IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISON, PRETOIRA

CASE NO.: 58530/2019

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

04 /09 /2023

DATE

[redacted]

SIGNATURE

In the matter between:

JOHN SINDISO NGCEBETSHA First Applicant

NGCEBETSHA MADLANGA ATTORNEYS Second Applicant

And

THE LEGAL PRACTICE COUNCIL Respondent

OF SOUTH AFRICA

In re:

THE LEGAL PRACTICE COUNCIL Applicant

OF SOUTH AFRICA

And

JOHN SINDISO NGCEBETSHA First Respondent

NGCEBETSHA MADLANGA ATTORNEYS Second Respondent

JUDGEMENT

SARDIWALLA J:

[1] This is an opposed application to re-open case number 58530/19 for the hearing of new evidence.

[2] The Applicant's sought the following relief in its Original Notice of Motion:

> "(a) Directing that case number 58530/19 be re-opened for the hearing of new evidence;
>
> (b) Directing that the order granted on 27 August 2020 by the Honourable Justice Van Niewenhuizen and the Honourable Acting Justice Nqumse be held in abeyance pending the outcome of case 58530/19 upon the hearing of new evidence;
>
> (d) Directing that the Respondent pay the costs of the application in this event that it is opposed; and
>
> (e) Further and/or alternative relief."

[3] The Applicant's sought to amended relief in terms of Rule 28 of the Uniform Rules of Court on 22 April 2022 seeking the following relief *inter alia*:

"1 By the consideration and variation of the order granted on 27 August 2020 by the Honourable Justice Van Niewenhuizen and the Honourable Acting Justice Nqumse by deletion of prayer (b) and by assertion of the following in its stead:

(b) Directing that the Respondent's application in case 58530/19 against the Applicant be dismissed and replacing with an order dismissing the Respondent's application."

[4] However due to the Applicant's having failed to file the amended pages as required the Respondent filed a notice of objection to the amendment on 31 August 2022 stating that due to the failure to file the amended pages, the amendment fell away. On 14 October 2022 the Applicant's filed a notice of withdrawal of the amendment and therefore this judgment deals with only the relief sought in terms of the original Notice of Motion.

Background to the Application:

[5] The following are the material facts of the matter:

5.1 In 2011, Pegasus Energy ("Pegasus"), a peregrine company, sold its shareholding in a South African company. The owners and directors of Pegasus, also not resident in South Africa, appointed Mr Bongani Raziya ("Mr Raziya") as well as the Second Applicant, together with an accounting firm, to represent them in effecting this transaction. A resolution was signed by the directors of Pegasus, appointing Mr Raziya as their local agent with the authority to finalise the transaction.

5.2 Mr Raziya was authorised in terms of this resolution to close the transaction, inclusive of all the elements concerned leading up to authorising the release of the proceeds of the sale ("the Pegasus funds").

5.3 The transfer of these funds did not follow the closing of the transaction and the finds remained in the possession of the Applicant's awaiting further instructions whilst internal issues of Pegasus was being remedied.

5.4 In the intervening period, a payment was made to Mr Raziya, on his

instruction, the Applicants notified Mr Van Rensburg who had also attended to the business of Pegasus and no issue was raised at the time.

5.5 It is alleged that NMI, the Second Applicant, was subsequently authorised by Mr Raziya to advance these funds to the First Applicant, Mr Ngcebetsha, in the form of a loan that would be repaid when Pegasus demanded payment.

5.6 The demand, when it came six years after the transaction, was not complied with immediately as the Applicants sought, first, to verify the identities of the persons making the demand.

5.7 Mr Van Rensburg, at the time of the demand for payment, enquired after the balance held on behalf of Pegasus, to which the Applicants responded by confirming the amount which had been received at the closing of the transaction – less the amount paid to the auditors who had assisted during the transaction.

5.8 The Applicants enquired whether the erstwhile authority of Mr Raziya in relation to the transaction and resultant funds had been rescinded by Pegasus. No answer was forthcoming to this enquiry. Accordingly, following the advice of Mr Raziya to tread cautiously and also flowing from the lack of clarity, the Applicants did not divulge any further information, this included the agreement relating to the loan of the funds by the Applicants.

5.9 An application brought on behalf of Pegasus, the outcome of which was that the Applicants were ordered to pay the Pegasus funds into the account of the law firm now appointed by Pegasus.

5.10 Simultaneously, a complaint was lodged with the Respondent which led to the application to strike the First Applicant from the roll.

5.11 The Respondents brought an application to remove the First Applicants name from the roll of Legal Practitioners and the Legal Practice Council was the Applicant. The Court found that the factual findings justified the First Applicant's name being

struck from the roll of attorneys on 4 August 2020

5.12 The Applicant's brought an application for leave to appeal which was dismissed on 5 May 2021.

5.13 Subsequently leave to appeal was also denied by the Supreme Court of Appeal.

5.14 Following these events, the First Applicant learnt that Mr Raziya had been approached by the attorneys of Pegasus who attempted to persuade him to recant the account which he had given under oath in his confirmatory affidavit, which Mr Raziya declined.

5.15 The effect of this evidence which was ultimately excluded from consideration and it is on this basis that the Applicant's bring the application to re-open the case.

First and Second Applicant's Argument

[6] It is the Applicants argument that in the hearing of the Respondent's application, the Applicant's legal representative was unable, through the questions from the bench and constraints of time, to take the court through all the matters that ought to have been considered. That reference to the record was made by the Applicants' legal representative who, together with such reference, expressed his comfort in the knowledge that the court *a quo* would have the record before it in its consideration of the matter.

[7] The Applicants' submit that the confirmatory affidavit of Mr Raziya was not formally introduced to the Court and considered, despite the fact that it had been uploaded onto caselines prior to the hearing of the matter. Further that prior to the hearing of the subsequent application for leave to appeal, the Respondent sought a postponement on the basis that the evidence of Mr Raziya was going to be shown to have been obtained fraudulently by the Applicants. Mr Raziya, according to the Respondent, was not aware at all of the account of the Applicants. The postponement was purportedly to secure evidence of such fraudulent conduct which would then be placed before the court in the application for leave to appeal. The application was, however, abandoned on the day of the hearing.

[8] The Applicants submit that Mr Raziya was taken through the contents of the affidavits prior to his deposing to the confirmatory affidavit wherein he confirmed the Applicants' account of the events. The Applicants' legal representative was instructed to request that the confirmatory affidavit of Mr Raziya be considered, upon which the court advised that the affidavit had not been introduced into the record and could not be considered. An application was made, from the bar, for the introduction of the confirmatory affidavit of Mr Raziya, in order for it to be considered by the court *a quo* in the application for leave to appeal. Upon being advised that this would require the adjournment of the proceedings for leave to appeal in order for a substantive application be made, the Applicants' elected to proceed with the hearing of the application for leave to appeal Leave to appeal was denied by the court *a quo* and subsequently, the Supreme Court of Appeal.

[9] Following these events, the First Applicant learnt that Mr Raziya had been approached by the attorneys of Pegasus who attempted to persuade him to recant the account which he had given under oath in his confirmatory affidavit. The Applicants submit that Mr Raziya declined to do so and pointedly declined to depose to an affidavit that had been produced for his signature wherein this *volte face* would have been performed. This would have been the fraudulent evidence on which the Respondent's abandoned postponement was premised.

[10] Notwithstanding the fact that this evidence was in existence at the time of the hearing, it was not led, and it was not considered by the court *a quo* for the above reason. The Applicants explain that they did not pursue the application to introduce the evidence due to the effect that it would have on the proceedings and were entitled to do so. Therefore this application to re-open the cause it's the only available route to have the new evidence considered.

[11] The Applicants submit that the allegation that the evidence is fabricated to reduce the effects of the order on the Applicants is false as the evidence being the confirmatory affidavit by Mr Raziya was obtained prior to the hearing of the *court a quo* and uploaded onto caselines. Mr Raziya was the agent of Pegasus in South Africa with responsibility for effecting the transaction from which the Pegasus funds came. The allegation that that Mr Raziya would, having been entrusted with such responsibility by Pegasus, would

subsequently participate in collusion with the Applicants against the interests of his erstwhile principals is incorrect and therefore the evidence of Mr Raziya is more likely to be true.

[12] That this evidence confirms that there was a loan of the Pegasus funds to the Applicants by Mr Raziya who had authority to do so. That this would change the outcome of the proceedings as the transfer of the funds was considered to be a misappropriation of the funds. That Mr Raziya's authority was clearly broad as confirmed by Mr van Rensburg when he authorized payment be made by the Applicant's to Mr Raziya. In those circumstances and authority the *court a quo's* finding cannot be sustained. The effect of the ruling of the court *a quo* is to exclude from practice a legal practitioner of long standing. Where the reason for such exclusion can be shown to have been flawed, however inadvertently, then the interest of justice would lie in the correction of such flaw so as not to visit the most substantial hardship or injustice upon the Applicants.

Respondent's Argument

[13] The Respondent contends that its answering affidavit destroys the Applicants version and after the filing of its answering affidavit the Applicant then filed a notice of intention to amend the Notice of Motion and did not file a replying affidavit rebutting the Respondents version. This especially relating to the incorrect factual background and the allegation that Pegasus demanded the payment after several years when the demand was made in 2012.

[14] Regarding the issue of the evidence attached to the Respondent's answering affidavit is inadmissible as it *'divulges material that is covered by the privilege that applies between attorneys and their clients"* the Respondent submits that the letter addressed by attorney Gootkin who acted on behalf of Mr Razia was done on instruction and for purposes of addressing the Applicants' false narrative and as such, Mr Razia who was previously the holder of privilege waived said privileged when he instructed attorney Gootkin to address the letter to Attorney Reece clarifying the facts surrounding the First Applicant's unethical conduct.

[15] That the conduct of the Applicants in regards to the history of the matter and its ever changing versions, that this court should not grant the re-opening of the case as this is the caution that has been set out in case law where litigants tailor their versions to suite the difficulties. The Answering Affidavit has gone to great lengths to extrapolate why the First Applicant's version regarding Mr Razia cannot, on any possible construction, come to his assistance. Accordingly, the *"reasonable possibility standard"* crystalized by the Constitutional Court cannot be met by the Applicant's in this application. Further that Mr Raziya has confirmed, through his attorneys of record that the First Applicant's version is a figment of his imagination. Not only does the Honorable Court have Mr Raziya's version but all the facts of the case support his version of events that no such authority was ever given to him and he did not authorize a loan to the First Applicant. That the manner in which the Applicants have crafted their Replying Affidavit does not come to their assistance as there is no rebuttal.

Legal principles regarding Re-opening

[16] The test for the admissibility of further evidence on appeal is well-established in **S v de Jager**[1] that an applicant must meet the following requirements:

(a) there must be a reasonably sufficient explanation, based on allegations which may be true, why the new evidence was not led in the court a quo;

(b) there should be a prima facie likelihood of the truth of the new evidence; and

(c) the evidence should be materially relevant to the outcome of the case.

[17] **Liesching and Others v S**[2] The applicants launched an application to the Constitutional Court for leave to appeal against the President's dismissal of their section 17(2)(f) application

[1] 1965 (2) SA 612 (A) at 613C – D)

[2] (CCT304/16) [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC) (29 August 2018)

contending that an interpretation of section 17(2)(f) that precluded the reconsideration of decisions refusing leave to appeal in criminal matters, where further evidence is sought to be adduced and violated their constitutional rights to a fair trial, equal protection of the law, and access to court. In analysing with the meaning of "exceptional circumstances" the Constitutional Court at paragraph 39 referred to **S v Petersen**[3] which held the following:

> "On the meaning and interpretation of 'exceptional circumstances' in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. In the context of section 60(11)(a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for certain flexibility in the judicial approach to the question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all applicable criteria. (Footnote omitted.)"

[18] The Constitutional Court went on further at paragraph 41 to hold the following:

> "[41] In line with a strict construction of the phrase "exceptional circumstances" in section 17(2)(f) of the Superior Courts Act, Mpati P held in *Avnit*: "Prospects of success alone do not constitute exceptional circumstances. The case must truly raise a substantial point of law, or be of great public importance or demonstrate that without leave a grave injustice might result. Such cases will be likely to be few and far between because the judges who deal with the original application will readily identify cases of the ilk. But the power under section 17(2)(f) is one that can be exercised even when special leave has been refused, so 'exceptional circumstances' must involve more than satisfying the requirements for special leave to appeal. The power is likely to be exercised only when the President believes that some matter of importance has possibly been overlooked or a grave injustice will otherwise result.""

[3] 2008 (2) SACR 355 (C) at paras 55-56

Analysis and findings

[19] On consideration of all the facts and evidence before me I am of the view that the application fails at the first hurdle. The Applicants rely on the fact that the Applicant's legal representative was time constrained in the Respondent's application to strike the First Applicant from the roll of attorneys but had alerted the court to the record, which included the confirmatory affidavit by Mr Razia, therefore although the Applicant's legal representative could not go through all the necessary facts but that they were safe in the comfort knowing the court had the record. Then later in its submissions the Applicant's concede that at the hearing the *court a quo's* application for leave to appeal, when it attempted to make an application to introduce the affidavit, it was advised that it would be required to postpone the matter and bring a substantial application. The Applicants apart from stating that this would have an effect on the proceedings and so they elected to continue with the application for leave to appeal and abandon the Court direction, the Applicants provide no reasonable explanation for not postponing the hearing and bringing the application.

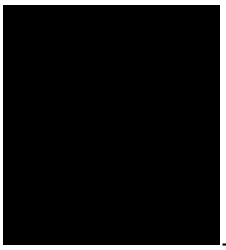
[20] This most importantly so when the Applicants allege that the outcome would have been different considering its entire argument hinged on the confirmatory affidavit by Mr Razia that the funds were advanced as a loan and therefore not a misappropriation of the funds as alleged in the complaint and the Respondent's application against the First Applicant. Considering the prejudice the non-admission of this evidence would cause to the Applicants this court finds it difficult to understand why the Applicants did not postpone the hearing and bring the application. This would have avoided the current application. I believe that the interests of justice require me to accept that the version of the Applicants regarding the new evidence are unlikely to be true. The Applicants had the duty to ensure ensure that all relevant facts are taken into account in determining whether the relief sought is just and equitable in the circumstances, especially where there is direction by the Court to do so.

[21] This coupled with the fact the new evidence is controverted by other evidence by the Respondent, I am not satisfied that the admission of the new evidence would materially affect the outcome. If it indeed would have affected the outcome the Applicants should have brought the necessary application at the time of the application for leave to appeal instead of bringing the present application, which not only constrains the Court to hear a whole new application

but also has a cost implication for the Respondents. In light of what was said in **Liesching and Others v S** and **S v Petersen** *supra* I cannot find that it is the interests of justice to permit such abuse of court processes.

[22] Accordingly, the following order is made:

1. The application is dismissed with costs.



SARDIWALLA J
JUDGE OF THE HIGH COURT

Appearances:

For the Applicants: Adv M Nxumalo
Instructed by: Kekana Bryan attorneys

For the Respondent: Adv CJ Jooste
Instructed by: Iqbal Mohamed attorneys