



**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

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| Reportable:                  | NO  |
| Of Interest to other Judges: | YES |
| Circulate to Magistrates:    | YES |

Case no: **5511/2022**

In the matter between:

**THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL**

Applicant

and

**LEBOHANG MICHAEL MOKHELE**

Respondent

In re:

**THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL**

Applicant

and

**LEBOHANG MICHAEL MOKHELE**

1<sup>st</sup> Respondent

**LM MOKHELE INCORPORATED**

2<sup>nd</sup> Respondent

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**CORAM:** JP DAFFUE, J

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**HEARD ON:** 06 March 2023

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**DELIVERED ON:** 17 March 2023

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**Summary:** Contempt of court – respondent fully aware of his temporary suspension from practice as attorney – non-compliance with the court order established beyond reasonable doubt – elements of wilfulness and mala fides also proved as the respondent failed to establish reasonable doubt – respondent declared to be in contempt of court and a suspended order for committal to imprisonment granted.

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## ORDER

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1. The applicant's non-compliance with the requirements pertaining to form, process, service and time periods is condoned and the matter is heard as one of urgency in terms of rule 6(12) of the rules of court.
  2. It is declared that the respondent is in contempt of the order of this court granted on 23 November 2022 under case number 5511/2022.
  3. The respondent is committed to imprisonment for a period of one month which committal is suspended on condition that he immediately complies with the order mentioned in paragraph 2 above.
  4. Should the respondent fail to comply with this order, the sheriff is hereby directed, with the assistance of members of the South African Police Service, to arrest and commit the respondent to prison.
  5. The respondent shall pay the applicant's costs of the application on an attorney and client scale.
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## JUDGMENT

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### INTRODUCTION

[1] The respondent in this contempt of court application, Mr Lebohang Michael Mokhele, has been temporarily suspended from practice as a legal practitioner under the same case number by the Honourable Justice C Reinders and Acting Justice Boonzaaier on 23 November 2022 (the suspension order).<sup>1</sup> The respondent is cited in the main application as the first respondent and his professional company of which he is the sole director, LM Mokhele Incorporated, is cited as the second respondent.

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<sup>1</sup> The court order is annexed as annexure "X" to the notice of motion, pp 5 – 11 of the record.

[2] In terms of the suspension order a rule nisi was issued returnable 20 April 2023, calling upon the respondents to show cause, inter alia why Mr Mokhele should not be suspended from the practice of legal practitioner pending an application to be launched by the applicant to have his name struck from the roll of legal practitioners.<sup>2</sup>

[3] It is common cause that the respondent continues to practise as a legal practitioner (an attorney) and has done so since the time that he has filed his application for leave to appeal the suspension order. He claims that he is entitled to carry on practising as such and that he is not in contempt of court. Whether he is entitled to practise at this stage is the crux of the issue to be considered in this application as it has a direct bearing on the relief sought, ie that he be held in contempt of court and committed to imprisonment, conditionally suspended.

## **ISSUES IN DISPUTE**

[4] The respondent raised several issues in his answering affidavit, his written heads of argument as well as in oral argument. The issues in dispute are the following:

- a. the application is not urgent and in any event, the applicant created its own urgency as it learned on 5 December 2022 that the respondent would continue appearing in various courts on the basis that he had filed an application for leave to appeal on 2 December 2022.<sup>3</sup> The contempt of court application was issued and served on 17 February 2023, ie more than two months later.
- b. The application is defective in that the applicant's attorney of record has been instructed as early as 1 February 2023 which preceded the resolution of the Executive Committee; consequently, the mandate and authority to launch the present application is defective.<sup>4</sup>

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<sup>2</sup> Paragraph 2.1 of the court order to be read with para 3 thereof which reads as follows: 'The orders in paragraphs 2.1 – 2.12 and 2.14 above shall operate as interim orders with immediate effect'.

<sup>3</sup> Answering affidavit: para 18, p 115.

<sup>4</sup> Applicant relies on the resolution taken at the Executive Committee meeting of 6 February 2023 which was confirmed in a letter dated 14 February 2023: annexures "FA1A" & "FA1B" to the founding affidavit.

c. The order suspending the respondent is final in effect, barring the respondent to operate as an attorney and to earn a living and this final and definitive order is not susceptible to alteration by the court of first instance.<sup>5</sup>

d. The noting of the appeal by the respondents suspended the operation and execution of the suspension order pending the outcome of the appeal and in this regard reliance is placed on the common law restated in subsec 18(1) of the Superior Court Act 10 of 2013.<sup>6</sup> Therefore, the respondent is not acting wilfully and mala fide.

## URGENCY

[5] Where a delay in hearing a matter will prejudice the public's interest, it should ordinarily enjoy the urgent attention of the court as stated in *Victoria Park Rate Payers Associations v Greyvenouw CC*:<sup>7</sup>

'All matters in which an ongoing contempt of an order is brought to the attention of a court must be dealt with as expeditiously as the circumstances and the dictates of fairness allow.'

[6] More recently the Constitutional Court reaffirmed the aforesaid principle in *Secretary of the Judicial Commission Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others (the State Capture judgment)*<sup>8</sup> when it inter alia stated:

'The ongoing defiance of this Court's order, by its very nature, renders this matter urgent.'

In casu the respondent is an officer of the court who should be protecting the Constitution and the rule of law.

[7] The respondent complained early on in his answering affidavit that the affidavit was prepared in haste and that he was 'extremely prejudiced in that I am not able, in this answering affidavit, to place all the "arsenal" of facts that, would otherwise have been at my disposal as well as proffer adequately researched legal submissions. I respectfully submit that, had it been otherwise, my factual and legal submissions would

<sup>5</sup> Paragraphs 40 and 41 of the answering affidavit, p 123.

<sup>6</sup> The respondent made it clear in his answering affidavit, written heads of argument and specifically in oral argument that reliance is placed on subsecs 18(1) and (3) of the Superior Court Act as well as *Ntlemenza v Helen Suzman Foundation and another* 2017 (5) SA 402 (SCA) at para 19.

<sup>7</sup> 2004 JDR 0498 (SE) at paras 26 & 27.

<sup>8</sup> 2021 (5) SA 327 (CC).

certainly swing the pendulum in my favor.<sup>9</sup> I quoted this paragraph to the respondent at the start of the proceedings and enquired from him whether he wanted a postponement in order to either file a supplementary affidavit, or to consider further legal argument. However, he made it clear that he was prepared to argue the application on the basis of the documents before me and that he was fully prepared to make submissions of a legal nature.

## **ALLEGED DEFECTIVE APPLICATION**

[8] The respondent's allegation is misguided. It is apparent that the applicant's attorneys were instructed on 1 February 2023 to bring a contempt of court application. This instruction was given based on a resolution by the applicant's Executive Committee via round robin communication. The round robin decision was ratified by the Executive Committee on 6 February 2023 as is evident from the letter by applicant's Executive Officer dated 14 February 2023.<sup>10</sup> The founding affidavit was deposed to by Ms JK Myburgh in her capacity as the National Chairperson of the applicant. Nothing more needs to be said about the respondent's contention, save to state that the applicant as *custos morum* is the guardian of morals of the legal practitioners' profession that acts in the public interest in these proceedings.

## **FACTS NOT IN DISPUTE**

[9] The following facts are not in dispute:

- a. That the suspension order was issued on 23 November 2022.
- b. The respondent opposed the relief sought in the main application and also filed heads of argument.
- c. He was in court when the suspension order was read out and he also received a copy thereof from the judge's secretary.<sup>11</sup>

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<sup>9</sup> Answering affidavit para 12, p 113.

<sup>10</sup> Annexures FA1A and FA1B to the founding affidavit, pp 36 & 37.

<sup>11</sup> Founding Affidavit para 49 on p 26; he confirmed this in court during argument on 6 March 2023.

d. Although the respondent denied that the sheriff had served the suspension order on him personally, submitting during oral argument that this requirement for contempt had not been met, he admitted that it was served at his office by the sheriff who also attached the relevant property in terms of the order, removed same and handed them over to the curator.<sup>12</sup>

e. The respondent appeared in two criminal matters on 6 December 2022 and 23 January 2023 respectively and on his own admission continues to practise as an attorney. He also made it clear that he would continue to practise as such and I quote:<sup>13</sup>

'It is stated by the Applicant that there are flagrant disregard of the order herein by the Respondent, instead, the Respondent is compliant with the said order in that, he only started operating only after the institution of the Application for Leave to Appeal and up until same has been set aside by a competent court, it remains the Respondent's stance that, he will continue operating normally as the order suspending him from practice has been suspended by the institution of the Application for Leave to Appeal.'

f. The respondent has not been issued a Fidelity Fund Certificate for the present year and is therefore practising contrary to the provisions of subsec 93(8) of the Legal Practice Act 28 of 2014 (the LPA).<sup>14</sup> In this regard it is his case that the applicant had blocked his profile and as a result it is impossible to apply for such a certificate.

## THE RESPONDENT'S ATTITUDE TOWARDS THE APPLICANT

[10] I was quite perturbed when reading the answering affidavit as well as respondent's heads of argument. There can be no doubt that the respondent has no respect for the professional body to which he belongs. I do not intend to quote each and every sentence or paragraph in support of my contention, but a few examples will suffice:

<sup>12</sup> Annexure FA5 to the founding affidavit p 76 read with annexure FA6 p 77 to 79, being a letter of the respondent to the applicant.

<sup>13</sup> Answering affidavit para 68, p 132.

<sup>14</sup> This subsection reads as follows: 'Any person who contravenes sections 84(1) or (2) or section 34, in rendering legal services— (a) commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and imprisonment; (b) is on conviction liable to be struck off the Roll; and (c) is not entitled to any fee, reward or reimbursement in respect of the legal services rendered.'

a. 'At the outset, I vouch that the application of the Applicant is ill conceived, ill-fated, misplaced and/or bad in law.'<sup>15</sup>

b. When responding to the applicant's allegation that the application was urgent as the respondent's conduct undermined the justice system by continuing to practise contrary to a court order, he referred to this as an 'outlandish averment which only exists in the figment of the imagination of the Applicant and is not supported by any objectively verifiable evidence.'<sup>16</sup>

c. The respondent also made the following comment: 'What is quite shocking from the Applicant's version is the fact that, they are failing to take the Honorable Court's (sic) in their confidence by stating was is causing (sic) the delay on their part to have brought this application timeously.'<sup>17</sup>

d. Later on the respondent seeks a costs order 'de bonis propriis against the applicant's deponent.'<sup>18</sup>

e. The respondent further commented as follows: 'What is shocking, alarming and which must be frowned upon is the conduct of the Applicant on how they have been handling this matter to the total disregard of the rights of the Respondent to the self-created protection of the public interest and which interest has never been a course (sic) of concern.'<sup>19</sup>

f. Another example is the following: 'It is a shame that, the Applicant with such vast resources at their disposal they stoop low and use frivolous application such as the present one to personally attack the Respondent's persona and standing in the legal profession.'<sup>20</sup>

[11] Some years ago the Supreme Court of Appeal referred to the common occurrence that practitioners accused of wrongdoing elect to attack the professional bodies to which they belong. The following dictum in *Law Society, Northern Provinces v Mogami and Others* is apposite<sup>21</sup> although that case dealt with dishonest conduct in striking off applications which is not the case in casu:

<sup>15</sup> Answering affidavit para 6, p 111.

<sup>16</sup> Answering affidavit para 27, p 119.

<sup>17</sup> Answering affidavit para 29, pp 119 & 120.

<sup>18</sup> Answering affidavit paras 31 & 33, p 120 & p 121.

<sup>19</sup> Answering affidavit para 118, p 144.

<sup>20</sup> Answering affidavit para 126, p 146.

<sup>21</sup> 2010 (1) SA 186 (SCA) para 26; also *Law Society, Northern Provinces v Sonntag* 2012 (1) SA 372 (SCA) at paras 17 & 18.

[26] Very serious, however, is the respondents' dishonest conduct of the proceedings. Instead of dealing with the issues they launched an unbridled attack on the appellant. It has become a common occurrence for persons accused of a wrongdoing, instead of confronting the allegation, to accuse the accuser and seek to break down the institution involved. This judgment must serve as a warning to legal practitioners that courts cannot countenance this strategy. In itself it is unprofessional.'

## CONTEMPT OF COURT

[12] The requirements to be satisfied to hold a party in contempt of court are well-known and once again confirmed in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty)*.<sup>22</sup> These are: '(a) the existence of a court order; (b) service or notice thereof; (c) non-compliance with the terms of the order; and (d) wilfulness and *mala fides*.'

[13] Once an applicant has established the existence of the order, service or notice thereof and non-compliance, the respondent bears the evidential burden in relation to wilfulness and *mala fides*. It is settled that the onus is on the applicant to prove all these requirements beyond reasonable doubt where committal of the respondent as a sanction is sought.<sup>23</sup>

[14] The court held in *Fakie NO v CCII Systems (Pty) Ltd (Fakie)* that the refusal to obey a court order should be both wilful and *mala fide* and that the unreasonable non-compliance with the order, provided it is *bona fide*, does not constitute contempt of court. Consequently, the offence of contempt of court is committed 'not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.'<sup>24</sup>

[15] Cameron JA provided the following summary in *Fakie*:<sup>25</sup>

'To sum up:

- a. The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

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<sup>22</sup> 2018 (1) SA 1 (CC) para 73.

<sup>23</sup> *Ibid* para 74.

<sup>24</sup> 2006 (4) SA 326 (SCA) para 10.

<sup>25</sup> *Ibid* para 42.

- b. The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.
- c. In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.
- d. But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.
- e. A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.'

[16] It is also important to quote the following dicta of the Constitutional Court in *Pheko v Ekurhuleni City*:<sup>26</sup>

'[36] ... Therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, *mala fides* and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.

[37] However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance such as declaratory relief, a mandamus demanding the contemnor to behave in a particular manner, a fine and any further order that would have the effect of coercing compliance.'

[17] There is a public interest element in each and every case where it is alleged that a party has wilfully and in bad faith failed to comply with a court order, especially so where a legal practitioner is alleged to be the guilty party. The effectiveness and legitimacy of the legal system will come under threat if nothing is done to prevent these kind of abuses. The Constitutional Court recently made this very clear in the *State Capture* Judgment referred to above.<sup>27</sup>

[18] Courts are the guardians of the Constitution and assert their authority in the public interest. Their dignity and authority must be upheld. Court orders will be effective only if there are assurances that they will be enforced. In *Pheko v Ekurhuleni City* the Constitutional Court with respect correctly held that 'disobedience towards

<sup>26</sup> 2015 (5) SA 600 (CC) at paras 36 & 37 with reference to *Fakie*; see also *Matjhabeng Local Municipality v Eskom Holdings Limited and Others*; *Mkhonto and Others v Compensation Solutions (Pty) 2018 (1) SA 1 (CC)* at para 67.

<sup>27</sup> Fn 8 at para 34 of the judgment; see also *Public Protector or South Africa v The Speaker of the National Assembly and others* [2023] 1 All SA 256 (WCC) para 24.

court orders or decisions risks rendering our courts impotent and judicial authority a mockery.’<sup>28</sup>

## **ANALYSIS AND EVALUATION OF THE EVIDENCE AND LEGAL PRINCIPLES**

[19] The respondent argued his own case, and apparently drafted his own answering affidavit and heads of argument. Let it be clear: the respondent who is in practice for 11 years is clearly fully conversant with the facts of this matter and if one considers the detailed manner in which he drafted the heads of argument, there can be no doubt that he should be fully acquainted with the legal principles pertaining to judgments and orders, the finality thereof as well as the legal principles applicable to appeal procedure.

[20] The respondent stated that the order of 23 November 2022 was never served upon him or upon a person older than 16 years and apparently because this is a status application, personal service should have taken place. Consequently, he argued that in the light of the improper service, one of the requirements of contempt of court has not been met.<sup>29</sup> This version is untenable, bearing in mind that he quoted the full court order in his application for leave to appeal.<sup>30</sup> As mentioned, he also confirmed during oral argument that he was made aware of the suspension order in court when it was read out. He also received a copy of the order in court.

[21] It is common cause that the respondent decided to carry on practising as an attorney notwithstanding his suspension. Over and above what was stated earlier herein, the respondent made his stance quite clear in the answering affidavit. He stated that ‘he only started operating only after the institution of the application for leave to appeal and up until same has been set aside by a competent court, it remains the respondent’s stance that, he will continue operating normally as the order suspending him from practice has been suspended by the institution of the application for leave to appeal.’<sup>31</sup> The first three requirements for contempt of court have been established beyond reasonable doubt.

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<sup>28</sup> Pheko loc cit para 1.

<sup>29</sup> Answering affidavit paras 105 – 106, pp 140 – 141.

<sup>30</sup> Annexure “FA2” to the founding affidavit pp 38 – 52.

<sup>31</sup> Answering affidavit para 68, p 132.

[22] The position under s 16 of the Superior Courts Act pertaining to appeals is in accordance with the general rule laid down in *Zweni v Minister of Law and Order of the Republic of South Africa*.<sup>32</sup> The three attributes of a 'judgment or order' subject to an appeal are the following:

- a. it must be final in effect and not susceptible of alteration by the court of first instance;
- b. it must be definitive of the rights of the parties, ie it must grant definite and distinct relief; and
- c. it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

It is accepted that an interlocutory order with a final and definitive effect on the main application is a 'judgment or order' which is appealable. The real question is whether it can be altered and/or corrected on the return date or whether it can only be attacked on appeal. Having said this, there is scope for a finding that an interim interdict is appealable on the basis that it has the effect of a final judgment.<sup>33</sup> This is not such a case.

[23] Although the return date of the rule nisi in casu has been set to be 20 April 2023, and thus about five months after the suspension order was granted, I have no doubt that the order of 23 November 2022 does not have the effect of a final judgment although the respondent is temporarily prevented from practising as an attorney. He and his company are called upon to show cause on the return date of 20 April 2023, a month from now why the interim orders should not be made final. Contrary to his version such orders are susceptible to alteration by the court of first instance. If the respondent really believed that he was entitled to practise in the meantime, he could have applied for relief to obtain his books and files confiscated by the applicant, to unfreeze his trust bank account with Standard Bank and to direct the applicant to allow him to apply for a Fidelity Fund Certificate. He failed to take any of the steps in this regard.

<sup>32</sup> 1993 (1) SA 523 (A) at 532 i – 533 b; see also *SA v JHA* 2022 (3) SA 149 (SCA) para 23 and numerous other judgments since *Zweni*.

<sup>33</sup> *Mathale v Linda and another* 2016 (2) SA 461 (CC) paras 25 – 30, which case is clearly distinguishable bearing in mind that the eviction order was found to have an immediate and devastating effect upon a homeless person.

[24] The respondent made it clear during oral argument that he specifically relied on the judgment of *Ntlemeza v Helen Suzman Foundation and another*<sup>34</sup> as well as the wording of subsecs 18(1) and 18(3). The reference to paragraph 19 in *Ntlemeza* is of no assistance as the court merely referred to the common law principles enunciated in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*.<sup>35</sup>

[25] It is important to quote subsecs 18(1) to 18(3) of the Superior Courts Act:

**'18 Suspension of decision pending appeal**

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.' (emphasis added).

[26] The respondent is wrong. Subsection 18(1) deals with the operation and execution of a decision which is appealable and the suspension thereof in the circumstances contained in the subsection. This subsection is not applicable in casu.

[27] Subsection 18(2) deals with interlocutory orders not having the effect of a final judgment. In such a case the operation and execution of such an interlocutory order is not suspended pending the decision of the application for leave to appeal or the appeal, unless the court under exceptional circumstances orders otherwise. This subsection is applicable in casu.

[28] In *Knoop NO v Gupta (Execution)*<sup>36</sup> the Supreme Court of Appeal held that the effect of subsections 18(1) and 18(3) is that an applicant seeking an execution order must prove three things: (a) namely exceptional circumstances; (b) that it will suffer irreparable harm if the order is not made; and (c) that the party against whom the order is sought will not suffer irreparable harm if the order is made. Contrary to the situation

<sup>34</sup> 2017 (5) SA 402 (SCA) at para 19.

<sup>35</sup> 1977 (3) SA 534 (A) at 544 h – 545 g.

<sup>36</sup> 2021 (3) SA 135 (SCA) para 45.

in subsec 18(1), and as mentioned, subsec 18(2) provides that the operation and execution of an interlocutory order not having the effect of a final judgment which is the subject of an application for leave to appeal or an appeal is not suspended pending the decision of the application or appeal, unless the court under exceptional circumstances orders otherwise. In casu, no application has been made by the respondent to suspend the suspension order issued on 23 November 2022. In any event, it is not the respondent's case that it was necessary for him to apply for such an order and consequently no issue of exceptional circumstances arise for consideration.

[29] *Ntlemeza* is no authority for the submission advanced by the respondent. In that case the decision by the High Court directing that *Ntlemeza* should not be permitted to continue in his post as National Head of the Directorate for Priority Crime Investigation was taken on appeal by way of an application for leave to appeal. Clearly the order of the High Court was final in effect and that court was *functus officio* pertaining to the decision arrived at. Consequently, the Supreme Court of Appeal had to consider the application of subsec 18(1) read with subsec 18(3) and concluded eventually that *Ntlemeza's* appeal should be dismissed.

[30] In *Samancor Chrome Ltd v Bila Civil Contractors (Pty) Ltd and Others*,<sup>37</sup> the Supreme Court of Appeal considered the legal advice allegedly provided to the respondents. The court held that they were obliged to state the full details of the alleged advice which in an ordinary course included details about the nature of the advice, when it was received, by whom it was received and by whom it was given.<sup>38</sup> In that case the respondents intended to lodge an application for leave to appeal to the Supreme Court of Appeal, but in the meantime and prior to the lodging of the application, continued transgressing the High Court order prohibiting them from carrying on with mining activities. The court referred to subsec 18(5) of the Superior Courts Act and concluded that the mere intention to file an application for leave to appeal was not enough insofar as the aforesaid subsection refers to the lodging of the application with the registrar in terms of the rules. The court held that the respondents' version was not only untenable, but also far-fetched<sup>39</sup> and concluded that the

<sup>37</sup> (Case no 159/2021) [2022] ZASCA 154 (7 November 2022).

<sup>38</sup> *Ibid*, para 53 with reference to *S v Abrahams* 1983 (1) SA 137 (A) at 146 F – H.

<sup>39</sup> *Ibid*, para 60.

respondents did not advance credible evidence to give rise to reasonable doubt and therefore non-compliance was found to have been wilful and mala fide.<sup>40</sup>

[31] Having referred to the first *Samancor Chrome* judgment of the SCA, it is necessary to consider the second *Samancor Chrome* judgment, to wit *Samancor Chrome Ltd v Bila Civil Contractors (Pty) Ltd*.<sup>41</sup> In that case the respondent relied on legal advice to the effect that the application for leave to appeal automatically suspended the order of the High Court. The Supreme Court of Appeal held that the legal advice provided was clear and that 'it is hard to conclude that Bila as a lay litigant did not genuinely accept the advice given by its legal representatives, albeit uncritically so, that the interim order could be appealed against.'<sup>42</sup> Therefore, the court could not ignore this and held that reasonable doubt was raised as to whether the order was disobeyed wilfully and mala fide.<sup>43</sup>

[32] The second *Samancor Chrome* judgment is distinguishable from the facts in casu for the following reasons. The respondent relies on his own opinion. Firstly, his reliance on the *Ntlemeza* judgment is totally wrong and any reasonable attorney would have noticed that. Secondly, he failed to consider the provisions of subsec 18(2) at all, but steadfastly tried to rely on subsecs 18(1) and (3). I am not prepared to find that the respondent as an experienced attorney could honestly believe that he could ignore the clear provisions of subsec 18(2) and tried to make out a case based on subsecs 18(1) and 18(3). I accept that in opposed motion proceedings, as in casu, the well-known *Plascon Evans* test must be applied as again reiterated in *Director of Public Prosecutions v Zuma*<sup>44</sup> and that it is often difficult to reject a respondent's version on the papers especially when motive is to be considered. It is therefore not surprising that contempt of court orders are often set aside on appeal. Notwithstanding this observation, I am still convinced that the respondent is transgressing the suspension order wilfully and mala fide.

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<sup>40</sup> *Ibid*, para 64.

<sup>41</sup> (Case no 810/2021) [2022] ZASCA 163 (8 November 2022); see in general paras 57 to 70 of the judgment.

<sup>42</sup> *Ibid*, para 67.

<sup>43</sup> *Ibid*, para 68.

<sup>44</sup> 2009 (2) SA 277 (SCA) para 26.

[33] Having come to the conclusion in the previous paragraph, it is necessary to say something about the respondent's two previous appearances in the High Court. It is not good enough to say that he appeared before two judges of this court who allowed him to act accordingly. In both matters the criminal cases were merely postponed. The first matter is a part-heard criminal matter that was postponed to 5 December 2022 to arrange new trial dates and the second matter was a pre-trial conference which was merely postponed. In the first matter the presiding judge emphasised during oral argument by the State Advocate and the respondent, after having been informed of the suspension order and the filing of the application for leave to appeal, that he did not have the benefit of legal argument relating to the finality or otherwise of the suspension order and refused to make a final determination. He ruled in favour of accused 2 before him that the respondent should not be barred from appearing on his behalf in the postponement proceedings. Consequently, the trial was postponed for further hearing from 15 May to 2 June, the dates being beyond the return date in the present matter.

[34] Contrary to the respondent's viewpoint that he is entitled to practise as an attorney, he failed to seek relief against the applicant to allow him to apply for a Fidelity Fund Certificate, bearing in mind that his profile had been blocked which prevents him from applying for such a certificate. The respondent also threatened with litigation if all his 'office tools' which presumably refers to his files and books were not returned to him before the 7<sup>th</sup> of December 2022, but notwithstanding such threats, he failed to execute them. Contrary to the advice of the applicant he continued as follows:<sup>45</sup>

'We do not intend to get into the reasons and grounds why we are stating with braveity (sic) that we are continuing on practicing normally but be pleased to take notice that, we will never cease operating and appearing in various courts and in various matters that we have.'

In the same letter the respondent stated that the application for contempt of court with which he was threatened would be vigorously opposed and a punitive costs order would be sought against the applicant's director.<sup>46</sup>

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<sup>45</sup> Paragraph 4, p 83.

<sup>46</sup> FA8, p 82 to 84.

[35] I conclude by reiterating that the respondent failed to persuade the court that he bona fide and honestly believed that he could continue practising as an attorney pending the return date of the interim suspension order granted on 23 November 2022. I am satisfied that the applicant has established his wilfulness and mala fides beyond reasonable doubt. During oral argument the applicant's counsel sought a term of six months' imprisonment, duly suspended as set out in the notice of motion. Such a sanction is too severe. In my view a period of one month will suffice. I need to mention at this stage that I detected a typing error in paragraph 3 of the notice of motion, being the reference so the order mentioned in paragraph 1 of the notice of motion, which is clearly a typing error as it should read paragraph 2. When I pointed this out before argument, applicant's counsel sought an amendment, but the respondent objected thereto without indicating any prejudice. I dismissed the objection and granted the amendment.

## **COSTS**

[36] The applicant is substantially successful and as the successful litigant it is entitled to a costs order in its favour. The general rule in striking off applications and applications of this nature is that the respondent (the practitioner) has to pay the costs of the professional body (in casu the applicant) on an attorney and client scale, the reason being that the applicant is not an ordinary litigant as it performs a public duty.<sup>47</sup> There is no reason not to follow the general rule.

## **ORDER**

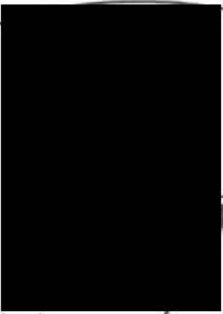
[37] The following order is issued:

1. The applicant's non-compliance with the requirements pertaining to form, process, service and time periods is condoned and the matter is heard as one of urgency in terms of rule 6(12) of the rules of court.
2. It is declared that the respondent is in contempt of the order of this court granted on 23 November 2022 under case number 5511/2022.
3. The respondent is committed to imprisonment for a period of one month which committal is suspended on condition that he immediately complies with the order mentioned in paragraph 2 above.

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<sup>47</sup> *Law Society of the Northern Provinces v Dube* [2012] 4 All SA 251 (SCA) para 33.

4. Should the respondent fail to comply with this order, the sheriff is hereby directed, with the assistance of members of the South African Police Service, to arrest and commit the respondent to prison.
5. The respondent shall pay the applicant's costs of the application on an attorney and client scale.



P DAFFUE, J

On behalf of the Applicant:  
Instructed by:

Adv MS Mazibuko  
Faizel M. Amade  
BLOEMFONTEIN

On behalf of the Respondent:  
Instructed by:

Mr Mokhele  
In Person  
BLOEMFONTEIN

