

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MAKHANDA]**

CASE NO. 181/2020

In the matter between:

LEGAL PRACTICE COUNCIL

Applicant

and

BULELANI RUBUSHE

Respondent

JUDGMENT

JOLWANA J:

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

[1] These are the words of Plasket J (as he then was) in *Mfengwana*¹ describing the conduct of Mr Rubushe, the respondent herein. Having described the respondent in the manner referred to above, he, *inter alia*, made an order setting aside the contingency fees agreement in issue and requested the registrar of this Court to deliver a copy of his judgment to the Cape Law Society.

¹ *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) at 454 para 27.

[2] The applicant is the successor in title to the then Cape Law Society which was a statutory body established in terms of the Attorneys Act 53 of 1979, which has since been repealed and which served as the regulatory body governing the affairs of all attorneys in the Western Cape, Northern Cape and the Eastern Cape. One of the duties of the applicant is to regulate all legal practitioners and candidate legal practitioners and to enhance and maintain the integrity and status of the legal profession inclusive of all members of what used to be referred to as the bar and the side bar. It was established in terms of the Legal Practice Act 28 of 2014, coming into effect in its entirety on 1 November 2018.

[3] While the applicant made reference to a number of complaints received against the respondent it made it clear in its founding affidavit that this matter primarily concerns the judgment of Plasket J referred to above. Incidentally on that date, 12 January 2017, the respondent wrote a letter to the applicant. The gist of the respondent's letter has been summarised by the applicant as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[8] Having received the said judgment on 12 January 2017 the applicant began investigating the conduct of the respondent as it related to his dealings with his

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

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

client, Mr Mfengwana. A lot of correspondence was exchanged between the applicant and the respondent as part of the applicant's process of investigating the complaint emanating from the *Mfengwana* judgment and giving the respondent a hearing. No useful purpose will be served by analysing the said correspondence. That correspondence included different bills of costs which had been submitted by the respondent to the applicant. The applicant appointed a cost consultant to advise it regarding the respondent's bill of costs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[13] There are many disturbing allegations made by Mr Mfengwana against the respondent in case number 3469/2017. Interestingly, the respondent did not oppose the said application or dispute any of the said allegations despite the seriousness

thereof. In addition to everything else, but just focusing on Mr Mfengwana's application, I find it particularly disturbing that on 28 November 2016 the matter of Mfengwana v Road Accident Fund was before Plasket J who was requested to make a settlement in that matter an order of court. On that date the respondent was ordered by the court to show cause on 13 December 2016 why his contingency fees agreement with Mr Mfengwana should not be set aside. He was also ordered to file the affidavits referred in section 4 of the Contingency Fees Act.

[14] Not only did the respondent not do any of the above but he, on 12 December 2016, which was the date before the date set out by the court for him to comply as aforementioned, withdrew as Mr Mfengwana's attorney of record. Having withdrawn as Mr Mfengwana's attorney of record on 12 December 2016, the respondent's correspondent attorneys issued a warrant of execution against the Road Accident Fund on 24 January 2017 for payment in the sum of R904 889.17. That amount was paid into the respondent's trust account. Of the said amount the respondent paid Mr Mfengwana a round figure of R700 000.00 on 10 February 2017 thus retaining a staggering amount of R204 889.17.

[15] Was this amount justifiable or reasonable regard being had to the quantity and quality of the work that the respondent did? Plasket J did not think so. The learned Judge assessed the work that was done after which he expressed himself as follows:

"It is clear from what I have said about the amount of work involved in this matter that a 'fee' of 25% of R904 889.17 – ie R226 222.30 – is grossly disproportionate and amounts to overreaching on an outrageous scale. When to that is added the poor quality of the work done, Mr Rubushe's conduct is cause for very serious concern. It is, perhaps, apposite to cite the oft-quoted passage from the late judge RPB Davies' foreword to the first edition of Herstein & Van Winsen's well-known book on civil procedure:

'But after all, industry is one of the attributes of an honourable character: no honourable and honest legal practitioner will accept a client's money for doing his work to the best of his ability, and then not do it. And before he ever accepts it, he will have qualified himself to do the work properly,

for, where skill is required, lack of it is equivalent to negligence. Indeed, to undertake to do something and the not do it with reasonable efficiency, either because of unskillfulness or [because] of lack of diligence, is something very closely akin to obtaining money by false pretences.”³

[16] How an attorney, having withdrawn as an attorney of record, still considers himself or herself entitled to have a warrant of execution issued in that same matter, not for costs taxed and allowed but for the capital amount of the damages claimed is beyond comprehension. It is in fact clear that in withdrawing as an attorney of record in the matter the respondent merely sought, with connivance, to avoid having to comply with Plasket J’s order issued on 28 November 2016. He, at the same time appropriated for himself, unlawfully, the right to still pursue the Road Accident Fund for the capital amount which the Road Accident Fund was ordered to pay with an obvious intention, again, unlawfully, to retain R204 889.17. This conduct on its own is of egregious proportions to say the least. It is, in my view, also a manifestation of dishonesty and deceitfulness on the part of the respondent.

[17] The overreaching and rapacious conduct of the respondent is also glaringly demonstrated by him, inter alia, charging a fee for redrawing a contingency fees agreement after it had been set aside by the court, charging 15 minutes for every phone call, charging for consultations which never took place; charging for work that was never done and charging for travelling to Grahamstown on occasions in which he did not go to Grahamstown. The list of the respondent’s similar behaviour is endless, at the centre of which is him descending like a vulture on his own client for his own personal, unjustified financial benefit.

[18] In his answering affidavit, deposed to some three and a half years or so after the judgment of Plasket J in the *Mfengwana* matter, there is a conditional acceptance by the respondent that the contingency fees agreement that he drew and signed with Mr Mfengwana was defective. He then blames his professional assistant for drawing what he calls an amended contingency fees agreement incorrectly which he falsely claims to have been drawn at the instance of the court. There is nothing in the judgment to suggest that Plasket J ever ordered or suggested that an amended

³ Note 1 supra at para 19.

contingency fees agreement should be drawn. I do not even think that the court could have done so for the simple reason that if a contingency fee agreement is defective, no amended agreement should be drawn. The defective one is simply set aside and the fees are ordered to be paid on an attorney and client scale which are then subjected to taxation. As far as I understand the legal position, no new agreement can be drawn to make an otherwise defective contingency fees agreement compliant. It is simply set aside and that is the end of it. He also claims to have misinterpreted section 2 of the Contingency Fees Act in good faith. However, the letters that he wrote to the applicant even before he had received a complaint, which I have referred to above as pre-emptive strikes against Plasket J, suggest otherwise.

[19] He claims to have asked one of his legal secretaries to draw the bill of costs which he perused and came to the conclusion that some significant attendances and costs had been omitted and that this required an amendment of the bill of costs. He says this is what led to another bill of costs having to be drawn. His desire to ensure that the bill of costs would be “100% correct” led him to ask an expert bill of costs consultant to draw it. He also seems to admit that some file notes were absent as a result of which his own cost consultant made it clear to the applicant’s costs consultant that he could not confirm the items reflected in the bill or some of them. For this situation he blames his own cost consultant for not being able “to support” a document he, the court consultant, drew. This, he says, led to the applicant’s cost consultant recommending that the matter be settled. He then says he indicated his preparedness to settle the matter on the basis of a party and party bill of costs. He ends his explanation in this regard with a bald averment that no overreaching or excessive charging took place and that Mr Mfengwana received everything he was entitled to. What he fails to explain is his overt attempt to overreach his client.

[20] He admits the letters dated 12 January 2017, 16 January 2017 and 18 January 2017, all of which were written before he was even required to respond to the complaint by the applicant. For the content of those letters, he, for the first time, does not blame anybody. His explanation for the content thereof is that at the time he wrote those letters he was “wrestling with the true manner in which the Contingency Fees Act should be interpreted” and was hoping for clarification or guidance from the

applicant. He was upset as he was genuine and bona fide in drawing the agreement in the manner he did and felt aggrieved about the matter, particularly the newspaper articles that were published at the time. He says the content of those letters reflected his subjective views at a time when he was upset that his “bona fide efforts to assist a needy client had given rise to such a disastrous outcome for [his] firm and for [his] reputation”. He accepted without hesitation or qualification that the “Judge had not erred in any way in his judgment after he had taken time to analyse the Act and the current legal position.”

[21] With regard to the memorandum that the applicant’s costs consultant drew he says that he “[h]as no reason to challenge the figures referred to” therein. It was his cost consultant who costed and finalized the fees for travelling time and expenses. He denies not doing an inspection in *loco* and rejects as unfounded “where the Applicant glibly avers that I have charged for services that did not take place.” He further avers that Mr Mfengwana was not put at any “unfair advantage” (sic), on the contrary Mr Mfengwana received the advantage of his office’s funding his claim to the point of settlement.

[22] Very strangely, the respondent deals with Mr Mfengwana’s founding affidavit in case number 3469/2017, the application which Mr Mfengwana instituted in order to recover R204 889.17 as well as his original file from him. He attempts, in these proceedings, to deny the allegations contained therein without dealing with the fact that he never opposed that application but tries to do so in this matter. He, however, admits that he paid the money “immediately on receipt of the application papers”. He, however, again says that it was not necessary for Mr Mfengwana to launch the said application which he resolved not to oppose as doing so would be too time consuming.

[23] The respondent’s answering affidavit can best be summarised as the respondent’s attempt at explaining the inexplicable. This he does by blaming everybody else from his staff to his bill of costs consultant and the applicant from which he says he merely asked for clarification and guidance on the Contingency Fees Act. He does not even acknowledge the despicable manner in which he attacked a sitting Judge for making findings that he clearly disagreed with. There is

not even a remote or even a half-hearted attempt at apologising to the judiciary in general and to Judge Plasket in particular. His was an unwarranted attack which he never withdrew which he again tries to explain by saying that he was upset and did not understand how his bona fide efforts to assist a needy client ended up with such a disastrous outcome. This again is yet another of the respondent's attempts to blame everything on something else or someone else other than himself instead of taking responsibility for his actions.

[24] Nowhere does he take responsibility for anything he did. He, on the contrary, boldly makes this assertion that Mr Mfengwana ultimately got what he deserved without even acknowledging how he almost got away with a substantial portion of Mr Mfengwana's money which was not due to him. The bill of costs itself, which was drawn after the judgment of Plasket J which set aside the contingency fees agreement and referred to the rapaciousness of the respondent, reflects yet another attempt by the respondent at overreaching as if the judgment meant nothing to him. The respondent clearly paid no attention to what the court said in the *Mfengwana* judgment and took no heed to how absolutely horrified at the overreaching that was in motion in that matter the court was. Instead of taking heed of the court's views on both the law and the facts the respondent chose to attack the presiding judge, effectively saying the judge did not know the law and did not understand the Thulo judgment in order to justify his claimed entitlement to 25% of Mr Mfengwana's money. It did not end there. He then drew the bill of costs which reflected the items and figures which the respondent himself says he has no reason to challenge. The said bill is also another instance of the rapaciousness of the respondent in his dealings with his client, Mr Mfengwana, and his dreadful handling of his matter.

[25] The approach that a court should follow in an application of this nature has been pronounced upon by our courts and is well known. It was restated in *Malan*⁴ in which Harms ADP said:

“As was said in *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) ([2000] 2 All SA 310) at para 10, s 22 (1) (d) contemplates a three – stage inquiry:

⁴ *Malan and Another vs Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) at para 4

First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities which is a factual inquiry.

Second, it must consider whether the person concerned 'in the discretion of the court' is not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and to this extent, is a value judgment.

And thirdly, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice."

[26] While reference to section 22 (1) (d) was to the since repealed Attorneys Act 53 of 1979, the approach is still the same even under the new dispensation provided for in the Legal Practice Act. This legal position was recently pointed out in *Bobotyana*⁵ where Kroon AJ said:

"Borrowing from the language of the Attorneys Act, the LPA similarly requires that a person be fit and proper in order to practice as either an attorney or an advocate. The LPA expressly provides that this Court retains its power to strike the name of an errant attorney off the roll of practising attorneys.

Thus, as was the position in terms of the Attorneys Act, the central question before the Court remains whether *Bobotyana* is a fit and proper person to practice law and, if not, what order is to be issued. It follows that the jurisprudence developed under the Attorneys Act will remain applicable to the adjudication of applications of this nature brought in terms of the LPA."

[27] In this matter the facts speak for themselves and do so loudly for all to hear. The judgment in *Mfengwana*, in which the court was clearly horrified at the greed of the respondent that was evident in that matter, has not been challenged and the findings

⁵ *South Africa Legal Practice Council v Bobotyana* [2020] 4 All SA 827 (ECG) para 10 and 11.

made therein remain extant. I am also satisfied that there is an abundance of evidence which shows very clearly that the respondent's conduct leaves much to be desired. He not only drew a contingency fees agreement in the manner described by Plasket J in *Mfengwana*. He also sought to justify his conduct by writing letters to the applicant in which he sought to mislead the applicant but also went further and attacked the presiding Judge for making the findings that he did. His attacks on Judge Plasket cannot, in my view, be separated from his attempt to overreach his own client, Mr Mfengwana. They are an aggravating factor. The respondent tried to escape having to comply with the court order of 28 November 2016 by withdrawing from the matter, only to cause a warrant of execution to be issued against the Road Accident Fund for the capital amount of damages awarded when he had no right to do so as has he had withdrawn from the matter. When the money was paid into his bank account he appropriated to himself a sum of R204 889.17 without any bill of costs having been taxed by the taxing master as the court had ordered. It took Mr Mfengwana another court application to get the money back from the respondent.

[28] All of the above uncontroverted facts establish, on a preponderance of probabilities, that Mr Rubushe is indeed guilty of an attempt to overreach Mr Mfengwana. This is over and above his derogatory and insulting language he chose to employ in communicating how he felt about the court and Judge Plasket in particular. All of this shows the respondent's ethical deviance of a fundamental nature.

[29] This conclusion brings me to the second stage of the enquiry which is whether or not in all the circumstances the respondent is fit and proper to be allowed to continue to practice as an attorney. This stage of the inquiry was explained more meaningfully in *Malan*⁶ where the court elaborated on the process involved and the applicable considerations as follows:

“As far as the second leg of the inquiry is concerned, it is well to remember that the Act contemplates that where an attorney is guilty of unprofessional or dishonourable or unworthy conduct different consequences may follow. The nature of the conduct may be such that it establishes that the person is

⁶ Note 7 supra para 5.

not a fit and proper person to continue to practice. In other instances, the conduct may not be that serious and a law society may exercise its disciplinary powers, particularly by imposing a fine or reprimanding the attorney (s 72 (2) (a)). This does not, however, mean that a court is powerless if it finds the attorney guilty of unprofessional conduct where such conduct does not make him unfit to continue to practice as an attorney. In such an event the court may discipline the attorney by suspending him from practice with or without conditions or by reprimanding him: *Law Society of the Cape of Good Hope v C* 1986 (I) SA 616 (A) at 638 I-693 E; *Law Society of the Cape of Good Hope v Berrange* 2005 (5) SA 160 (C) ([2006] I All SA 290) at 173G – I (SA) and 302 (All SA).”

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

[31] That said, a sanction serious enough and which gives him an opportunity to re-educate himself and re-conscientise himself on the ethics of the attorneys’ profession and court etiquette generally would be the most appropriate in the circumstances of this matter. I do think that the appropriate sanction would be one in which the respondent is suspended from practising as an attorney for a period of two years. At the end of the two-year suspension period his re-entry into the attorneys’ profession will not be automatic. He will have to satisfy the court, with proper supporting evidence, that he is contrite about how he deliberately and shamelessly

conducted himself towards his client, Mr Mfengwana. Evidence of a proper understanding of his obligations as a legal professional and an officer of the court, regard being had to his attitude to the courts in general and to Plasket J in particular, will obviously be one of many considerations. There is no doubt that the respondent brought the attorneys' profession into dispute by his conduct.

[32] His re-entry into the profession will not be a matter of an agreement between him and the applicant nor should it be at the whim of the applicant. He will have to bring a substantive application to court, which must determine if indeed he has demonstrated that he is fit for practice once more. It is the court that will hear the application for his re-entry into the profession that will consider whatever evidence as shall be presented to it. It is that court that must consider the application and satisfy itself that the respondent has so undergone a fundamentally positive paradigm shift of perspective that he can be allowed to re-join the legal profession. The suspension of the respondent from practice for an effective period of two years will protect the members of the public from his clearly deviant ethical predisposition while he undergoes proper introspection, training and the like. This is absolutely necessary as he seems to be blissfully unaware of his serious responsibilities to his clients and the court.

[33] I am fortified in my views encapsulated hereinbefore by the sentiments expressed by Harms ADP in *Malan*,⁷ where the learned Acting Deputy President, writing for the full court, stated the legal position as follows:

“Obviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of removal. (Exceptional circumstances were found in *Summerley* and in *Law Society, Cape of Good Hope Peter* [2006] ZASCA 37 and the court was able in the formulation of its order in those cases to cater for the problem by requiring that the particular attorney had to satisfy the court in a future application that he or she should be permitted to practice unconditionally.) Where dishonesty has not been established the position is as set out above,

⁷ *Malan* note 4 supra page 221 at D-H

namely that a court has to exercise a discretion within the parameters of the facts of the case without any preordained limitations.

As mentioned in *Summerly* (at para 15), the fact that a court finds that an attorney is unable to administer and conduct a trust account does not mean that striking-off should follow as a matter of course. The converse is, however, also correct: it does not follow that striking off is not an appropriate order (compare *Prokureurorder van Transvaal v Landsaat* 1993 (4) SA 807 (T); *Law Society of the Transvaal v Tloubatla* [1999] 4 All SA 59 (T). To the extent that the judgment in *Law Society of the Cape of Good Hope v King* 1995 (2) SA 887 (C) at 892 G 0 894C propagates an 'enlightened approach', requiring courts to deal with misconduct which does not involve dishonesty with (in my words) kid gloves, I disagree. In order to stem an erosion of professional ethical values a 'conservative approach' is more appropriate (*Incorporated Law Society Transvaal v Goldberg* 1964 (4) SA 301 (T) at 304 A-F)."

[34] It would be inappropriate to attempt to prescribe to the applicant and even the court that will assess the respondent's suitability to be permitted to practice again after the hiatus following his suspension. The facts as shall be presented by the respondent at that stage will have to be considered by the court together with the attitude of the applicant and the reasons therefor at that stage. As the court said in *Malan* there should be no pre-ordained limitations to the court exercising its discretion as it considers the facts before it.

[35] In the result the following order shall issue:

1. The respondent, Bulelani Rubushe, is suspended from practising as an attorney for a period of two years.
2. The respondent shall surrender and deliver to the Registrar of this Court his certificate of enrolment as an attorney within two (2) weeks from date hereof.

3. Should the respondent fail to comply with the provisions of paragraph 2 above within two (2) weeks from date hereof, the sheriff for the district in which such certificate of enrolment is, is empowered and directed to take possession of and deliver same to the registrar of this Court.

4. After the expiry of the suspension period, and in the event that the respondent is desirous of practising as an attorney, he shall make a substantive application to the High Court having jurisdiction to be permitted to practise as an attorney and shall serve such application upon the Legal Practice Council.

5. The respondent is directed to pay the costs of and incidental to this application on a scale as between attorney and client.

6. This order shall be served on the respondent personally at any place in the Republic of South Africa where he may be found.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

I agree:

A. GOVINDJEE

JUDGE OF THE HIGH COURT

Heard: 24 March 2022

Delivered: 07 June 2022

Appearances:

Applicant's Counsel: Adv K. Watt

St George's Chambers in Makhanda

Respondent's Counsel: No appearance