

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2022/13204

CASE NO: 13381/21

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



Date: 15 January 2023

In the matter between:

SENZO WISEMAN MKHIZE

APPLICANT

and

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

RESPONDENT

JUDGMENT

DE VOS AJ (MBONGWE J concurring)

[1] Mr Mkhize seeks leave to appeal against the finding of this Court striking him from the roll of advocates. Leave is being sought in circumstances where Mr Mkhize faced six separate complaints from the public. The common theme of the complaints is that Mr

Mkhize did not conduct himself as a referral advocate, by either breaching the referral rule or engaging in direct correspondence with his opponents' clients. There are also some complaints that Mr Mkhize did not see his mandate through.

- [2] This Court is being asked to grant leave to appeal in circumstances where Mr Mkhize accepts that he consulted with a member of the public and his office accepted payment, without complying with the referral-rule. Even on Mr Mkhize's version, he has committed misconduct. Mr Mkhize has doubled-down on this defence and persisted with a stance of innocence, hiding behind his employees. The case law does not permit this abdication of responsibilities. In these circumstances, there is no rational basis for the conclusion that another Court will find that Mr Mkhize, as a referral advocate, did not accept instructions and deposits directly from clients without an attorney. This Court cannot grant leave in circumstances where the breach of the referral rule is not disputed.
- [3] The Court is also not persuaded that Mr Mkhize's application raises a compelling reason to entertain the appeal. Mr Hlalethoa, arguing for the Legal Practice Council, has submitted that whilst the dispute may sound an alarm and serve as a warning to other practitioners, it is not per se, a dispute of significant public interest and neither does it raise a novel point of law. The Court is persuaded by this submission.
- [4] The Court will consider Mr Mkhize's grounds for leave to appeal in turn. First, Mr Mkhize opposes the finding that he accepted monies from the public. The ground of appeal relates to the complaint by Ms Nkala. Mr Mkhize's submission is that Ms Nkala paid money to the incorrect parties. Mr Mkhize blames Ms Nkala for entering into some type of agreement with his staff – behind his back – where they accepted payment without his knowledge or approval. Mr Mkhize wishes the Court to treat him and his employees as silos.
- [5] The Court rejected the defence as fanciful. The Court went further and held that even if it was to be accepted, it did not amount to a defence, as counsel cannot abdicate to their employees conduct which breaches counsel's rules of ethics. There is no prospect that another Court would come to a different conclusion in this regard, as the finding bears the weight of judicial authority and precedent.

[6] A legal practitioner cannot abdicate responsibility for breaches of their ethical rules by blaming a partner or an employee. The position is long-standing. In *Incorporated Law Society, Transvaal v K*¹ the Court considered, in the context of an attorney, that it is often the case that partners separate the work done, with one being responsible for the books and the other for court appearances. The Court held that -

“no attorney should be heard to say that, because of the arrangement that he would be doing a particular type of work and thereof was not concerned with the manner in which the books of account had been kept, or the trust account, he should not be blamed. He will not be heard in that regard. Every attorney must realise that it is a fundamental duty on his part, breach of which may easily lead to his being removed from the roll, to ensure that the books of the firm are properly kept.”

[7] Similarly, in *Limpopo Provincial Council of the South African Legal Practice Council v Cheueu Incorporated Attorneys*² the Supreme Court of Appeal, considering co-directors to a law firm that had equally sought to abdicate responsibility, that –

“to plead ignorance of financial matters, when faced with allegations of misappropriation, does not absolve a director. It has been emphasised over the years that legal practitioners cannot escape liability by contending that they had no responsibility for the keeping of the books of account or the control and administration of the trust account”.³

[8] Mr Hlaletsoa submits that, similarly, Mr Mkhize is not excused from the allegation that his practice receives funds directly from clients. The fact that Mr Mkhize does not deny this but seeks to shift the blame renders this allegation common cause. On this basis alone, he has misconducted himself. The submission is unassailable.

[9] The ground of appeal is without merit.

[10] The second ground of appeal is that Mr Mkhize contends that the Court committed an act of judicial overreach by considering the evidence contained in the LPC’s supplementary affidavit and not providing Mr Mkhize an opportunity to respond to these allegations. Some context is required. The LPC filed a founding affidavit in which the complaint by Ms Nkala was disclosed to the Court. However, subsequent to the filing of the founding affidavit, five more complaints came to light and the LPC filed a supplementary affidavit informing the Court of these five further complaints.

¹ 1959 (2) SA 386 (T) at 381C-E

² [2023] ZASCA 112 (26 July 2023)

³ Id at para 26

- [11] Mr Mkhize's complaint is that he did not have an opportunity to respond to these complaints referred to in the supplementary affidavit.
- [12] Even if the supplementary affidavit were entirely disregarded, and the application decided solely on the LPC's founding affidavit, that would still leave Ms Nkala's complaint as set out in the LPC's founding affidavit. This complaint, combined with how Mr Mkhize conducted himself during the course of litigation, is sufficient to ground a finding that he is unbefitting of his profession.
- [13] In addition, Mr Mkhize's complaint that he has not been afforded an opportunity to respond to these allegations is incorrect. Mr Mkhize was afforded an opportunity to respond to the affidavit by virtue of the rules of court, of which he is aware. In addition, Mr Mkhize was then afforded four additional opportunities to respond in terms of court orders. Three previous court orders, dealt with in detail in the main judgment, all provided Mr Mkhize with an opportunity to file his papers. Yet, he failed to do so. When the matter came before this Court, Mr Mkhize requested a postponement – after two years of litigation - to place his version before the Court. The Court afforded Mr Mkhize this opportunity. This was done on the clearest of terms: if Mr Mkhize did not use this opportunity, the Court would make a finding on the papers as they currently stand. Again, Mr Mkhize did not use this opportunity. Mr Mkhize was afforded every conceivable opportunity to respond to the allegations.
- [14] Lastly, the nature of these proceedings are sui generis. The LPC is not in the ordinary role of an ordinary adversarial litigant. The LPC's mandate is to bring evidence of a practitioner's misconduct to the attention of the Court, to enable the Court to exercise its disciplinary powers.⁴ The supplementary affidavit contained such evidence. In addition, the Court's role is not its usual role. Part of this unusual role is its inherent power to take cognizance of the conduct of its officials and can receive information from any interested party.⁵ The content of the supplementary affidavit falls squarely in the type of information the Court is empowered to receive.
- [15] This ground of appeal, also, is without merit.

⁴ Van der Berg v General Council of the Bar of South Africa [2007] All SA 499 (SCA) para 2

⁵ Law Society of the Northern Provinces v Soller (992/2001) [2002] ZAGPPHC 2 (26 November 2022) at paras 3 - 4

[16] Mr Mkhize's application for leave to appeal contains the allegation that a "group of old women" set out together with the LPC to taint his reputation and destroy his career in a "pre-determined and planned" manner. Again, the unsubstantiated allegation shows a lack of any accountability and prefers to locate all wrongdoing on his clients and the LPC. There is no basis on which another court would come to a different conclusion. We note with regret, that after finding that Mr Mkhize's attacks on the LPC were inappropriate, he again, under oath accused – without any factual basis – that the LPC was guilty of perjury.

[17] The rationale for the leave to appeal process is "a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit".⁶ Permitting unmeritorious applications for leave to appeal to be heard, limits the Court's availability to assist other people seeking access to court. In addition, the Court is aware of the heightened threshold for granting leave to appeal⁷ and that the bar for leave to appeal has been raised.⁸ Mr Mkhize's application has not met this threshold and to grant leave, in these circumstances, would unduly limit access to valuable court time.

[18] As to the issue of costs, the general rule is that costs must follow the result. The particular rule at play is that the LPC, due to the particular role it plays, is entitled to its costs on an attorney and client scale. I see no reason to depart from this rule.

Order

[19] As a result, the following order is granted:

- a) The application for leave to appeal is dismissed with costs on an attorney client scale.



I de Vos
Acting Judge of the High Court

⁶ Dexgroup v Trsutco 2013 (6) SA 520 (SCA) at para 24

⁷ The Mont Chevaux Trust v Tina Goosen [2014] JDR 2325 (LCC) and Notshokovu v S [2016] ZASCA 112 (7 September 2016) at para 2

⁸ Acting National Director of Public Prosecutions and Others v Democratic Alliance In RE: Democratic Alliance v Acting National Director of Public Prosecutions and Others [2016] ZAGPPHC 489 at para 25

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.

Representing the applicant:	In person
Counsel for the respondent:	Mr I Hlaithoa
Instructed by:	Mphokane Attorneys
Date of the hearing:	10 November 2023
Date of judgment:	15 January 2023