

SOUTH AFRICA / JUDGMENT

Legal Practice Council v Rubushe (181/2020) [2022] ZAECKMKHC 37 (7 June 2022) [2022] ZAECKMKHC 37

COURT

Eastern Cape High Court, Makhandia

BEFORE

Jolwana

CASE / FILE NUMBER

181/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

[EASTERN

CAPE DIVISION: MAKHANDIA]

CASE

NO. 181/2020

In

the matter between:

LEGAL
PRACTICE
COUNCIL
Applicant
and
BULELANI
RUBUSHE
Respondent

JUDGMENT

JOLWANA J:

“This is yet another case in which an attorney – an officer of the court who is supposed to act with integrity and comply with the highest ethical standards – is guilty of an attempt to grossly overreach his client, of rapacious and unconscionable conduct. Unfortunately, in this jurisdiction, this is a problem that is all too common. That said, however, it seems to me that the problems in relation to contingency fee agreements that come to the attention of the courts are, in all likelihood, but the tip of the ice-berg.”

- [1] These are the words of Plasket J (as he then was) in *Mfengwana*[1] describing the conduct of Mr Rubushe, the respondent herein. Having described the respondent in the manner referred to above, he, inter alia, made an order setting aside the contingency fees agreement in issue and requested the registrar of this Court to deliver a copy of his judgment to the Cape Law Society.
- [2] The applicant is the successor in title to the then Cape Law Society which was a statutory body established in terms of the Attorneys Act 53 of 1979, which has since been repealed and which served as the regulatory body governing the affairs of all attorneys in the Western Cape, Northern Cape and the Eastern Cape. One of the duties of the applicant is to regulate all legal practitioners and candidate legal practitioners and to enhance and maintain the integrity and status of the legal profession inclusive of all members of what used to be referred to as the bar and the side bar. It was established in terms of the Legal Practice Act 28 of 2014, coming into effect in its entirety on 1 November 2018.
- [3] While the applicant made reference to a number of complaints received against the respondent it made it clear in its founding affidavit that this matter primarily concerns the judgment of Plasket J referred to above. Incidentally on that date, 12 January 2017, the respondent wrote a letter to the applicant. The gist of the respondent’s letter has been summarised by the applicant as follows:

“13.1 A contingency fee entered into with a client can agree that on settlement the attorney is entitled to 25%, as between attorney and client;

13.2 The majority in the profession are still using the 25% fee, especially in litigation matters;

13.3 Judges are interfering with attorney and client agreements and making defamatory remarks “on” attorneys;

13.4 “The honourable court is trying to guard against overreaching client, which on the other hand is prejudicing the Attorneys ...”;

13.5 There was an incorrect allegation that the respondent had overreached.”

- [4] Four days later on 16 January 2017 the respondent fusilladed with another letter which the applicant has summarised as follows:

“14.1 The respondent’s office was in the process of filing an application for leave to appeal the judgment as Judge Plasket had “acted ultra vires in posing (sic) his nose of client contingency, as the matter was in Court for settlement to be made, in fact contract was signed by client.”;

14.2 The respondent wondered why the Honourable Judge closed one eye when he read the Thulo judgment,

14.3 The Honourable Mr Justice Plasket did not follow the Contingency Fee Act by referring the dispute to the applicant;

14.4 That the respondent was of the view that the actions of the Honourable Mr Justice Plasket were “malicious, contradictory and acted contrary to the Act.”

[5] The last of these letters, all of which can only be described as pre-emptive strikes against the applicant, is dated 18 January 2017. The applicant has also summarised it as follows:

“16.1 The Thulo vs Road Accident Fund case was attached, clearly interpreting the 25% ceiling of contingency fees;

16.2 Mr Mfengwana was contacted the previous day and he had asked “who gave instructions the Judge to challenge his agreement (sic).”

[6] All of these letters predate any of the applicant’s actions about the referral of the judgment of the court in Mfengwana to it. It was only on 26 January 2017 that the applicant sent the first correspondence to the respondent. In that correspondence the applicant acknowledged receipt of the respondent’s letters, attached the judgment in the Mfengwana matter and requested the respondent to furnish it with a copy of the contingency fee agreement with Mr Mfengwana as well as copies of the affidavits which the court had directed the respondent to file. It appears from the Mfengwana judgment that the court had issued an order in the following terms:

“1. Mr Bulelani Rubushe, the plaintiff’s attorney, is directed to show cause on Tuesday 13 December 2016 why the contingency fee agreement between him and the plaintiff should not be set aside.

2. Mr Rubushe is furthermore directed to furnish affidavits deposed to by himself and the plaintiff, by 09h30 on Tuesday 13 December 2016, that comply fully with s 4 of the Contingency Fees Act 66 of 1997.”[2]

[7] It is apposite to point out in parenthesis that the respondent ignored the order of Plasket J in this regard as he did not file any affidavits and in fact spurned the opportunity the court gave him to make representations to the court about why his contingency fees agreement with Mr Mfengwana should not be set aside. It therefore beggars belief and defies all sense of logic that he chose to write his letter dated 12 January 2017 to the applicant, effectively insulting Plasket J. He did not file the application for leave to appeal the judgment which he indicated he would file in his letter dated 16 January 2017. In fact, he continued in his disrespectful and insulting language against Plasket J up to the 18 January 2017 when the last of these unprovoked letters were written.

- [8] Having received the said judgment on 12 January 2017 the applicant began investigating the conduct of the respondent as it related to his dealings with his client, Mr Mfengwana. A lot of correspondence was exchanged between the applicant and the respondent as part of the applicant's process of investigating the complaint emanating from the Mfengwana judgment and giving the respondent a hearing. No useful purpose will be served by analysing the said correspondence. That correspondence included different bills of costs which had been submitted by the respondent to the applicant. The applicant appointed a cost consultant to advise it regarding the respondent's bill of costs.
- [9] After receiving a report from its cost consultant the applicant requested the said cost consultant to provide it with a detailed

memorandum setting out what he considered to be overreaching of his client by the respondent. It does not appear that the respondent was given an opportunity to comment on the said report and the memorandum. However, in this application the applicant has annexed to its founding affidavit the various bills of costs that the respondent had prepared including the said report and memorandum of the applicant's cost consultant. The said memorandum chronicles in quite some graphic detail how an attempt was made to take advantage of Mr Mfengwana.

- [10] The contents of all the documents attached to the founding affidavit, including the said memorandum, are not disputed by the respondent in his answering affidavit. He gives some other explanation without disputing or in any way challenging the findings of the applicant's cost consultant. I therefore consider them to be admitted and therefore common cause. That being the case, and because of the nature of the relief sought by the applicant, I deem it necessary to set out the contents of the memorandum as reflected in the founding affidavit. The respondent's complete disregard for ethical probity and integrity is breath-taking and the memorandum graphically illustrates the "rapacious and unconscionable conduct" of the respondent that the court referred to in the Mfengwana

judgment.

- [11] Some of the contents of the memorandum prepared by the applicant's costs consultant, which in essence the respondent admits to the extent that he does not dispute any of them or confront them, are detailed as follows in the founding affidavit:

"28.1 The Respondent had drafted and issued four separate bills in the matter, the first with fees in the sum of R84 023.50 and disbursements in the sum of R61 877.57 (the bill had 293 items). The second bill had fees in the sum of R76 659.50 and disbursements in the sum of R60 737.57 (the bill had 293 items). The third bill had fees in the sum of R101 630.00 and disbursements in the sum of R101 987.57 (363 items). The fourth bill had fees in the sum of R268 054.50 and disbursements in the sum of R143 819.68 (687 items);

28.2 The Respondent had charged a total of R121 668.00 for travelling time and expenses, with the majority of the attendances reflecting travelling to the Road Accident Fund to deliver correspondence and travelling to the Post Office. The cost of letters to the Road Accident Fund or to the Post Office, which is billed on the tariff of R105.50, was increased to R1 122.00 when added to the travelling;

28.3 The Respondent charged R2 204.00 to deliver the summons to the sheriff and to collect same, which is in itself overreaching and which was dealt with by this Honuorable Court in the case of *Dumse v Mpambaniso*;

28.4 There were various fees that were charged where the work had not been done by the Respondent, which included charging for consultations, inspections in loco and telephone calls which did not take place;

28.5 The Respondent could not produce any file notes or records for numerous items contained in the bill, including travelling;

28.6 The Respondent charged for arranging for a witness to sign the power of attorney, consent to inspect police records and consent to inspect medical records, which witness was a member of the respondent's staff;

28.7 The first three bills reflected an initial consultation of one hour, while the fourth bill reflected a consultation lasting two hours;

28.8 The Respondent charged for drafting the Summons and Particulars of Claim and, after they had been issued, again charged for the perusal thereof;

28.9 Despite the Respondent practising as an attorney in East London, he charged for a telephone call to phone the Sheriff to determine whether the Road Accident Fund was in their jurisdiction;

28.10 The Respondent claimed that there were 168 pages in the index, however the main index comprised 14 pages, and the miscellaneous index 37 pages;

28.11 The respondent charged for items after he withdrew as attorney of record for Mr Mfengwana, and included an opinion from an advocate (at a cost of R5 985.00) regarding the validity of his contingency fee agreement. The respondent further, despite having withdrawn, proceeded to settle the party and party costs on 23 January 2017 and 22 March 2017;

28.12 The only conclusion to be drawn is that the respondent sought to take unfair advantage of a lay litigant, where he sought to recover fees to which he was not entitled."

[12] Another aspect of the respondent's shockingly unethical conduct is reflected in an application issued by Mr Mfengwana against his own attorney, the respondent under case number 3469/2017. In that application Mr Mfengwana sought and obtained relief in terms of which the respondent was ordered to pay to him the sum of R204 889.17. The respondent was also ordered to make available to Mr Mfengwana his entire original file in respect of his claim against the Road Accident Fund. That application was not resisted by the respondent

and Mr Mfengwana obtained the relief he sought including an order for costs of the said application on an attorney and client scale.

- [13] There are many disturbing allegations made by Mr Mfengwana against the respondent in case number 3469/2017. Interestingly, the respondent did not oppose the said application or dispute any of the said allegations despite the seriousness thereof. In addition to everything else, but just focusing on Mr Mfengwana's application, I find it particularly disturbing that on 28 November

2016 the matter of Mfengwana v Road Accident Fund was before Plasket J who was requested to make a settlement in that matter an order of court. On that date the respondent was ordered by the court to show cause on 13 December 2016 why his contingency fees agreement with Mr Mfengwana should not be set aside. He was also ordered to file the affidavits referred in section 4 of the Contingency Fees Act.

[1] Mfengwana v Road Accident Fund 2017

(5) SA 445 (ECG) at 454 para 27.

[2] Section 4 of the Contingency Fees Act 66 of 1997 provides:

- (1) Any offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the professional controlling body, if the matter is not before court, stating-
 - (a) the full terms of the settlement;
 - (b) an estimate of the amount or other relief that may be obtained by taking the matter to trial;
 - (c) an estimate of the chances of success or failure at trial;
 - (d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;
 - (e) the reasons why the settlement is recommended;
 - (f) that the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and
 - (g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.
- (2) The affidavit referred to in subsection
 - (1) must be accompanied by an affidavit by the client, stating –
 - (a) that he or she was notified in writing of the terms of the settlement;
 - (b) that he or she understands and agrees to them; and

- (c) his or her attitude to the settlement.
- (3) Any settlement made where a contingency fees agreement has been entered into, shall be made an older court, if the matter was before court.”
- [3] Note 1 supra at para 19.
- [4] Malan and Another vs Law Society, Northern Provinces [2008] ZASCA 90; 2009 (1) SA 216 (SCA) at para 4
- [5] South Africa Legal Practice Council v Bobotyana [2020] 4 All SA 827 (ECG) para 10 and 11.
- [6] Note 7 supra para 5.
- [7] Malan note 4 supra page 221 at D-H
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