

SOUTH AFRICA / JUDGMENT

Legal Practice Council v Rubushe (1004/2022) [2023] ZASCA 167 (1 December 2023) [2023] ZASCA 167

COURT

Supreme Court of Appeal

BEFORE

Petse, Mbatha, Musi, Binns-Ward, Kathree-
Setiloane

CASE / FILE NUMBER

1004/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no. 1004/2022

In the matter between:

LEGAL PRACTICE COUNCIL

Appellant

and

BULELANI RUBUSHE

Respondent

Neutral Citation: Legal Practice Council v Bulelani Rubushe (Case no 1004/2022)

[2023] ZASCA 167 (1 December 2023)

Coram: PETSE DP and MBATHA JA and MUSI, BINNS-WARD and KATHREE-SETILOANE AJJA

Heard: 22 November 2023

Delivered: 1 December 2023

Summary: Legal Practitioner – misconduct involving dishonesty – striking from the roll appropriate remedy – court a quo making material misdirection in suspending the respondent from practising for two years – suspension order set aside on appeal and replaced with striking order.

ORDER

On appeal from: Eastern Cape Division of the High Court of South Africa, Makhanda (Jolwana J, Govindjee J concurring) sitting as a court of first instance:

1. The appeal is upheld with costs on the scale as between attorney and client.
2. Paragraphs 1 and 11 of the revised order of the High Court issued on 4 August 2022 are set aside.
3. Paragraph 1 of the said order is substituted with an order directing that the respondent's name be struck off the roll of legal practitioners kept by the applicant in terms of s 30(3) of the Legal Practice Act 28 of 2014, and paragraph 12 of the said order is consequentially renumbered as paragraph 11.
4. Save as provided in paragraphs 2 and 3 above, the revised order made by the High Court is otherwise confirmed.

BINNS-WARD AJA (PETSE DP and MBATHA JA and MUSI and KATHREE-SETILOANE AJJA concurring):

- [1] The respondent, Mr Bulelani Rubushe, was an attorney practising for his own account under the name and style B.R. Rubushe Attorneys at Vincent, East London. Consequent upon proceedings instituted by the Legal Practice Council (the appellant) arising from the respondent's dishonest misconduct, the Eastern Cape Division of the High Court (Jolwana J, Govindjee J concurring) made an order that provided, in paragraph 1 thereof, that the respondent be suspended from practising as an attorney for a period of two years, and, in paragraph 11, that '[a]fter the expiry of the suspension period, and in the event that the Respondent is desirous of practising as an attorney, he shall make a substantive application to the High Court having jurisdiction to be permitted to practise as an attorney and shall serve such application upon the Legal Practice Council'. [1] This appeal, which is brought with leave granted by the High Court, concerns only those paragraphs of the order.
- [2] Mr Rubushe's misconduct was uncovered when a settlement agreement in a motor vehicle accident claim, in which he represented a certain Mr Zama Mfengwana, was put before Plasket J in the High Court to be made an order of court. The learned judge's misgivings, and the outcome of the enquiry he made arising from them, are related in detail in the judgment he handed down on 15 December
2016. The judgment has been reported sub nom Mfengwana v Road Accident Fund. [2] A brief summary of the pertinent facts will therefore suffice for present purposes.

- [3] The judge was informed that the matter was the subject of a contingency fee agreement. The affidavits required by s 4(1) and s 4(2) of the Contingency Fees Act[3] were not in the court file put before him, and he therefore directed that they be produced before he could make the requested order. Only an affidavit by Mr Rubushe was forthcoming. There was no affidavit from the client.
- [4] The judge found Mr Rubushe's affidavit to be 'wholly inadequate'. There was no response by the respondent to the judge's directions for the shortcomings to be rectified.
- [5] Plasket J summarised the pertinent provisions of the Act in his judgment. It permits legal practitioners to conclude contingency fee agreements with their clients on a no-win no-fee basis. Practitioners are entitled to stipulate for a success fee in such agreements. The statute limits the extent of any success fee so stipulated to a maximum of double the normal fee that the practitioner would charge for the work concerned, provided that 'in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs'.[4]
- [6] In the course of his discourse on the import of the Contingency Fees Act, the learned judge also referred to the judgment of Morrison AJ in *Thulo v Road Accident Fund*,[5] which, he said, sets out the position 'in very clear terms'.[6] The reason for mentioning the judge's reference to *Thulo* will become apparent shortly.
- [7] The settlement agreement provided for an award of damages in favour of Mr Mfengwana in the sum of R904 889.17. The contingency fee agreement purported to allow Mr Rubushe a fee of 25 percent of the settlement amount. The salient provisions of the agreement provided as follows (warts and all):

'5. The Attorneys hereby warrants (sic) that the normal fees on an attorney and own client basis perform work (sic) in connection with

the aforementioned proceedings are calculated on the following basis: 25% of the total of damages awarded,

(Set out hourly, daily, and or applicable rates) (sic)

6. The Parties agrees (sic) that if the Clients is (sic) successful in the aforementioned proceedings;

An amount shall be payable to the Attorney, calculated according to the following method;
see paragraph 5

For purpose of calculating the higher fee, costs are not included,'

[8] Plasket J found Mr Rubushe's subsequent attempt to get around the inconsistency between the agreement he had made with his client and the provisions of the Act to be disingenuous. He said:

[22] Mr Rubushe has, in the affidavit he filed on 6 December 2016 (which I found to be inadequate), attempted to remedy the predicament he has found himself in. He stated that he wished to confirm that 'I had complied with Contingency Fee Act 66 of 1977 (sic) in that I will charge fee of 25% from the client or (double my fees and take whichever is lesser which would not be more than 25% agreed fees)'. In the following paragraph he stated:

"Any fees referred to in paragraph 5 of the Contingency fee Agreement shall be calculated as follows; the client shall owe the Attorneys

fee calculated in terms of Rule 70 of the Rules of the High Court plus 100% thereof. (hereafter referred to as the success fees)

provided that in the case of claims sending (sic) in money, the total of any such success awarded, or any amount obtained by client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating fee, include any costs. This was explained to client on 26th November 2014."

[23] 26 November 2014 is the date of signature of the contingency fee agreement. Two problems arise from the passages of the affidavit that I have quoted. First, what Mr Rubushe said about his fee and its computation is contrary to what is contained in the contingency fee agreement. He appears to accept that the contingency fee agreement is contrary to the Act and now seeks to tender to amend it unilaterally and retrospectively. That cannot avail him in his attempt to sidestep the difficulty posed by clauses 5 and 6 of the contingency fee agreement. Secondly, he could not have given the information he claims to have given to Mr Mfengwana when the contingency fee agreement was signed for the simple reason that it did not contain that information. The affidavit is transparently disingenuous.'

[9] Plasket J identified that not only did the agreement not comply with the Contingency Fees Act, it also purported to permit Mr Rubushe to claim in fees (excluding disbursements) a sum that was grossly disproportionate, having regard to the modest amount of work involved in attaining the early settlement of the claim and the demonstrably poor quality of the professional services that he had rendered.

[10] The judge concluded that Mr Rubushe was 'guilty of an attempt to grossly overreach his client, of rapacious and unconscionable

conduct'. [7] He set the agreement aside and directed that 'BR Rubushe Attorneys may only recover from [Mr Mfengwana] their attorney and client costs on the High Court scale, such costs to be taxed by the Taxing Master prior to the presentation of the bill of costs to [Mr Mfengwana]'. Plasket J requested the registrar of the court to forward a copy of his judgment to the Cape Law Society (the appellant's legal predecessor as the regulatory body for the attorneys' profession) and 'to contact [Mr Mfengwana] and to explain to him the import of th[e] judgment and the rights

that it accord[ed] him'.^[8]

[11] In two letters written to the Law Society in response to Plasket J's complaint about his conduct, Mr Rubushe showed that he refused to accept the court's analysis of the Contingency Fees Act and its determination that he had not complied with it. He accused the learned judge of having 'acted ultra vires in posing (sic) his nose of client contingency (sic), as the matter was in Court for settlement to be made. In fact contract was signed by client'. He proceeded 'I am wondering why the judge close (sic) one eye when he was reading Thulo judgment, and I fail to understand why Thulo at 451' (sic). He concluded, 'I find that this actions (sic) [ie those of the judge] were malicious, contradictory

and acted (sic) contrary to the Act'. In a further letter to the Law Society, Mr Rubushe claimed that Mr Mfengwana had called him to ask 'who gave instructions to the Judge to challenge his agreement'.

[12] It goes without saying that the grossly disrespectful and contemptuous tone and content of Mr Rubushe's letters to the Law Society evinced further examples of conduct unbefitting a member of the legal profession. The High Court was correctly conscious of this, and professed to have taken it into account as an aggravating factor.

[13] Mr Rubushe informed the Law Society that he intended to lodge an appeal from the judgment of Plasket J. Unsurprisingly, he did not do so.

[14] Over the course of the following months, under pressure from the Law Society, Mr Rubushe had four different and mutually irreconcilable bills of costs in respect of his attendances in Mr Mfengwana's matter drafted for taxation. The Law Society engaged a costs consultant to review the bills prepared by the respondent. The review exposed that Mr Rubushe had sought to charge exorbitant amounts for attendances for which he was not entitled to charge a fee. An example was charging for drafting the summons and particulars of claim and then also for perusing those documents after the summons had been issued. There were also a number of charges for work that had not been done, including consultations, inspections in loco and telephone calls that did not take place. It hardly needs stating that this afforded yet further evidence of dishonest conduct by the respondent. He blamed others for the problems discovered with his bills of costs. His explanation did not bear scrutiny. It is inconceivable that anyone else would have dreamt up attendances by Mr Rubushe which had not happened. The overwhelming probability is that such attendances were included in the bills at the instance of the respondent.

[15] If that were not enough, in defiance of the judgment of Plasket J delivered four months earlier, Mr Rubushe paid Mr Mfengwana only R700 000 of the settlement award that he received from the Road Accident Fund on his client's behalf. The payment to client was made on 10 March 2017. In the face of a judgment holding that he was not entitled to do so, Mr Rubushe

sought to withhold from his client an amount approximating 25 percent of the award. He was seeking thereby to implement a contract that the court had found to be unlawful and overreaching. His conduct in this regard, if not downright dishonest, was outrageously dishonourable for an officer of the court.

- [16] The position was aggravated by the fact that Mr Rubushe exacted the payment of the settlement award to his offices at a time after he had given notice of his withdrawal as Mr Mfengwana's attorney. He therefore had no authority to receive payment of the award on Mr Mfengwana's behalf. It is obvious that he did so only so as to facilitate his ability to withhold from his erstwhile client a substantial portion of the award payment.
- [17] In July 2017, Mr Mfengwana instituted proceedings against Mr Rubushe for payment of the monies that had been withheld. He did not oppose the claim, and judgment was granted in favour of Mr Mfengwana on 5 September 2017 by Robeson J. He was ordered to pay the costs of those proceedings on a punitive scale. Mr Rubushe made payment of the part of the settlement award that he had wrongfully withheld only after he was ordered to do so.
- [18] The appellant thereafter resolved to bring proceedings to have the respondent's name struck from the roll of attorneys. In its judgment in those proceedings, the court a quo reviewed the evidence against Mr Rubushe that I have summarised in this judgment and rejected his attempts at answering it. It aptly described his answering affidavit as an 'attempt at explaining the inexplicable'. It rightly pointed out that he failed to 'take responsibility for what he did' and attempted 'to blame everything on something else or someone else other than himself instead of taking responsibility for his actions'.
- [19] After referring to the three-stage analysis described in *Jasat v Natal Law Society*[9] that is applied in applications for the striking of a legal practitioner from the roll and the elaboration thereon in *Malan and Another v Law Society of the Northern Provinces*,
- [10] the High Court determined that it would be inappropriate to strike Mr Rubushe's name from the roll. It reasoned its conclusion as follows in para 30 of the judgment:

'The facts of this matter make it clear that the respondent is not a fit and proper person to continue to practice (sic). While the conduct of the respondent is indisputably of a seriously egregious nature it is somehow ameliorated by the fact that when all is said and done the respondent did not succeed in overreaching his client, Mr Mfengwana. I must, however, point out that his lack of success cannot be accounted for by his lack of trying. It was foiled by Mr Mfengwana and his new attorneys who acted swiftly in recovering the amount of R204 889.17 before it was decimated which would most likely have happened had they tarried in moving the application under case no. 3469/2017. There must be a clear distinction between an attempt to commit an offence and actually committing the offending conduct. That distinction leads me to the conclusion that, while he is clearly not a fit and proper person to continue to practice, imposing what is essentially the most extreme punishment a court can give to a legal practitioner would not be appropriate.'

[20] For the reasons that follow, the High Court's reasoning was materially misdirected, and this Court is consequently entitled to interfere with the order that was made, notwithstanding its discretionary character. The court was not at large in the exercise of its discretion. It was obliged to exercise it judicially, which included the obligation to have due regard to the principles and judicial policies in point identified in the judgments of this Court.

[21] The primary issue to be determined was whether Mr Rubushe was a fit and proper person to remain on the roll of legal practitioners.

Having correctly found that, by reason of his dishonesty, he was not, there would have to be exceptional circumstances before a court will order a suspension instead of a removal. That much was stated in the clearest of terms in *Malan*,^[11] where Harms ADP, writing for a unanimous court, said 'Obviously, if a court finds dishonesty, the circumstances must be exceptional

before a court will order a suspension instead of a removal. Where dishonesty has not been established the position is . . . that a court has to exercise a discretion within the parameters of the facts of the case without any preordained limitations.' (Emphasis supplied.)

[22] The principle was articulated in similar terms by Brand JA in *Summerley v Law Society, Northern Provinces*: 'The attorney's profession is an honourable profession, which demands complete honesty and integrity from its members. In

consequence dishonesty is generally regarded as excluding the lesser stricture of suspension from practice, ... '[12]

[23] This Court, also held in *Malan* that '[i]t is seldom, if ever, that a mere suspension from practice for a given period in itself will transform a person who is unfit to practise into one who is fit to practise. Accordingly, as was noted in *A v Law Society of the Cape of Good Hope* 1989

(1) SA 849 (A) at 852E - G, it is implicit ... that any order of suspension must be conditional upon the cause of unfitness being removed. For example, if an attorney is found to be unfit of continuing to practise because of an inability to keep proper

books, the conditions of suspension must be such as to deal with the inability. Otherwise the unfit person will return to practice after the period of suspension with the same inability or disability. In other words, the fact that a period of suspension of, say, five years would be a sufficient penalty for the misconduct does not mean that the order of suspension should be five years. It could be more to cater for rehabilitation or, if the court is not satisfied that the suspension will rehabilitate the attorney, the court ought to strike him from the roll. An attorney, who is the subject of a striking-off application and who wishes a court to consider this lesser option, ought to place the court in the position of formulating appropriate conditions of suspension.' (Emphasis supplied.)

[24] In the current case, the respondent did not do anything to place the court in the position of formulating appropriate conditions of suspension and the order made by the court did not provide for any such conditions. On the contrary, the requirement to which the sanction imposed was made subject, namely an application by the respondent at the end of the period to be permitted to resume practice as an attorney, clearly signals that the court was not satisfied that Mr Rubushe would be a fit and proper person to practise as an attorney at that time. For all the reasons cited with reference to this Court's judgment in

Malan, the only appropriate order in the circumstances of this case was an order striking his name from the roll.

[25] The High Court was clearly misdirected in failing to adhere to the principles articulated in Malan and other judgments of this Court to the same effect. The fact that the respondent did not succeed in his dishonest endeavour to deprive his client of a substantial amount of his damages award only because of the intervention of a conscientious judge did not serve in any measure to mitigate his dishonesty. The dishonest character of the respondent's dishonesty was not affected by his failure to succeed in his attempt to recover the extortionate fee for which he had stipulated. It was the character of his conduct, not its degree of success, that was germane to the court's determination of whether he was a fit

and proper person to remain on the roll of legal practitioners.

[26] As Nugent JA (Harms ADP concurring) explained in *Law Society of the Cape of Good Hope v Peter*:

'The enquiry before a court that is called upon to exercise that power [ie to strike a practitioner's name from the roll or suspend him or her from practising] is not what constitutes an appropriate punishment for a past transgression but rather what is required for the protection of the public in the future. Some cases will require nothing less than the removal of the attorney from the roll forthwith. In other cases, where a court is satisfied that a period of suspension will be sufficiently corrective to avoid a recurrence of the offensive conduct, an order of suspension might suffice. But the proper approach in each case is not to weigh the various factors for the purpose of finding an appropriate punishment - as a criminal court would do when sentencing an offender - but to determine whether, or if appropriate when, an attorney should be permitted to continue in practice'.[13]

It is evident from the passage in the court a quo's judgment quoted above[14] that it adopted the wrong approach in the exercise of its powers.

[27] It was in any event clear from the evidence summarised in the High Court's judgment that the respondent's dishonesty was not confined to attempting to overreach his client. It also manifested in his further conduct after his initial misconduct was exposed. Far from showing any insight into his wrongdoings, the respondent sought to make little of them, blame others for them, and, by his failure to pay Mr Mfengwana the full amount of his award and reliance on fraudulent bills of costs, he perpetuated and exacerbated them. He

showed no amenability to rehabilitation; quite the opposite.

[28] In the circumstances, the High Court erred in not taking these considerations properly into account. Making an order of suspension was misconceived. It was predicated on misdirections in fact and principle.

[29] In the result, an order is made as follows:

1. The appeal is upheld.
2. Paragraphs 1 and 11 of the revised order of the High Court issued on 4 August 2022 are set aside.
3. Paragraph 1 of the said order is substituted with an order directing that the respondent's name be struck off the roll of legal practitioners kept by the applicant in terms of s 30(3) of the Legal Practice Act 28 of 2014, and paragraph 12 of the said order is consequentially renumbered as paragraph 11.
4. Save as provided in paragraphs 2 and 3 above, the revised order made by the High Court is otherwise confirmed.

A G BINNS-WARD

ACTING JUDGE OF APPEAL

Appearances

For the appellant: KL Watt

Instructed by: Wheeldon Rushmere & Cole, Makhanda

Symington De Kok Attorneys, Bloemfontein

For the respondent: No appearance

[1] The order, as originally framed, omitted to make provision for the detailed directions ordinarily included in such orders concerning

the handing over of the delinquent practitioner's practice to the executive officer of the Legal Practice Council for winding up. The omission was rectified by way of a revised and amplified order issued on 4 August 2022. The judgment, incorporating the originally made order, is listed on SAFLII sub nom, Legal Practice Council v Rubushe [2022] ZAECKMKHC 37. The orders in issue on appeal were in paragraphs 1 and 4 of the originally made order.

[2] *Mfengwana v Road Accident Fund*

[2016] ZAECKGHC 159; 2017 (5) SA 445 (ECG).

[3] Contingency Fees Act 66 of 1997.

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- [4] Section 2(2) of the Contingency Fees Act.
- [6] Mfengwana para 20.
- [7] Mfengwana para 27.
- [8] Ibid para 32B.
- [9] Jasat v Natal Law Society
- [2000] ZASCA 14; 2000 (3) SA 44 (SCA); [2000] 2 All SA 310 (A) para 10.
- [10] Malan and Another v Law Society of the Northern Provinces
- [2008] ZASCA 90; 2009 (1) SA 216 (SCA) ; [2009] 1 All SA 133 (SCA) (Malan).
- [11] Malan para 10.
- [12] Summerley v Law Society of the Northern Provinces
- [2006] ZASCA 59; 2006 (5) SA 613 (SCA) para 21.
- [13] Law Society of the Cape of Good Hope v Peter
- [2006] ZASCA 37; 2009 (2) SA 18 (SCA) para 28 (referred to with approval by a unanimous bench in Law Society of the Northern Provinces v Sonntag
- [2011] ZASCA 204; 2012 (1) SA 372 (SCA) para 16, note 7).
- [14] Para 18.
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