 October 2009,[32] the learned Justice spoke to the duties of counsel to the court in relation to its role in the proper administration of justice. The speech commences with the following quotation from the judgment of Lord Reid in the matter of *Rondel v Worsley*[33]

'[A]s an officer of the court concerned in the administration of justice [a legal practitioner] has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests'

[58] Later on in her speech the learned Justice highlights a practitioner's duty to the court as follows:

'The Duty to the Court

The lawyer's duty to the court is an incident of the lawyer's duty to the proper administration of justice. This duty arises as a result of the position of the legal practitioner as an officer of the court and an integral participant in the administration of justice. The practitioner's role is not merely to push his or her client's interests in the adversarial process, rather the practitioner has a duty to "assist the court in the doing of justice according to law."

The duty requires that lawyers act with honesty, candour and competence, exercise independent judgment in the conduct of the case, and not engage in conduct that is an abuse of process. Importantly, lawyers must not mislead the court and must be frank in their responses and disclosures to it. In short, lawyers "must do what they can to ensure that the law is applied correctly to the case."

The lawyer's duty to the administration of justice goes to ensuring the integrity of the rule of law. It is incumbent upon lawyers to bear in mind their role in the legal process and how the role might further the ultimate public interest in that process, that is, the proper administration of justice. As Brennan J states, "[t]he purpose of court proceedings is to do justice according to the law. That is the foundation of a civilized society."

When lawyers fail to ensure their duty to the court is at the forefront of their minds, they do a disservice to their client, the profession and the public as a whole.' (footnotes omitted)

[59] From everything that we have said thus far on this aspect and from the authorities referred to above, it is clear that this duty was breached before the learned

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[32] The speech is available at http://www.austlii.edu.au/au/journals/VicJSchol/2009/15.pdf, accessed 25 August 2021.

[33] *Rondel v Worsley* [1967] UKHL 5 at 2;[1969] 1 AC 191 at 227, [1967] 3 All ER 993 at 998.

magistrate on numerous occasions. In our view, this type of conduct is unacceptable. It serves no purpose other than to undermine the effective functioning of a court and due administration of justice. Such conduct must not recur in the future.

[60] In all the circumstances, we make the following order:

The appeal is dismissed with costs

Mossop AJ

Seegobin J

APPEARANCES

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Date of Hearing	:	27 August 2021
Date of Judgment	:	21 September 2021