

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, MTHATHA)

In the matter between:

Case No: 1713/2007

THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA

Applicant

And

VUYISILE DLOVA

Respondent

Coram: **Chetty and Griffiths JJ**

Date Heard: **24 July 2012**

Date Delivered: **13 September 2012**

Summary: ***Advocate** – Misconduct – Breach of referral rule – Whether established – Sanction imposed – Respondent's conduct during hearing – Perjurious testimony – Aggravating circumstances – Striking off only appropriate sanction*

JUDGMENT

Chetty, J

[1] The **Admission of Advocates Act**¹ (the Act), was promulgated to provide for the admission of persons to practice as advocates in the Republic of South Africa. One of the prerequisites to admission is the requirement that the court must be satisfied that such person is fit and proper to be admitted to the ranks of the profession and authorised to act as an advocate. The Act, *inter alia*, empowers the General Council of the Bar of South Africa or any of its constituent

¹ Act No, 74 of 1964

bars, as part of its regulatory function, to bring evidence of actual misconduct to the notice of the court. The applicant herein is the General Council of the Bar of South Africa. The misconduct, upon which the relief sought by the applicant is predicated, is succinctly stated thus in the founding affidavit –

- “15.1 The Respondent, though an advocate, engages in the practice of an attorney;
- 15.2 the Respondent practices as such without having been admitted and enrolled as an attorney as required by the Attorneys Act, No. 53 of 1979;
- 15.3 the Respondent accepts instructions directly from clients without the intervention of an attorney;
- 15.4 the Respondent takes money directly from clients which, as an advocate, he is not permitted to do;
- 15.5 the Respondent failed to carry out his mandate with serious consequences for Mr Mjekula.”

[2] It will be gleaned from the foregoing that the applicant’s opprobrium is specifically directed at the infraction of the referral rule which governs the practice of an advocate. It was described thus by the Supreme Court of Appeal in

Rösemann v General Council of the Bar of South Africa² -

“[28] At this point the referral rule and its implications (as to which see *De Freitas and Another v society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA) at 756C-760I and 764C-765A and *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA) at 620C) became significant. An advocate in

² 2004 (1) SA 568 (SCA) per Heher JA at para [28]

general takes work only through the instructions of an attorney. The rule is not a pointless formality or an obstacle to efficient professional practice, nor is it a protective trade practice designed to benefit the advocacy. The rule requires that an attorney initiates the contact between an advocate and his client, negotiates about and receives fees from the client (on his own behalf and that of the advocate), instructs the advocate specifically in relation to each matter affecting the client's interest (other than the way in which the advocate is to carry out his professional duties), oversees each step advised or taken by the advocate, keeps the client informed, is present as far as reasonably possible during interaction between the client and the advocate, may advise the client to take or not to take counsel's advice, administers legal proceedings and controls and directs settlement negotiations in communication with his client. An advocate, by contrast, generally does not take instructions directly from his client, does not report directly or account to the client, does not handle the money (or cheques) of his client or of the opposite party, acts only in terms of instructions given to him by the attorney in relation to matters which fall within the accepted skills and practices of his profession and, therefore, does not sign, serve or file documents, notices or pleadings on behalf of his client or receive such from the opposing party or his legal representative unless there is a Rule of Court or established rule of practice to that effect (which is the case with certain High Court pleadings but finds no equivalent in magistrate's court practice). The advocate does not communicate directly with any other person, save opposing legal representatives, on his client's behalf (unless briefed to make representations), does not perform those professional or administrative functions which are carried out by an attorney in or from his office, does not engage in negotiating liability for or the amount of security for costs or contributions towards costs or terms of settlement except with his opposing legal

representative and then only subject to approval of his instructing attorney. (This catalogue does not purport to be all-embracing. It is intended only to illustrate the sharpness of the divide and to point the answer to other debates on the same subject.)”

[3] It is not in issue that the respondent, a duly admitted and enrolled advocate of this court is not a member of any of the applicant’s constituent bars. It matters not however. It has long been recognised that the applicant or any of its constituent bars has a direct interest in the professional conduct of any person admitted and enrolled as an advocate in the Republic of South Africa and is legally obliged, as the *custos morum* of the profession, to bring applications for the striking off or the suspension of any advocate from its ranks. In terms of section 7 (1) (d) of the Act an advocate may be struck off the roll of advocates or suspended from practicing as such “*if the court is satisfied that he (or she) is not a fit and proper person to continue practice as an advocate*”. The starting point in this inquiry is to determine whether, as a matter of fact, the offending conduct has been established. If so, the court is required to make a value judgment whether the person concerned is not a fit and proper person as envisaged in section 7 (1) (d). If it does make such a finding, *caedit questio*. Striking off or suspension must follow as a matter of consequence.

[4] The respondent refuted the allegations levelled against him. In his opposing affidavit, his riposte to the applicant’s contentions that he breached the

referral rule were articulated as follows -

"5.7 Whilst working as a Professor of law at the then University of Transkei, I established a community of advisory business law centre known as NIKWANTO COMMUNITY BUSINESS LAW CENTRE in Mthatha. This centre was formally registered in 2000 as a Trust the registered name thereof being NIKWANTO LEGAL AND FINANCIAL CONSULTANTS with Trust number 26/9/570/2000. It was established as a community centre to assist the community of Mthatha and surrounding districts on various matters including legal matters. It employed attorneys and advocates as its consultants. I left the University of Transkei during 2002 and was also engaged by this community business law centre as one of its consultants. Although the said centre had always engaged an instructing attorney whenever it used the services of an advocate, we have always understood and still understand it in the same contact as the legal Resources Centre which also employs attorneys and advocates. I learnt that the Legal Resources Centre, for instance, in Port Elizabeth had employed Judge Pickering, Judge Bam and Judge Mpati when they were still advocates and other lawyers. These then advocates used to appear in all the courts at the instructions of the Legal Resources Centre. Members of the community with legal problems would approach the Legal Resources Centre which in turn would engage its aforementioned lawyers to represent such members in all the courts in respect of court matters. Mr Justice Pickering and Mr Justice Bam, when they were still advocates, established the Legal

Resources Centre in Port Elizabeth. The only difference between the Legal Resources Centre and NIKWANTO LAW CENTRE, as far as I am concerned, is that the latter, unlike the Legal Resources Centre, had been generating its own resources and not dependent, for finance, on finance agencies that financed non-governmental organisations. No proceedings were ever instituted against the said lawyers for their removal from the roll of advocates on the basis that by representing in court members of the community that had engaged the Legal Resources Centre on instructions direct from the Legal Resources Centre, they had in fact dealt directly with clients whereas, just as I am, they were advocates and not attorneys.

- 5.8 Despite the above knowledge on the practice of the Legal Resources Centre, NIKWANTO LAW CENTRE took an additional precaution that whenever an advocate, including myself, was engaged by the centre, it would also instruct an attorney to instruct the advocate concerned. In respect of all my appearances at court at the instance of the centre, I have always had an instructing attorney. In the case under consideration, Mr Mjekula had appointed his attorney in 2001 when the case commenced. The centre assured me that those attorneys were attorneys of record in the Mjekula case and that my appearance in mitigation of sentence in the said case was premised on the said attorneys being my instructing attorneys in the matter."

It will be gleaned from the foregoing that central to the respondent's defence is the contention that Nikwanto was in reality a counterpart of the Legal Resources

Centre, and, as such, entitled to operate in the manner in which it did. But as I shall in due course show, it was a conduit through which the respondent solicited work from the general public in flagrant disregard of the referral rule. I shall henceforth refer to Nikwanto Law Centre interchangeably as either Nikwanto or the Centre

[5] Although the application could properly have been decided on affidavit, it was, perhaps presciently, given the respondent's conduct during the hearing, referred for oral evidence on defined issues, formulated as follows –

"2. . . .

- a) whether, in acting for G.M. and N.C. Mjekula during the period of April – November 2002, the Respondent was conducting himself as an attorney or as an advocate;
- b) if the respondent was conducting himself as an advocate, whether he was properly instructed by an attorney for that purpose;
- c) whether the Respondent's conduct is deserving of the sanction of striking off the roll of advocates or any other sanction."

[6] In argument before us, Mr *Tshiki*, on behalf of the respondent raised, as a point *in limine*, the admitted unfortunate delay which has beset this application. He submitted that the delay negated the respondent's constitutionally entrenched

right to a fair trial as provided for in section 35 (3) (d) of the **Constitution**³ and was of such magnitude that the application should on that ground alone, without recourse to the merits of the application, be dismissed, and urged us to firstly make a ruling thereanent. We declined this self-serving invitation by reason of the fact that the delay cannot be viewed in isolation. Section 35 (3) (d) reads as follows –

"35 Arrested, detained and accused persons

- 1) . . .
- 2) . . .
- 3) Every accused person has a right to a fair trial, which includes the right –
 - (a) . . .
 - (b) . . .
 - (c) . . .
 - (d) to have their trial begin and conclude without unreasonable delay."

[7] Although applications of this ilk are *sui generis*, and not criminal proceedings, I shall assume, in favour of the respondent that, given the punitive character of potential sanctions which may be imposed, that the broad based fair trial requirements are of equal application herein.

[8] The question whether a court may properly dismiss an application by reason of an inordinate delay in its prosecution was recently considered by the Supreme Court of Appeal in **Mohammed Cassimjee v Minister of Finance**⁴

³ Act No. 108 of 1996

⁴ [2012] ZASCA 101 (1 June 2012)

where Burochowitz AJA, writing for the Court, with reference to a long line of authority, affirmed the principle that “an inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of an action”. The question is, is this such a matter. In the founding affidavit the deponent, the applicant’s then chairperson, acknowledged that although the resolution to launch the application was taken on 8 March 2003, the application papers were only filed on 12 December 2007. The reasons advanced for the delay are firstly, the dilatoriness and inaction of certain members of the Transkei Bar who were entrusted by the General Council of the Bar to bring the application and was thereafter compounded by administrative problems occasioned by successive changes in its council, in particular its chairpersonship. Although the delay may be construed as inordinate, I am satisfied, for the reasons proffered, that the delay is not inexcusable or sufficient to, *per se*, warrant the dismissal of the application. In any event, apart from lamenting the delay the respondent does not say that it impacted deleteriously upon his ability to mount a meaningful defence to the charges of misconduct. In applying the balancing test espoused by Sachs J in **Bothma v Els**⁵, I am satisfied that the delay, such as it is, does not taint the overall substantive fairness of the application. With that prelude therefor, I turn to a consideration of the facts which underpin the applicant’s case.

[9] In his testimony in chief Mr *Mjekula* alluded to the circumstances under which he met the respondent and eventually came to be represented by him in his criminal trial. His evidence is a mirror image of the averments made in his

⁵ 2010 (2) SA 622 (CC)

supporting affidavit to the applicant's founding affidavit. Therein, he described how, given the nexus between his spouse and that of the respondent, he was directed to the respondent's offices situate at 22 Chatham Street, Mthatha, where he met the respondent and sought his advice concerning a plethora of legal problems pertaining to the imminent sale in execution of his home at the instance of Standard Bank and the criminal prosecution instituted against him. He testified that the respondent undertook to assist him and requested an initial deposit of R20 000.00 which he duly paid but was not issued with a receipt.

[10] Thereafter the respondent advised him of his successful negotiations with Standard Bank whereby they had agreed to accept the sum of R5000.00 per month in satisfaction of the amount misappropriated from them by the respondent. He advised *Mjekula* to deposit a further sum of R40 000.00 into his trust account which he would disclose to the court during the criminal trial to vouchsafe *Mjekula's* commitment to repay Standard Bank. He testified further that he duly paid the money into the respondent's trust account and was issued with a deposit slip, (annexure GMM1 to his affidavit). The respondent duly represented him in the regional court during 2002 and sought a postponement which was duly granted. During a subsequent appearance the respondent delegated a young man, whom he introduced to him as a candidate attorney, to appear for him. On the date of trial the respondent appeared on his behalf and at the conclusion of the trial he was duly convicted and sentenced to imprisonment for five years, wholly suspended for five years, on condition that he repaid the

sum of R265 000.00 to the bank at the rate of R5000.00 per month.

[11] Under cross-examination, save for the assertion that another person at the Nikwanto Law Centre had introduced him to the respondent and that the respondent had been instructed by Nikwanto to represent him at his criminal trial, *Mjekula's* evidence went unchallenged.

[12] In his oral testimony the respondent, save for admitting that the extent of his participation in *Mjekula's* affairs was limited to addressing the trial court in mitigation of sentence, refuted, and castigated as false, the entire body of *Mjekula's* evidence. He steadfastly maintained that the first and only time he met *Mjekula* was on the morning of the trial in a "porch" leading to the court room where he briefly obtained instructions from him regarding his personal circumstances. The respondent's evidence that he met *Mjekula* for the first time in the corridors of the magistrates' court is, as I have recounted, in conflict with the narrative contained in his affidavit where he in effect admitted having met *Mjekula* at Nikwanto. The latter's evidence hereanent was never disputed. He furthermore steadfastly denied having received any money from *Mjekula* and maintained that whatever monies may have emanated from him, were collected by the Centre but that he bore no personal knowledge of the arrangements between *Mjekula* and the Centre.

[13] Under cross-examination he was referred to the trial papers and bundle

and to a letter and an annexure thereto in the bundle which he had sent to advocate *Dukada* in response to a letter addressed to him by the latter concerning a complaint lodged with the Society of Advocates of Transkei by *Mjekula*. Counsel's attempt to get the respondent to look at these documents elicited a vituperative response. He became abusive, pointedly refused to look at the documents provided to him, raised his voice and proceeded to shout at counsel. Eventually, after being admonished by me, he maintained that both documents were written by the Centre and decried any personal knowledge thereof. Counsel's attempt to extract an answer that his signature was appended to the letter was deftly evaded and so too questions concerning the content of the annexure. The letter bears his signature and there is no doubt that he signed the letter and sent both it, and the annexed statement, to *Dukada*. His reluctance to admit the obvious is not difficult to discern. Its content not only gives the lie to his evidence that he neither consulted with nor received money from *Mjekula* but establishes, quite unequivocally, that he is the Centre's alter ego. During his testimony he was at pains to place as wide a berth as possible between himself and the Centre. It is common cause that the offices from which he practices in Mthatha, bore the name, Nikwanto Law Centre. That is the address *Dukada* forwarded his letter to.

[14] It is not in issue that the respondent answered *Dukada's* letter whilst in Elliott. This appears clearly from the letter itself. The annexure, which he decried any knowledge of, was likewise sent to *Mjekula* from Elliott and establishes the

falsity of the respondent's evidence. It affords ample corroboration for *Mjekula's* evidence that he not only paid the respondent the sum of R20 000.00 plus the R40 000.00 but that he consulted with him on a whole range of issues as reflected on the statement.

[15] As adverted to earlier the respondent denied having personally received either the R20 000.00 or the R40 000.00. During cross-examination he was referred to a bank deposit slip annexed to *Mjekula's* affidavit. It reflected a payment of R40 000.00 deposited into account number 4048192833 on 30 April 2002 in the name of Prof. V Dlova Trust Fund. The respondent's answers to questions relating hereto was evasive in the extreme and, on being provided with the deposit slip, suddenly maintained that he could not properly see the document. He was then referred to the trial bundle and in particular to extracts of cheque account no, 4048192833 bearing the name Dlova Vuyisile Trust and in particular the crediting of the account in the sum of R40 000.00 on 10 May 2002.

[16] The respondent refused to answer any questions concerning these bank statements contending that by reason of their alleged hearsay status he was absolved from answering them. These bank statements are clearly admissible. They were obtained by the applicant pursuant to a subpoena *duces tecum* having been served on Absa Bank for their production in terms of the provisions of section 28 of the **Civil Proceedings Evidence Act**⁶. The entries constituted prima facie evidence of the transactions recorded therein and the respondent's

⁶ Act No, 25 of 1965

refusal to even look at the statements provides further proof of his untruthfulness. It is apparent therefrom that the R40 000.00 emanating from *Mjekula* was indeed deposited into his own banking account.

[17] The respondent's evidence that he merely pleaded in mitigation of sentence became the focus of further cross-examination. Mr *Suhr* referred him to the transcript of the criminal proceedings which formed part of the trial bundle. After prevaricating, he eventually relented and put to counsel that it vindicated him and conclusively established the correctness of his answer. The truth is, it exposed his duplicity. The transcript commences with the prosecutor placing on record the composition of the court, its personnel and the parties' representation prior to the charge being put to *Mjekula*. The respondent, rather disingenuously, sought to show that the record merely established that *Mjekula* had previously pleaded guilty. The record reads as follows –

<u>"COURT:</u>	Mr Dlova
<u>MR DLOVA:</u>	Your Worship, Adv Dlova, I represent the accused in this matter. The accused has pleaded guilty to the charge and we will address the Court at the defence stage.
<u>COURT:</u>	Are you handing in any statement stating the plea of guilty, are you going to address the Court?
<u>MR DLOVA:</u>	Your Worship, I will address the Court.
<u>COURT:</u>	Okay, you can do so.
<u>MR DLOVA:</u>	Your Worship, my client has pleaded guilty to this offence, in order to save the time of this Court and the Court all around, the charge of

unauthorised borrowing. The accused was a bank manager at Standard Bank, he had been there for 25 years and rose through the ranks. Around the time of June to November he lapsed into temporary financial difficulties, according to him and he did tap into an overdraft facility which was not authorised. He was the manager in capacity to recommend overdrafts but when it related to him, he needed a special permission which never obtained. It is clear from the reading the statement, between June and November that there was trafficking in and out of money on this account, it is clear that around November he ran out of cash and was not able to service this facility, unauthorised facility and as a result he was invited by the manager of the bank to account. He promptly admitted, asked for an apology, resigned in embarrassment, subsequently dismissed and did not challenge the procedure, reduced his indebtedness by almost half to 265 with the bank and has made this plea before you for guilty. If appropriate, Your Honour, I must mention that he has no previous convictions or acquittal, in other words has never been an allegation of a criminal nature against him. I have already mentioned his service to the bank.

COURT: It suffices that you . . .

MR DLOVA: Thank you.

COURT: Let us just have a short adjournment. Court will adjourn."

[18] Although the aforementioned extract from the evidence could perhaps, charitably construed, convey the impression that *Mjekula* had tendered a plea on some prior occasion, contextually, it establishes that the respondent tendered a plea and explanation of plea on behalf of *Mjekula* at the commencement of the trial. The magistrate then delivered his judgment and the matter proceeded to sentence. The record yet again establishes the falsity of the respondent's testimony.

[19] The parallelism which the respondent sought to establish between Nikwanto and the LRC is, upon a proper appraisal of his own testimony, fatuous. Under cross-examination he was constrained to admit that Nikwanto was not staffed by any qualified legal practitioners, save himself, and it is instructive to reproduce his evidence hereanent for it establishes, quite clearly, that Nikwanto was merely the vehicle which he utilised to circumvent the referral rule. During his examination in chief, his attorney attempted to establish that as regards the *Mjekula* matter, he had been instructed by an attorney. The question was deftly avoided. Instead of a simple answer he proffered the following convoluted response –

RESPONDENT: Nikwanto Law Centre is a ... (inaudible) and by its very nature I also had another institution called the Law Clinic there. By its very nature it does instruct people. That is a practice that is well known. The ... (indistinct) used to do that and the other people, Late

Bam used to do that in the Legal Resources Centre. They were advocates. They went straight to court on the instructions of the Legal Resource Centre. But I say as a matter of – because of the time we were at war with the Bar Council at that time the Bar Council wanted us to send – I was a professor, I had practice, I even appeared in the International Court of Justice on behalf of South African – on behalf of the Pan Africanist Congress which was – had an observer status at the United Nations there. So when we come here I applied to the Bar Council to be a member and they say that I should do ... (indistinct). And I said to them, "Who's going to be my master amongst you here?" I wanted his CV so that I can – so ultimately we had to go to Parliament to get recognition under the Foreign Legal Jurisdiction Act to act in this country. When we were fighting for this country for more than twenty years right in the battlefield as ... (inaudible) we were. So I knew – we knew that we were on a minefield here. We were in a very hostile environment. The old order did not want us to practice here.

MR TSHIKI:

And the persons who were employed at the Nikwanto Law Centre at that time are they available ... (inaudible)?

RESPONDENT:

(Inaudible) ... none of them is under our control here. I don't even know

whether they – I know ... (inaudible) is not there. I know ... (inaudible) died and I don't know who else is – was there now. But at any rate a person who would intimate Nzuma was there was a financier and Jilata was there ... (inaudible) was the administrator there. So that is what happened.

COURT 1:

Were they qualified lawyers?

RESPONDENT:

No. Legal resources are not run by qualified lawyers in general.

COURT 1:

No, I'm asking you these people whose names you mentioned ... (intervention).

RESPONDENT:

No, they were not. Legal resources can't afford lawyers. These are community centre advisory centres. They can't pay lawyers they are just there to facilitate. And they invite lawyers when and where it is necessary and those lawyers are operating ... (inaudible) basically.

MR TSHIKI:

How do they instruct ... (inaudible)?

RESPONDENT:

From my own ... (inaudible) you can see the records ... (inaudible) records there. They are there on file.

MR TSHIKI:

Is there ... (intervention).

RESPONDENT:

(Inaudible). Throughout in the High Court I've given you records there. In the Magistrate Court I've given you records there. My accusers the ... (inaudible) the Bar Council don't bring anything and yet they are in control of these things even today.

MR TSHIKI:

You wouldn't recall the particular attorney who was involved in this

Mjekula matter?

RESPONDENT:

How would I recall that when Mjekula is saying here he – this case started in 2002 lying through his teeth here saying this case appeared – I mean came in when the case is clearly in 2001. That is within his province. That is within the province of my accusers. He who alleges must prove. That's at least what I taught my children.

MR TSHIKI:

Were you handling a few or so many cases on behalf of the centre through attorneys?

RESPONDENT:

I'm very busy, Mr Tshiki. I was a Dean of Faculty of Law, I was – I couldn't sit there. As a Dean I attend meetings almost every day with the Vice Chancellor. I'm a member of Council. I'm a member of ... (indistinct). I'm a distinguished writer in the law and the researcher. Spend quite a lot of my time in the library. And I had no time to sit and – if I wanted to be an attorney why should I do ... (indistinct). Why should I do the Doctor of Law if I wanted just to be an attorney to sit in the office as a clerk? And as a solicitor searching for clients. That was below me as far as I'm concerned. My apologies to attorneys who are here. I'm sorry."

[20] The respondent's difficulties in providing a coherent answer to this simple

question was compounded during his cross-examination. Mr *Suhr* questioned him on the identity of the person(s) who, according to the statement of account sent to *Mjekula* under cover of a letter signed by him, performed various tasks. He responded as follows –

MR SUHR: Are you able to tell us who did those elaborate negotiations?

RESPONDENT: Yes.

MR SUHR: Who was it?

RESPONDENT: I told you that Nikwanto Law Centre asked me to ... (intervention).

MR SUHR: But who at Nikwanto Law Centre?

RESPONDENT: The people who running Nikwanto Law Centre at the time.

MR SUHR: Ja, but the people – but who?

RESPONDENT: I told you, Ms Nzuma was the responsible administrator at that time. I did tell you.

MR SUHR: You see ... (intervention).

RESPONDENT: I did tell you that Ms Nzuma was there. I told you that I couldn't be sitting at Nikwanto Law Centre, sir, I didn't – I was busy I was a full time – I was a person who was engaged in so many things. I've got 17 Trusts I can't – I've got 10 Trusts I couldn't sit in all of them at the same time. Why are you drilling me on having to be at that office of Nikwanto when there are many? You go to the Master's office you'll see the offices what I am Trustee of. And that is usual practice in South Africa. People go to 91 sites and you can't be drilling

them on all the instances. I'll tell you what I was told to do and I didn't write that letter. I was not responsible for but I was – what the import of what I said in 73 was that “please contact Nikwanto Law Centre who have got idea – the full idea about what you are saying”. And they neglected to contact Nikwanto Law Centre so that they can pin down the author of this letter who would now come and enrich this Court about the issues. When you were preparing this case so experienced the high – the greatest legal brains in the country ... (intervention).”

[21] The above reproduced nonsensical response demonstrates, quite unequivocally, the falsity of his testimony. The truth of the matter is that he lied unashamedly. On a conspectus of the evidence, I can attach no weight whatsoever to his testimony and accept Mjekula's evidence unreservedly. The respondent's breach of the referral rule has clearly been established.

[22] Generally speaking, an isolated breach of the referral rule would not, ordinarily, attract the sanction of as harsh a penalty as a striking off from the roll of advocates. There are however a number of aggravating circumstances which demand its imposition. These factors, considered seriatim thereafter, relate to his conduct during the oral hearing, his perjurious testimony and his avowed intent to continue to act on behalf of members of the general public through the conduit of

Nikwanto.

The respondent's conduct during the hearing

[23] In the course of the judgment I adverted to the respondent's conduct under cross-examination. At the inception thereof, Mr *Suhr*, in fairness to the respondent, given his intended line of questioning, sought to establish whether the latter was in possession of both the papers and the trial bundle. Copies of the documents aforesaid were duly handed to the respondent and counsel put the innocuous question, "Do you follow?" It elicited a litany of nonsensical complaints that was to become the hallmark of his answers thereafter. The question elicited the following answer –

"RESPONDENT: I'm not a child don't say "you follow?"
Please, with respect. Don't say, "You follow?" Don't be condescending when you are talking to me. Just say – don't tell me that I follow that's why you want to make me a pupil because you want to – you think I don't follow.

COURT 1: The counsel is asking you a simple question.

RESPONDENT: No but why does he say, "you follow" – "do you follow?" That is condescending and that's not acceptable.

COURT 1: Have a look at those documents on the side.

RESPONDENT: Sorry?

COURT 1: On the – the ones Mr Tshiki gave you.

RESPONDENT: Yes.

COURT 1: And then you'll understand what he's trying to say.

RESPONDENT: No, he said, "Do you follow?" That is condescending your Lord – My Lordship, with all the respect. I have never been addressed like that at this level where a person says something and they say, "Do you follow?" That is condescending ... (inaudible).

COURT 1: I don't think so. Just answer the question please."

[24] The next question put, in order to establish whether his date of birth was in fact 4 March 1955, required a simple yes or no. Instead he dramatically reached into his pocket and produced his book of life which he impertinently thrust forward for counsel himself to view. The next question put by counsel and which arose from his opposing affidavit which conveyed the distinct impression that he had practiced abroad, elicited a venomous response and evaded. It is unfortunately necessary to reproduce the answer in its totality as an example of the evasive nature of his replies. The answer proffered was –

"RESPONDENT: Yes. The operative word there is "we remain". I'm talking of the Freedom Fighters who are lawyers and my element of practice there is the broader element of having taught at West Brunel University. That was the broader context that I was talking to myself but

I say there "we" because I was talking about the vendetta there that you Bar Council are having against educated exiles.

MR SUHR:

Mr Dlova, do I understand from your reply that you have not practiced in any of the leading countries of the world?

RESPONDENT:

What do you mean by "practice"? That's what I want to say. I say practice of law you are a professor of law, you are in law practice. You are an attorney at law you are a practitioner. I don't say I was – we were practitioners. I say we have practiced. I've said we were law practitioners. There's a distinction between that. Between a law practitioner and a person who practices law. A judge is not practicing. An academic like professor ... (inaudible) is not practicing and he was not practicing at that time.

MR SUHR:

So you did not practice? These persons referred to in page 95 paragraph 5.6 ... (intervention).

RESPONDENT:

I say ... (inaudible) given you the context of that. I've said "we". I was ... (inaudible) in the – and I'm saying "we have been excluded by you as exiles". There are a lot of us who were practicing in court I was not one of them. There were a lot of us who were practicing in the academia. I was one of them. There was a lot of us who were practicing in the prosecurials – prosecutorial service. There are three

branches of practicing law, sir. There is the side Bar, there is the Bench, there is also the academia, there is also the prosecutorial service. That is my – that is what I’m saying. So if you want to give a narrow description that you are the only practitioner of law because you practice at the side Bench then no, sir.

MR SUHR:

So what is your answer?

RESPONDENT:

It’s – I don’t know what answer you want. I’ve told you that I – there are three branches. I was practicing in the academia branch of the law. I was practicing as a academic and as a law professor. I practiced in that. I was in West London University teaching English Law in English”

[25] The cross-examination then proceeded to establish whether the use of the word, professor, in various of his missives, was an emeritus title conferred upon him subsequent to his departure from the local university. The garbled response concluded with the diatribe –

“You have contempt for academia, sir, if you are saying that. You have got complete contempt and I understand why you didn’t proceed in your studies.”

[26] During questioning related to the Nikwanto Law Centre Trust, the

respondent produced a form, CM22 of a company, Capital and Securities Exchange (Pty) Ltd. When asked why the document had not been discovered, the respondent's answer clearly established that he had no understanding of what discovery entailed.

[27] Mr *Suhr* then referred the respondent to the letter written by him to Mr *Dukada* of the Transkei Bar and the annexed fee statement sent to *Mjekula* emanating from the Nikwanto Law Centre, Elliott. It reads as follows –

"Complaint

Thanks for your rather rude and uncouth letter you dated 6/2/2002.

I am not a member of your organisation and I was not commissioned under your auspices in rendering the services rendered on behalf of Nikwanto Law Centre to the Mjekula's.

As for the substance of your letter suffice to refer to the fee statement sent to Mr Mjekula in November last year and herein enclosed.

That statement will show that advocacy constitutes less than 20% of the range of consultancy services provided to Mr and Mrs Mjekula.

You are free to pursue any course of action that may please you in this matter. For future reference however may I remind you that my title is not Dlova, I am a Professor of Law, an advocate and a Doctor of Law.

Yours sincerely

Prof V. Dlova"

[28] Although it is apparent from the content of the letter that the respondent sent the fee statement to *Dukada*, he, quite disingenuously, decried all knowledge of either it or its content. His difficulty in providing a coherent response to the simple question is not difficult to discern. It is obvious that he was the author of the fee statement. Its content conclusively establishes the falsity of his evidence. The record is replete with further examples of the contemptuous manner in which the respondent conducted himself in court. Repeated admonishments to curb his errant and at times, obnoxious behaviour, were ignored and his shouting increased in tempo which he sought to justify by stating that it was a trait of the *Zandwa* family. The foregoing excerpts from the transcript detailing the manner in which the respondent conducted himself in court was, as adumbrated hereinbefore, deplorable. It evinces a peculiar lack of understanding of the manner in which officers of the court should conduct themselves.

Respondent's untruthfulness

[29] The question whether the respondent's untruthfulness may properly be taken into account as an aggravating circumstance in the decision to strike his

name from the advocates roll appears settled. In Olivier v Die Kaapse Balieraad⁷, Rabie J.A, reasoned as follows –

“Namens appellant is daarop gewys dat in laasgenoemde sake - anders as in die saak waarop hy steun - die Hof gelet het op gedrag van die advokaat buite die Hof, nie, soos in die onderhawige geval, op leuenagtige getuienis wat in die loop van die verrigtinge van die Hof self gegee is nie. Dit is so, maar die feit bly staan dat die Hof kennis geneem het van getuienis oor gebeure wat nie die onderwerp van spesifieke klagtes was nie en van daardie getuienis gebruik gemaak het in sy beoordeling van die vraag oor hoe teen die betrokke advokaat opgetree moes word. In laasgenoemde beslissings is daar geen bespreking van die saak van *Dagg* en die sake waarin daardie beslissing gevolg is nie en dit blyk nie dat hulle onder die Hof se aandag gebring is nie. In die omstandighede kan dit waarskynlik nie gesê word dat ons gewysdes in hierdie stadium helderheid gee oor die punt wat namens appellant geopper is nie. Ek sal gevolglik aanvaar, sonder om daaroor te beslis, dat dit 'n verkeerde benadering is om - soos die Hof *a quo* gedoen het - leuenagtige getuienis wat in die loop van 'n verhoor gegee word as 'n selfstandige grond vir die skrapping van 'n advokaat se naam te beskou. Dit laat die vraag of die Hof dan hoegenaamd nie geregtig was om van sodanige getuienis kennis te neem nie. Appellant se betoog is dat hoewel die Hof natuurlik geregtig was om te bevind - en te sê - dat getuienis leuenagtig was en om dit om daardie rede te verwerp, dit nie geregtig was om verder te gaan en om van die feit dat valse getuienis gegee is gebruik te maak by die beoordeling van die vraag oor hoe daar teen appellant opgetree moes word nie. Voordat die Hof dit kon doen, lui die betoog, moes appellant meegedeel gewees het dat die Hof beoog het om van daardie getuienis vir daardie doel kennis te neem en moes hy 'n geleentheid gegun gewees het om hom daarop voor te berei en moontlik omstandighede ter versagting aan te voer. Die Balieraad, kan kortliks daarop gewys word, sou nouliks so 'n mededeling aan appellant kon gedoen het, want dit kon nie geweet het hoe die Hof oor appellant se getuienis gaan oordeel nie. Ek meen dat dit ietwat kunsmatig is om te sê dat die Hof geregtig is om getuienis te verwerp op grond daarvan dat dit vals is maar dat dit dan nie geregtig is om, bv beoordeling van die vraag oor hoe teen die betrokke persoon - 'n beampte van die Hof - opgetree moet word, kennis te neem van die feit dat hy 'n persoon is wat bereid is om valse getuienis te gee nie. 'n Advokaat wie se gedrag die onderwerp van 'n aansoek onder art. 7 van die Wet is, besef noodwendig dat as dit bevind word dat hy hom van leuens bedien het, sy getuienis om daardie

⁷ 1972 (3) SA 485 (A) at 500A-501B

rede verwerp kan word en dat dit dan kan lei tot 'n bevinding dat hy hom skuldig gemaak het aan die gedrag wat hom ten laste gelê is. In hierdie omstandighede kom dit my nie as onbillik voor nie om te sê dat hy ook moet verwag dat die Hof leuenagtige getuienis as 'n verswarende omstandigheid kan beskou wanneer dit moet beslis oor die vraag hoe teen hom opgetree moet word. 'n Hof sal vanselfsprekend nie 'n weg volg wat verrassing en dus moontlik onverdiende nadeel vir 'n persoon inhou nie en sal derhalwe in gepaste gevalle moontlik 'n prosedure kan volg soos deur appellant voorgestaan word, maar andersins is dit my mening dat 'n Hof wel kennis kan neem van die feit dat 'n advokaat leuenagtige getuienis gegee het wanneer dit beslis oor die vraag hoe teen hom opgetree moet word. In die onderhawige geval word namens appellant toegegee dat hy 'sekere stellings gemaak het wat nie juis is nie' en daar is nie te betwyfel dat hy in verskeie opsigte valse getuienis gegee het nie. In al die omstandighede is daar weinig rede om te dink dat die Hof *a quo* anders sou geoordeel het as wat dit inderdaad gedoen het indien dit die benadering gevolg het wat ek pas hierbo genoem het eerder as dié wat dit wel gevolg het.”

[30] The aforementioned approach was affirmed by Hefer J.A, in **Kekana v Society of Advocates of South Africa**⁸. Where the learned judge stated the following –

“I share the view expressed in Olivier’s case *supra* at 500H *ad fin* that, as a matter of principle, an advocate who lies under oath in defending himself in an application for the removal of his name from the roll, cannot complain if his perjury is held against him when the question arises whether he is a fit and proper person to continue practicing. I also support Hefer J’s observation in the present case that

‘(t)he word of an advocate is his bond to his client, the court and justice itself. In our system of practice the courts, both high and low, depend on the *ipse dixit* of counsel at every turn.’

8 1998 (4) SA 649 (SCA) at 655G-656A

This is why there is a serious objection to allowing an advocate to continue practicing once he has revealed himself as a person who is prepared to lie under oath. Legal practitioners occupy a unique position. On the one hand they serve the interest of their clients, which require a case to be presented fearlessly and vigorously. On the other hand, as officers of the Court they serve the interests of justice itself by acting as a bulwark against the admission of fabricated evidence. Both professions have strict ethical rules aimed at preventing their members from becoming parties to the deception of the Court. Unfortunately the observance of the rules is not assured, because what happens between legal representatives and their clients or witnesses is not a matter for public scrutiny. The preservation of a high standard of professional ethics having thus been left almost entirely in the hands of individual practitioners, it stands to reason, firstly, that absolute personal integrity and scrupulous honesty are demanded of each of them and, secondly, that a practitioner who lacks these qualities cannot be expected to play his part.”

Intent to continue to act through the medium of the Centre

[31] During the concluding stages of his cross-examination Mr *Suhr* asked the respondent whether he considered the circumstances under which he appeared for *Mjekula* to be above reproach. The question elicited the following response –

“RESPONDENT: I’m saying that Mr Mjekula knows his attorney. I don’t know the attorney. Nikwanto knows the actual attorney but I’ve said to you that I’ve got the records

here that I always appear with an attorney and I'm saying to you that I didn't participate in this case. And people who talk in mitigation do not have to – people who talk in mitigation in cases are not – we are – the pleadings I was not part of the pleadings of these things. I was not part of anything on this but I know that the case had gone on for a year under Nikwanto and some lawyers and this fellow. So I talked only on mitigation, sir, the transcript says that. I'm sorry. The Court said that I am talking on a – so what I'm saying is that this is clear from the transcript that I'm in at mitigation stage.

MR SUHR:

Right so ... (intervention).MACHINE
SWITCHED OFF - ON RESUMPTION

RESPONDENT:

And at the invitation of Nikwanto and their lawyers. That's what I'm saying and there's nothing improper that I've done this. And that you have taken 12 years to bring these things shows very clearly that your conscience also tells you that there's nothing improper in my conduct.

MR SUHR:

Then ... (intervention).

RESPONDENT:

Just your vendetta.

MR SUHR:

And what you are saying is that you did nothing wrong there, you've done – you'll do the same again today?

RESPONDENT:

Do the same what?

MR SUHR:

You'll take instructions without meeting an attorney, without getting a brief,

without rendering a fee note, without keeping a record. You did nothing wrong then and you'll still ... (intervention).

RESPONDENT: I don't keep records, my friend, I'm very sophisticated, I'm very – I'm also a little bit – have a little bit of money. I don't have to do accounts now. I've done that in my early ages but now I've become more relaxed and I've got people around me. As I'm talking now I've got about 30 people around me.

MR SUHR: You did nothing wrong and you'll carry on doing what you did then you'll do it now?

RESPONDENT: You don't know what I did and I told you what I did. If you are saying I'll carry on doing what you suggest that I did then I will not answer that question."

[32] The aforementioned response, commensurate with the entire body of his evidence shows quite clearly that the respondent has no insight that continuing to act on behalf of the general public through Nikwanto constitutes an ongoing and flagrant breach of the referral rule.

[33] In the result the following orders will issue –

1. The respondent's name is struck off from the roll of advocates.

2. The respondent is ordered to pay the costs of the application on the scale as between attorney and client.

D. CHETTY
JUDGE OF THE HIGH COURT

Griffiths, J

I agree.

R.E GRIFFITHS
JUDGE OF THE HIGH COURT

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