GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA v MATTHYS 2002 (5) SA 1 (E)

Citation 2002 (5) SA 1 (E)

Case No 6/2001

Court Eastern Cape Division

Judge Kroon J and Jones J

Heard June 14, 2001

Judgment June 29, 2001

Counsel R G Buchanan SC (with him G Goosen) for the applicant.
P Daubermann for the respondent.

Annotations Link to Case Annotations

B

Flynote : Sleutelwoorde

Advocate - Misconduct - Unprofessional conduct - What constitutes - Application for order in terms of s 7(1)*(d)* of Admission of Advocates Act 74 of 1994 that advocate's name be struck C from roll of advocates - Advocate charged with lying to and/or misleading courts and/or presiding officers; failing to comply with duty owed to client to prepare properly and fully for presentation of client's case and to act in best interests of client; failing to appear on various dates before presiding officer, either timeously or at all, in criminal matter in which he was appearing; failing to appear D before regional court on dates to which matters in which he was appearing had been postponed; accepting clashing briefs; failing to return deposit paid by client after termination of mandate and non-performance of services in respect of which deposit paid; and accepting instructions from member of public without intervention of attorney - Court to decide whether offending conduct established on E preponderance of probability and, if so, whether person a fit and proper person to practise as advocate - Latter finding to some degree involving value judgment but in essence one of making objective finding of fact - Once finding that person not fit and proper person to practise made, he or she could, in Court's discretion, either be suspended or struck off roll - Permissible for Court to have regard to totality of F advocate's conduct and cumulative effect thereof in arriving at decision - Permissible for Court, when assessing effect of advocate's conduct on question whether he or she a fit and proper person to practise as advocate, to have regard to explanations tendered by advocate for his or her conduct, either to General Council of the Bar or in papers filed by G

advocate in application for striking name from roll - Advocate in present matter not fit and proper person to practise A as advocate and struck from roll.

Headnote : Kopnota

The respondent was a practising advocate and member of the Independent Association of Advocates of South Africa (IAASA), which was not affiliated to the applicant. The applicant applied for an order in terms of s 7(1)*(d)* of the Admission of Advocates Act 74 B of 1994 (the Act) that the respondent's name be struck from the roll of advocates. The relevant section provided that the Court could, upon application, suspend any person from practice as an

advocate or order the name of any person to be struck off the roll of advocates if the Court was satisfied that such person was not a fit and proper person to continue to practise as an advocate. C

The applicant's papers alleged a number of complaints regarding the conduct of the respondent. The respondent was charged with lying to and/or misleading courts and/or presiding officers; failing to comply with the duty owed to a client to prepare properly and fully for the presentation of the client's case and to act in the best interests of the client; failing to appear on various dates before a presiding officer, either at all or timeously, in a criminal matter in which he D was representing the accused; failing to appear before a regional court on dates to which matters in which he was appearing had been postponed; accepting clashing briefs; failing to return a deposit paid by a client after the termination of the mandate and non-performance of the services in respect of which the deposit had been paid; and accepting instructions from a member of the public without the intervention of an E attorney. The respondent largely admitted that he had conducted himself in the manner alleged by the applicant. In some respects he sought to dispute the alleged conduct or the validity of the categorisation of misconduct applied by the applicant to the conduct in question. In cases where he admitted misconduct, he tendered an apology and, in most cases, an explanation for his conduct. F

Held, that the proceedings in the instant matter were not ordinary civil proceedings, but *sui generis* in nature. They were proceedings of a disciplinary nature of the Court itself, not those of the parties, with the Court exercising its inherent right to control and discipline practitioners who practise within its jurisdiction. The applicant, in bringing the application, acted as the *custos morum* of the profession in the interests of the Court, the public at large and the profession, its role being to bring G evidence of the practitioner's misconduct before the Court in order for the latter to exercise its disciplinary powers.(Paragraph [4] at 5A - B/C.)

Held, further, that it had to be decided whether the offending conduct had been established on a preponderance of probabilities and, if so, whether the person was a fit and proper person to practise as an advocate. The latter finding to some degree H involved a value judgment but was in essence one of making an objective finding of fact. Discretion did not enter the picture. However, once there was a finding that the respondent was not a fit and proper person to practise, he could, in the Court's discretion, either be suspended or struck off the roll. It was permissible to have regard to the totality of the respondent's conduct and the cumulative effect thereof in arriving at a decision. (Paragraphs [5] and [36] at I 5D - E/F and 24B.)

Held, further, that, when assessing the effect that the respondent's conduct had on the question of whether he was a fit and proper person to practise as an advocate, it was permissible to have regard to the explanations tendered by the respondent for his conduct, either to the applicant when it had called for an explanation for his conduct or in the papers filed by the respondent in the application. (Paragraph [34] at 21H - I.) J

Held, further, after considering the evidence and explanations tendered, that it was an unavoidable conclusion that the A respondent had misled the courts and/or presiding officers as alleged, and had done so deliberately. In the circumstances it could not be said with confidence that the respondent would not lie to, or mislead, a Court, or be party to a client of his doing so in the future. Furthermore, in seeking, in his answering affidavit, to persist in false allegations, the respondent had been untruthful to the B instant Court. Such conduct was deserving of severe censure and it had to be concluded that the respondent was not a fit and proper person to practise as an advocate. (Paragraphs [37], [39] and [40] at 24C, 26D, 27C/D - D and 24G.)

Held, further, that, in failing to comply with the duty owed to a client to prepare properly and fully for the presentation of the client's case and to act in the best interests of C the client, the conduct of the respondent reflected such a fundamental breach of the duty which a practitioner owed to his client and such a grave dereliction of duty that no other conclusion was possible but that the respondent was unfit to practise as an advocate. (Paragraph [41] at 27I - J.)

Held, further, that the conduct of the respondent in failing to appear in court on designated dates or arriving late without adequate explanation was not only disruptive, if not subversive, of the D administration of justice, but also constituted extreme discourtesy and a disservice to the court, the prosecutor, the client and the witnesses involved, and was contemptuous of the court. The conduct had been aggravated by the respondent's failure to apologise to the court or explain his

absence. This, also, was extremely discourteous and reflected an attitude towards the court that could not be countenanced. (Paragraph [42] at 28A/B - C.) E
Held, further, that the rule against an advocate accepting clashing briefs was a time-honoured and fundamental one. The respondent conceded that his indulging in the practice was improper and inexcusable. (Paragraph [44] at 28H - I.)
Held, further, that the issues of whether it was improper for the respondent to have accepted a fee in advance for work to be F performed by him and whether such deposit constituted trust funds did not have to be determined for the purposes of the judgment. It was not in dispute that on the termination of the mandate, prior to having performed the services he had been engaged to perform, the respondent became immediately obliged to refund the whole of the deposit. The respondent's statement that he did not have the funds G immediately to repay the amount once the client had been located amounted to no more than the fact that the respondent had used the funds to which he had not been entitled and had thereby placed himself in the position where he could not fulfil his legal and moral obligation to a former client. His conduct had been improper and sufficiently deserving of censure for it to be found that he was not fit to practise as an advocate. (Paragraph [45] at 29A - B/C and H F/G - H.)
Held, further, that the respondent's conduct in accepting instructions from, and performing services for, a client without the intervention of an attorney had to be found to have been unprofessional. (Paragraph [46] at 30B.)
Held, further, as to the respondent's intimations of remorse, that, while remorse, if genuine, was a mitigating feature, the nature of and circumstances surrounding the transgressions established I against a practitioner might nevertheless be such that he merited the severest censure the Court could impose. The present was such a case. Furthermore, the genuineness of the respondent's professed remorse was somewhat tainted by the feature that even in the instant proceedings the respondent had not been completely frank and open with the Court. (Paragraph [47] at 30G/H - I/J.) J

Held, accordingly, that the respondent was not a fit and proper person to practise as an advocate and should be disbarred. A (Paragraph [47] at 31E/F.) The respondent's name was accordingly struck from the roll of advocates.

Cases Considered

Annotations

Reported cases

De Freitas and Another v Society of Advocates of Natal and Another 2001 (3) SA 750 (SCA) (2001 (6) B BCLR 531): applied

Ex parte Swain 1973 (2) SA 427 (N): dicta at 434E - H applied

Incorporated Law Society, Transvaal v Meyer and Another 1981 (3) SA 962 (T): dictum at 968F applied

Jasat v Natal Law Society 2000 (3) SA 44 (SCA): dictum at 52B applied C

Kekana v Society of Advocates of South Africa 1998 (4) SA 649 (SCA): dicta at 654C - E and 655D - 656F applied

Law Society v Du Toit 1938 OPD 103: approved

Rhodesian Bar Association v Maruza 1976 (3) SA 334 (R): dictum at 337C applied D

Society of Advocates of Natal and Another v Merret 1997 (4) SA 374 (N): dictum at 383D - G applied

Society of Advocates of South Africa (Witwatersrand Division) v Cigler 1976 (4) SA 350 (T): dicta at 357H - 358B and 358D - E applied

Society of Advocates of South Africa (Witwatersrand Division) v Edeling 1998 (2) SA 852 (W): dictum at 859I *et seq* applied.

Statutes Considered

Statutes E

Admission of Advocates Act 74 of 1964, s 7(1)*(d)*: see *Juta's Statutes of South Africa 2000* vol 5 at 3-123.

Case Information

Application for an order in terms of s 7(1)*(d)* of the Admission of Advocates Act 74 of 1964 that the respondent's F name be struck from the roll of advocates. The facts appear from the judgment of Kroon J.

R G Buchanan SC (with him *G Goosen*) for the applicant.

P Daubermann for the respondent.

Cur adv vult.

Postea (29 June 2001). G

Judgment

Kroon J:

A. Introduction

[1] The applicant, the General Council of the Bar of South Africa, applies that this Court issue an order in terms of H s 7(1)*(d)* of the Admission of Advocates Act 74 of 1964 that the respondent's name be struck from the roll of advocates.

[2] The section provides that the Court may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates 'if the Court is I satisfied that he is not a fit and proper person to continue to practise as an advocate'.

[3] The respondent practises in Grahamstown as an independent advocate and is not a member of any society of advocates affiliated to the applicant. J

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B. The nature of the proceedings A

[4] (1) The proceedings are not ordinary civil proceedings, but are *sui generis* in nature: they are proceedings, of a disciplinary nature, of the Court itself, not those of the parties; the Court exercises its inherent right to control and discipline the practitioners who practise within its jurisdiction; the applicant, in bringing the application, acts pursuant to its duty as *custos* B *morum* of the profession; in the interests of the Court, the public at large and the profession, its role is to bring evidence of a practitioner's misconduct before the Court, for the latter to exercise its disciplinary powers; the proceedings are not subject to all the strict rules of the ordinary adversarial process. *Society of Advocates of South Africa (Witwatersrand Division) v Edeling* 1998 (2) SA 852 (W) at 8591 *et seq*. C

(2) Evidence which would have been inadmissible in 'civil proceedings' may be considered in disciplinary proceedings against a practitioner in the High Court. *Incorporated Law Society, Transvaal v Meyer and Another* 1981 (3) SA 962 (T) at 968F.

[5] The Court has first to decide whether the alleged offending conduct has been established on a preponderance of probability and, if D so, whether the person is a fit and proper person to practise as an advocate. Although the last finding to some extent involves a value judgment, it is in essence one of making an objective finding of fact and discretion does not enter the picture. But, once there is a finding that he is not a fit and proper person to practise, he may in the E Court's discretion either be suspended or struck off the roll. *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 654C - E; *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at 51.

[6] (1) '''The proceedings are instituted by F the Law Society for the definite purpose of maintaining the integrity, dignity and respect the public must have for officers of this Court. The proceedings are of a purely disciplinary nature, they are not intended to act as punishment of the respondent. He has received his sentence for the offence he committed and it is no longer a matter that will influence us in dealing with this case. It is for the Courts in cases of this nature to be careful to distinguish between justice and mercy. An attorney fulfils a very important function in the G work of the Court. The public are entitled to demand that a Court should see to it that officers of the Court do their work in a manner above suspicion. If we were to overlook misconduct on the part of officers of the Court, if we were to allow our desire to be merciful to overrule our sense of duty to the public and our sense of importance attaching to the integrity of the profession we should soon get into a position where the profession would be prejudiced and brought into discredit.''' H

Law Society v Du Toit 1938 OPD 103, approved in *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* 1976 (4) SA 350 (T) at 357H - 358B.

(2) 'In dealing with cases of this kind the Court should be I guided by what was said by Williamson JP in *Ex parte Knox* 1962 (1) SA 778 (N) at 784G:

> ''The Courts have repeatedly warned themselves against allowing sympathy for the applicant to weigh with them in deciding whether or not to allow an attorney or advocate again to enter the ranks of his profession. The Court's duty is first and foremost and at all times, to be satisfied in these matters that the applicant is a proper person to be allowed to practise and J

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> a person whose readmission to the ranks involves no danger to the public and no danger to the good name of the A profession.''
>
> In the present case I have some sympathy for the applicant bearing in mind that he was first admitted to practise as an advocate as long ago as 1947 but other considerations are paramount.
>
> In view of his conduct in the Wulfes case I have no doubt that the applicant's readmission as an advocate might well involve a danger to B the public generally and might involve the good name of the profession.'

Ex parte Swain 1973 (2) SA 427 (N) at 434E - G.

[7] 'The clear need for a stern approach towards erring practitioners whose conduct has called for disciplinary action must not, however, render the Court blind to the penal consequences to the offender of the measures to be taken.'

Rhodesian Bar Association v Maruza 1976 (3) SA 334 (R) at C 337C.

C. The respondent's conduct

[8] The applicant's papers detail complaints numbered 1 to 6 against the respondent. As detailed, the complaints set out the manner in which the respondent allegedly conducted himself on a specific D occasion or a series of specific related occasions. It is, however, the categorisations of features of that conduct that form the actual charges laid against the respondent by the applicant. This judgment will accordingly address each of the charges in question.

[9] In the main, the respondent has admitted that he conducted himself in the manner alleged. In some respects he has sought E to dispute the alleged conduct or the validity of the categorisation of misconduct applied by the applicant to the conduct in question. In other respects he has admitted the categorisation and that the conduct in question constituted misconduct; he has tendered an apology and, in most instances, an explanation for his conduct. F

[10] The charges against the respondent are those set out in the paragraphs that follow.

D. Charge of lying to and/or misleading a court and/or a presiding officer

[11] Count 1: G

(1) It is common cause or not in dispute:

(a) that criminal appeals had been set down for hearing in this Court on 28 April 1999 and that Leach J was to preside at those hearings;

(b) that a criminal trial had been set down for hearing in this Court for a period commencing on 28 April 1999, to be H presided over by Mpati J;

(c) that the respondent had been briefed to appear in one of the appeals over which Leach J was to preside, viz the fourth appeal on the roll; I

(d) that on 26 April 1999 (or possibly 27 April) the respondent received a request from the local representative of the Legal Aid Board to appear for the accused in the criminal trial referred to in *(b)*; that the respondent accepted the brief;

(e) that on the morning of 28 April 1999 the respondent attended on Mpati J in chambers, advised him that the police docket in the J

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matter had just been made available to him and that he needed time to peruse same and consult further with his client; A that at his request Mpati J agreed that the criminal trial could stand down until 11h15, ie until after tea;

(f) that the respondent failed to mention to Mpati J that he had undertaken work in the criminal appeal Court and would be engaged in that Court during the period that Mpati J had allowed the B criminal trial to stand down;

(g) that the respondent was in the appeal Court from the commencement of the appeal hearings at 09h30 until the appeal in which he was appearing was called, when he applied for, and secured, a postponement because his instructing attorney had failed to arrange for the timeous filing of heads of argument (presumably, had the C respondent's attendance in the appeal Court been required beyond 11h15 he would have had to make further arrangements with Mpati J);

(h) that the respondent advised Leach J that the reason why he had been unable to introduce himself to the appeal Judges prior to appearing before them was because he had been requested to D step into a criminal matter that was due to start after tea that morning and that when he went to see the presiding Judge in that trial he had been detained longer than anticipated.

(2) The gravamen of the charge against the respondent under the present heading is that he misled Mpati J by seeking an adjournment E of the criminal trial ostensibly for the purposes of consultation whereas the respondent was in fact to be engaged in another Court during the adjournment; his purpose in misleading Mpati J was to avoid the consequences of his having accepted clashing briefs. F

(3) In an explanation tendered by the respondent to the applicant on 25 June 1999 the former stated:

(a) that he accepted the brief in the criminal trial as he was of the view that by doing so he would be of assistance to the Court and the Legal Aid Board (which, so his impression was, was 'in dire need' of procuring the services of a legal practitioner in the G criminal trial in that the attorney initially briefed therein had withdrawn from the matter); that, had he not accepted the brief, 'greater delays' in the trial would have been incurred;

(b) that, in retrospect, he accepted that he should have informed Mpati J of his engagement in the appeal Court, but that he had had no intention of misleading the learned Judge; that he had indeed H required to consult with the accused;

(c) that he in fact advised Leach J that he was due to appear in Mpati J's Court later that day.

(4) The respondent's answering affidavit in the application repeats the substance of the above

explanation. Further averments are I the following:

(a) the representative of the Legal Aid Board had advised him that no other legal practitioner was available to accept the instruction in the criminal trial;

(b) had it been his intention to mislead either Mpati J or Leach J or to conceal the fact that he held clashing briefs, he would certainly J

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not have told Leach J that he was going to appear before another Judge in a criminal matter due to start after tea that A day;

(c) he apologises to Mpati J and to this Court for not having advised the former of his engagement in the appeal Court;

(d) he acknowledges that he was guilty of accepting clashing briefs, conduct which he concedes was improper and inexcusable.

[12] Count 2: B

(1) It is common cause:

(a) that during May 1999 the respondent appeared in the regional court for an accused who was charged, *inter alia*, with a count of robbery; C

(b) that in explanation of the accused's plea of not guilty on that count, the respondent merely made the bald statement that the accused did not commit the robbery in question;

(c) that the complainant's evidence was in essence that he was attacked and robbed by three assailants, one of whom he identified as the accused; that the complainant's companion merely D testified that the complainant was attacked by three men, none of whom she could identify;

(d) that the essence of the cross-examination of these two witnesses by the respondent was directed at testing the reliability of the complainant's identification of the accused as one of his assailants; that the accused's defence, as it later transpired E to be, was not put to either of the witnesses; that it was only put to the complainant that the accused denied that he stabbed or robbed the complainant as the latter alleged;

(e) that, similarly, a third witness who testified that the accused, armed with a spear, demanded money from the complainant, F who was in the company of the second witness, was merely asked by the respondent, in the relevant part of the cross-examination, to confirm that the complainant was under the influence of intoxicating liquor (which the witness did);

(f) that during the testimony of the second witness the following exchange took place between the presiding magistrate and the G respondent:

'Hof: Net voor ons verder gaan mnr Matthys, kan ek aanvaar die pleging van die roof self is nie in geskil nie?

Mnr Matthys: Nee, glad nie. H

Hof: Ek kan aanvaar die klaer was beroof van die geld, dit gaan oor identifikasie.

Mnr Matthys: Dit is korrek';

(g) that prior to the accused testifying a short adjournment took place; I

(h) that when the accused testified, the respondent led him to place himself on the scene and to furnish details of what had transpired between himself and the complainant (who was in the company of the second witness); that, in short, that version was to the effect that he, the accused, demanded that the complainant repay certain money

owing to him, that the complainant refused to do J

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so and instead commenced attacking the accused, that the latter stabbed the A complainant in self-defence and that, after picking up some money that the complainant's companion had thrown to the ground, the accused left the scene;

(i) that the accused, when questioned by the magistrate, stated that while he had not had a full opportunity to consult with the respondent, he had, during a consultation at the court, instructed B the respondent with the version set out above, save that he did not mention the money he had picked up nor where he had obtained the weapon with which he stabbed the complainant;

(j) that, on enquiry by the magistrate, the respondent stated that during the adjournment referred to (ie after the close of the State case) the accused had favoured him with the C version in question, that prior to the commencement of the trial there had not been sufficient opportunity for the accused to instruct him with that version, that at that stage his instructions were merely that the accused had not committed the robbery, that, because his secretary D only had a smattering of the Xhosa language and he did not have an interpreter at his office, he had not been able to secure further instructions from the accused and that his earlier intimation to the magistrate that the fact that the robbery itself was not being disputed (but only the identification of the accused as one of the robbers) had been based solely on the accused's instructions that he had not E committed the robbery.

(2) In a letter of explanation, dated 25 June 1999, addressed by the respondent to the applicant, he stated as follows:

'In this matter I received instructions from client to the effect that he knows nothing about the alleged robbery and that he did not commit the crime. F

When the accused was called upon to testify he did not only surprise the court, but I was indeed also surprised by his evidence.

This is not a rare occurrence in criminal matters and I submit that I never intended to manipulate the proceedings or to mislead the court.'

(3) The gravamen of the charge against the respondent under the present heading is: G

(a) that he intentionally lied to, or misled, the presiding magistrate as to the tenor of the instructions he had received from the accused;

(b) that he intentionally, alternatively negligently, misled the presiding magistrate as to the true facts of the matter; H

(c) that he misled the court by cross-examining witnesses and presenting a version of events the veracity of which he failed to establish, alternatively knew to be in conflict with his instructions.

(4) In response, the respondent's answering affidavit reads as follows:

'10. I deny the applicant's allegation that I cross-examined I witnesses and presented a version of events, the veracity of which I failed to establish or knew to be in conflict with my instructions. As appears from the record of the proceedings in the regional court -

10.1. . .

10.2 I merely tested the reliability of the identification of [the accused] by the [complainant] and put to him that [the accused] denies that he robbed him. . . . J

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10.3 I never put any version to the [second witness] on behalf of A [the accused].

10.4 I never put any version to the [third witness] on behalf of [the accused].

10.5 [The accused's] evidence was not in conflict with the bare [denial] that I put to [the complainant] on his behalf.

11. I respectfully submit that I was entitled to test the B reliability of the identification of [the accused] by the [complainant], notwithstanding the fact that an incident had occurred between himself and [the complainant]. This is what I did.

12. I admit, however, that I failed to take full and proper instructions from [the accused] prior to the commencement of the trial in question and that I intentionally misled the regional court magistrate by stating that only identity and not the commission of the C robbery was in dispute. As far as I can recall [the accused] instructed me at the outset that he had stabbed the [complainant] in self-defence. I did not want to disclose this to the regional court magistrate as I considered that it would be fatal to [the accused's] case for me to do so.

13. I admit that I acted unprofessionally by failing to take full and proper instructions from [the accused] prior to the commencement D of the trial in question and acted improperly by intentionally misleading the regional court magistrate as aforesaid. I am very sorry for this and apologise to the regional court magistrate and the above honourable Court for my inexcusable conduct.'

[13] Count 3: E

(1) It is common cause:

(a) that a certain criminal appeal was due to be heard by Erasmus J and Mpati J in this Court on 15 September 1998;

(b) that the notice of appeal lodged with the magistrate on 24 July 1997 was signed by the appellant over the words 'Adv R Matthys, 10 Hill Street, Grahamstown' (ie the respondent); F

(c) that the Director of Public Prosecutions advised the respondent on 9 June 1998 that the appeal had been set down for hearing on 15 September 1998;

(d) that no notice of withdrawal of the appeal, or from acting, by the respondent was received and he remained on record as G the legal representative of the appellant;

(e) that, when the appeal was called, there was no appearance, either by the respondent or the appellant personally;

(f) that the matter stood down until 10h15 so that the secretary of Erasmus J could telephone the respondent to advise him H that, as he was still on record, the learned Judges considered that he ought to have been in Court and to enquire what the position was; that the respondent advised the secretary that he had telephoned Mr Henning (who appeared for the State) and requested him to have the matter struck from the roll; I

(g) that the matter stood down further to enable Mr Henning to telephone the respondent to advise him that his presence was required at Court at 14h15 so that he could explain the position; that Mr Henning did so, contacting the respondent on his mobile telephone; that the respondent advised him that he was out of town and could not attend at Court at 14h15; that, on Mr J

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Henning's further inquiry, the respondent stated that he expected to be back in A Grahamstown by 15h00, but that he preferred that the matter not stand down until that time as he would not be appearing in the matter at all; that *en route* home at 12h15 Mr Henning passed the respondent's vehicle in town; that at 14h15 Mr Henning advised the Court of this last-mentioned fact as well as of the preceding telephone conversation between him and the respondent; B

(h) that the Court, when striking the appeal off the roll, directed the Registrar to favour the respondent with a copy of the judgment delivered (which set out a recital of the facts detailed above) and request him to explain his conduct; C

(i) that, by letter addressed to the respondent on 13 November 1998, the Registrar

complied with the directive and further requested an urgent reply from the respondent; that, by letter dated 25 November 1998, the respondent replied that his response was being prepared and would be received shortly; that on D 14 May 1999 the Registrar addressed a follow-up reminder to the respondent in which the respondent was directed to submit his reply by 28 May 1999; that the respondent never furnished the explanation.

(2) The gravamen of the charge against the respondent under the present heading is that he made himself guilty of dishonesty in that he E lied to an officer of this Court (Mr Henning) and, through him, to this Court as to his whereabouts on 15 September 1998.

(3) An associated charge is that, by failing to file a notice of withdrawal of the appeal or to furnish the explanation required of him, the respondent acted in a manner contemptuous of this Court. F

(4) The relevant portions of the respondent's answering affidavit read as follows:

'15.1 admit, further, that I lied to Mr Henning and, indirectly, to the above honourable Court when I informed Mr Henning that I was not in Grahamstown and could not attend Court on 15 September 1998. I was in fact in Grahamstown at the time and could have attended Court. G

...

20. A clerk of one of the honourable Judges in the appeal telephoned me prior to the date for which the appeal was set down for hearing to enquire whether the appeal would be proceeding. I informed her that the appeal would not be proceeding and would have to be struck off the roll. I also undertook to file a notice withdrawing as the appellant's legal representative. I had been told by a colleague that H the honourable Mr Justice Erasmus had displayed a somewhat hostile attitude towards him as an ''independent'' advocate and had been particularly scathing of the fact that ''independent'' advocates disregarded the so-called ''referral rule''. I was, in the circumstances, reluctant to file a notice of withdrawal in my own name just to be scorned upon by the honourable Mr Justice Erasmus. I Furthermore, I did not realise the importance of filing a notice of withdrawal at the time and did not regard my failure to file a notice of withdrawal as a serious matter. I was of the view at the time that it was sufficient to have advised the Judge's clerk that the appeal would not be proceeding and that the matter would have to be struck off the roll. J

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21. The reason why I lied to Mr Henning and, indirectly, to the A above honourable Court is that I thought at the time that the honourable Mr Erasmus (*sic*) required my attendance at Court in order to belittle me in open Court.

22. The reason why I did not furnish the requested explanation for my conduct to the honourable Mr Justice is (*sic*) Erasmus is that I was simply uncomfortable in drafting a reply to his queries. I knew that the Eastern Cape Society of Advocates had been sent a copy of B the memorandum [ie a memorandum by Erasmus J in which he registered a complaint in respect of the respondent's conduct] and had heard rumours that it was going to rely on the incidents referred to in the memorandum in bringing an application to have my name struck off the roll of advocates. I feared such an application and was indecisive as to whether I should furnish a reply to the honourable Mr Erasmus' C (*sic*) request for an explanation. I believed that I might prejudice myself by furnishing a reply and was, accordingly, hesitant to do so. I certainly did not intend any disrespect towards the honourable Mr Justice Erasmus or the above honourable Court by failing to furnish the requested explanation.

23. I admit that I acted improperly in failing to file a notice of withdrawal, lying to Mr Henning and to the above honourable Court and D failing to furnish the honourable Mr Justice Erasmus with the explanation requested by him. I appreciate that my dishonesty in lying to Mr Henning and the above honourable Court amounts to serious misconduct on my part. I realise that there was a duty on me as an advocate to be scrupulously honest and that I failed in my duty in this regard. I am very sorry for my improper conduct and apologise to the E above honourable Court for same.'

[14] Count 4:

(1) It is common cause:

(a) that the respondent was due to appear in a part-heard criminal matter before the magistrate of Adelaide on 29 F March 1999;

(b) that at 08h30 on that day the respondent telephoned the prosecutor to request a

postponement of the matter on the ground that he intended requesting the recusal of the presiding officer; that, by agreement with the magistrate, the latter being under the mistaken impression that the recusal request related to another matter, the prosecutor advised the respondent that the postponement G would be done in his absence; that the mistake was discovered shortly thereafter but the prosecutor was unable to contact the respondent until 11h00, when it was discovered that the respondent was appearing in the regional court at Alexandria;

(c) that on 29 April 1999 when the matter, by arrangement between the prosecutor and the respondent, was due for H hearing of the application for the recusal (but the respondent did attend at court), the respondent advised the prosecutor that he was not going to seek the recusal of the magistrate, a statement he repeated to the court on 11 June 1999; I

(d) that the respondent subsequently (ie at the inquiry referred to in para [16] below) advised the magistrate that he had confused the matter with another matter in which he did intend to apply for the recusal of the magistrate (which he in fact did do successfully);

(e) that the magistrate rejected the respondent's explanation of having confused the two matters in that on neither 29 April 1999 J

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nor 11 June 1999 did he claim such confusion; that the magistrate concluded that on 29 March 1999 the A respondent had used the statement that he wished to apply for the recusal of the magistrate in the applicable matter merely as a ploy (to enable himself to appear in the regional court in Alexandria and thus extricate himself from his self-created predicament caused by his having 'double-booked' himself) as he knew (for reasons that will B appear elsewhere in this judgment in another context) that the court would not agree to a postponement of the matter.

(2) The gravamen of the charge against the respondent under the present heading is that he intentionally misled the prosecutor and, through him, the court by falsely claiming that he intended seeking the C recusal of the magistrate in the matter in question and thereby secured a postponement, which would not otherwise have been forthcoming, in order to enable him to appear that day in another *forum*.

(3) In his answering affidavit the respondent reiterates that he did confuse the matter which was on the roll for 29 March 1999 with the other matter referred to above and he denies that he was D guilty of the ploy ascribed to him by the magistrate.

E. Charge of failing to comply with the duty owed to a client to prepare properly and fully for the presentation of the latter's case and to act in the best interest of the client

[15] (1) This charge relates to the conduct by the E respondent of his client's defence on a charge of robbery in the regional court to which reference was made in para [12] above.

(2) The gravamen of the charge is F

(a) that the respondent failed to take full and proper instructions from his client prior to embarking on the latter's defence on the said charge;

(b) that, in defending his client, he was guilty of the conduct referred to in para [12](3) above.

(3) The respondent's response in his answering affidavit is embraced in the extract therefrom quoted in para [12](4) above. G

F. Charge of failing on various dates to appear before the magistrate of Adelaide, either at all or timeously, in a criminal matter in which he was representing the accused H

[16] (1) This charge relates to the respondent's conduct of the defence in the criminal matter

referred to in para [14] above and specifically his failure to appear, either at all or timeously, on various dates to which the matter had been postponed. (It is relevant to note that prior to the events referred to in (3) below the matter had, at the instance of the respondent, been postponed on a number of occasions over a period of approximately one year.) I

(2) In the result, the magistrate in due course held an inquiry in terms of s 108 of the Magistrates' Courts Act 32 of 1944 at which the respondent faced eight counts of contempt *in facia curiae.* He was convicted on five of the counts. On one count he was cautioned and discharged. On the other J

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four counts fines ranging from R200 to R600 were imposed. The proceedings were subsequently A confirmed on review by a Judge of this Court.

(3) As to the facts of the five counts on which the respondent was convicted, the papers reveal the following:

(a) On 4 February 1999 the respondent arrived at court at 10h45 instead of 09h00. He had not contacted the prosecutor at any time prior to his late arrival nor, after his arrival, did he B tender any apology or explanation. By reason of his failure to arrive by 09h40 the magistrate proceeded to nearby Bedford to attend to certain postponements in that centre's court. In consequence, the matter in question could only commence after the magistrate's return at 11h30. C

At the subsequent inquiry, held on 25 November 1999, the respondent stated that he was unable to recollect why he had been late or why he had failed to contact the prosecutor if he had been unavoidably delayed. He was also unable to explain his failure to apologise to the court or to tender an explanation on the day in D question. He did, however, tender an apology at the inquiry (which apology embraced his other infractions as well).

(b) On 4 February 1999 the matter, then part-heard, was postponed to 29 March 1999. It was stressed to the respondent that he should ensure that he was present at 09h00 as the whole day would be set aside for the hearing of the case. On that E day the events referred to in para [14](1)*(b)* above took place. When the prosecutor spoke to the respondent at 11h00, the latter undertook to appear at the Adelaide court at 14h00 for the purpose of having his application for the recusal of the magistrate being heard. At 14h30 he telephoned to advise the prosecutor that he was still engaged in the regional court matter and would not be able to F come to Adelaide at all.

At the inquiry the respondent, for the first time, voiced his claim that he had confused the matter with another (a claim which, as recorded in para [14](1)*(e)* above, the magistrate rejected). He did, however, admit that he had 'double-booked'. His G explanation was that the case in Alexandria had been urgent in that the accused in that matter were in custody and he wished to apply for their release on bail.

(c) On 29 March 1999 the matter was, by arrangement with the respondent, postponed to 8 April 1999. The H respondent failed to appear. On the next date that the respondent was at court, 11 June 1999, he was advised by the magistrate that the latter intended to inquire into his failure to appear on previous occasions. At the respondent's request, however, the magistrate granted him a postponement of the inquiry to I allow him an opportunity fully to prepare himself. At the subsequent inquiry, however, the respondent could tender no explanation for his non-attendance on 8 April 1999.

(d) On 30 September 1999 the matter was postponed to 8 November 1999 for further trial. Again, the respondent was specifically J

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advised to be present at 09h00 as the whole court day would be set aside for the matter and another one in which the A respondent was also appearing. On the postponed date the respondent only arrived at 10h30 and again tendered no apology or explanation for his late attendance. At the inquiry he could not tender any explanation for his late arrival.

(e) On 8 November 1999 the matter was postponed to 25 November 1999 for judgment and for the holding of the inquiry. B Once again, the respondent was warned that the court would start at 09h00 as the day in question was set aside solely for the finalisation of the case and for other matters in which the respondent was appearing. The respondent was not in attendance at 09h00. At 09h30 another part-heard matter and a new matter, in both of which the C respondent was appearing, were postponed and seven witnesses, some of whom had come from other districts, were excused. The respondent arrived at 10h10 and apologised for his late arrival. His explanation was that he had been obliged to attend on his cellphone service provider in Grahamstown for the renewal of his service contract, which D had expired the previous day. He conceded, however, that it would take 70 minutes to travel from Grahamstown to Adelaide, that he had only attended on the service provider at 08h30 and that, while he had been unexpectedly detained there until 09h15, it had been possible for him E to use another telephone to contact the prosecutor to explain his position, but that he had failed to do so.

(4) It is, however, necessary also to refer to the facts of one of the other counts of contempt on which the respondent was acquitted.

(a) On 16 April 1999 the matter was postponed to 29 April 1999, a date, as already recorded, arranged between the F prosecutor and the respondent for the hearing of the application for recusal.

(b) On 28 April 1999 the respondent telephonically advised the prosecutor that he was to appear in the High Court the next day and therefore could not be in Adelaide on that day. (The matter in the latter Court was in fact the criminal trial before Mpati J referred to in para [11](1) above.) G

At the inquiry his explanation of how he had come to accept the brief to appear in the High Court was in substance the same as that set out in para [11](3)*(a)* and (4) above. He added that, as he put it, as a gesture of goodwill and mindful of the view of High Court H Judges that matters in their Court take precedence, he decided to assist by accepting the High Court matter.

(5) The gravamen of the charge against the respondent is that he:

(a) repeatedly failed to appear at court on dates and/or at times arranged with him and ordered by the court; I

(b) conducted himself with reckless disregard as to the prejudice caused to his client, to the State and to witnesses and as to the inconvenience to the court and the disruption of the administration of justice caused by his conduct;

(c) offered no explanation at all in respect of certain instances where he failed to appear or to do so timeously; J

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(d) admitted to repeated instances of double briefing. A

(6) In his answering affidavit the respondent concedes that his conduct in arriving late at court or in not arriving at all and in accepting clashing briefs was improper and states that he does not

wish to proffer any excuse for same. He does, however, state that he is sorry for what he did, that he has already apologised to the magistrate and that he repeats that apology. B

G. Charge of failing to appear before the regional court at Grahamstown on dates to which matters in which the respondent was appearing had been postponed

[17] In respect of the first count it is common cause:

(1) that on 25 March 1999, in the presence of the C respondent, a case in which he was appearing for an accused facing a charge of murder was postponed to 31 May 1999 for trial and the State witnesses were warned accordingly;

(2) that the respondent failed to appear on 31 May 1999; that the matter was accordingly postponed to 26 August 1999 and D State witnesses were again warned accordingly; that it was noted that the respondent was 'in the High Court';

(3) that on 26 August 1999 the respondent advised the magistrate that he had telephonically advised the prosecutor (apparently the control prosecutor) that he would be appearing in the High Court on 31 May 1999, a statement that the prosecutor E appearing in the case confirmed.

[18] In respect of the second count it is common cause:

(1) that on 31 May 1999 a case in which the respondent was defending an accused on a charge of housebreaking with intent to steal and theft was postponed to 25 August 1999 for trial (although the F respondent was not present, it is clear from the papers as a whole that he either knew of the date to which the matter was to be postponed or subsequently became aware of the postponed date);

(2) that the respondent failed to appear on 25 August 1999; that it was noted that the prosecutor informed the court that according G to the control prosecutor the respondent was engaged in the High Court in a bail application; that the matter was accordingly postponed to 26 August 1999;

(3) that on 26 August 1999 the respondent advised the magistrate that he apologised for his absence the previous day, that he H had been engaged in an urgent bail application in the High Court, that he had, however, unfortunately omitted to advise the prosecutor, but had, as soon as he could, returned to attend at the regional court.

[19] On 27 August 1999 the Eastern Cape Society of Advocates favoured the respondent with a copy of the regional I magistrate's letter of complaint (which concerned the respondent's non-appearances referred to above and the accompanying failure by him to seek the magistrate's permission for him to be excused) and requested an explanation for his conduct as well as for his apparent double briefing on the dates in question. J

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No response was received to this request. A

[20] The gravamen of the charge against the respondent is the same as that recorded in para [16](5)*(a)*, *(b)* and *(d)* above.

[21] In his answering affidavit the respondent states as follows:

> '32. I admit that I accepted briefs to appear in the High (*sic*) on 31 May 1999 and 25 August 1999 at a time when I already held instructions to appear in the regional court on the B said dates in the cases referred to by magistrate D Allers. I concede that I acted improperly by accepting the said briefs. I concede, further, that I should have made appropriate arrangements with magistrate Allers before accepting the said briefs. I should also have gone to magistrate Allers on 31 May 1999 and 25 August 1999 to excuse myself from appearing in the cases which were postponed by C him due to my non-availability. I apologise to magistrate Allers for my improper conduct and the inconvenience occasioned thereby.
>
> 33. I do not seek to offer any excuse for my misconduct because there is none. However, I wish to explain the circumstances in which I accepted the aforesaid clashing briefs. When I was a prosecutor in the lower courts it often happened that an advocate would come to my court D on a

particular day and inform me that he has now been briefed to appear in a High Court trial, that High Court trials take precedence over lower court trials and that, accordingly, the trial in the lower court in which he is due to appear on that day will have to (*sic*) postponed. In my experience, both district and regional court magistrates always accepted this to be the position and readily postponed trials in their courts in such circumstances. This led me to believe that it is an accepted practice for an advocate to E accept a brief in the High Court which clashes with a brief in a lower court. I was thereby brought under the erroneous impression that I am entitled to accept a brief to appear in the High Court which clashes with a brief to appear in the lower court.

34. I believed, at the time that I accepted the clashing briefs in the High Court, that I was entitled to do so. I now know that I was F wrong and am sorry for what I did.'

H. Charge of accepting clashing briefs:

[22] Count 1:

(1) This count relates to the respondent having accepted a brief to appear in a criminal trial before Mpati J in this Court on 28 G April 1999, whereas he was already engaged to appear on the same date in the appeal Court in which Leach J was to preside - see para [11](1) above.

(2) The respondent's answer to this charge has already been set out in para [11](3)*(a)* and (4) above.

[23] Count 2: H

(1) This count relates to the respondent having accepted a brief to appear in the regional court at Alexandria on 29 March 1999, whereas he was already engaged to appear on the same date in the magistrate's court at Adelaide - see paras [14](1) and [16](3)*(b)* above. I

(2) The respondent's answer to this charge has already been set out in paras [14](1)*(d)* and (3) and [16](3)*(b)* above.

[24] Count 3:

(1) This count relates to the respondent having accepted the brief to appear before Mpati J (see para [11](1)*(b)* and *(d)* above) which J

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required him to be in that Court on 29 April 1999 as well, whereas he was already engaged to appear on that A date in the magistrate's court at Adelaide - see paras [14](1)*(c)* and [16](4) above.

(2) The respondent's answer to this charge has already been set out in paras [11](3)*(a)* and (4), [16](4)*(b)* and [16](6) above.

[25] Counts 4 and 5: B

(1) These counts relate to the respondent's having accepted briefs to appear in the High Court whereas he was already engaged to appear in the regional court on the dates in question - see paras [17] and [18] above.

(2) The respondent's answer to these charges has already been C set out in para [21] above.

I. Charge of failing to return a deposit paid to the respondent by a client after termination of the mandate and non-performance of the services in respect of which the deposit was paid

[26] It is common cause or not in dispute: D

(1) that during May 1999 the respondent was called to the local prison where he was instructed by a Mr Lusawana to appeal against the sentence imposed on the latter in respect of a conviction of murder in the High Court; E

(2) that the respondent received a deposit of R2 500 from Lusawana in respect of the performance of the said mandate;

(3) that shortly thereafter Lusawana withdrew the respondent's mandate;

(4) that the R2 500 accordingly fell to be refunded by the respondent to Lusawana; F

(5) that the respondent failed to repay the deposit to Lusawana, ie until 5 June 2001 (as to which see para [30] below);

(6) that the Eastern Cape Society of Advocates requested the respondent to respond to Lusawana's letter of complaint, dated 9 December 1999 to the effect that, despite several telephonic and written requests after the termination of the respondent's mandate, the latter had failed to refund the deposit of R2 500 (a copy G of which letter was made available to the respondent and which reflected Lusawana's address as Central Prison, Umtata);

(7) that the response of the respondent, dated 11 April 2000, included the following statements: H

> 'Shortly thereafter I was informed telephonically by Mr Lusawana not to proceed with the appeal. I advised him that I would arrange for his deposit to be returned. When I went to Grahamstown prison, I was informed that Mr Lusawana had been transferred to another prison. The prison authorities could however not advise me precisely as to which prison he had been taken. I
>
> Therefor (*sic*), prior to receiving your letter I was not aware at which prison Mr Lusawana was serving his sentence.
>
> I will gladly and immediately return the money handed to me by Mr Lusawana.'

[27] In the founding affidavit filed on behalf of the applicant the following is stated: J

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> '44. It is instructive to note that the respondent does not A address himself in terms to the substance of the complaint lodged by Mr Lusawana and furthermore
>
> 44.1 offers no explanation as to why the money was not immediately refunded;
>
> 44.2 nor what steps were taken to trace the whereabouts of Mr Lusawana.
>
> 45. It is submitted that the respondent is under a legal and ethical obligation to deal with moneys received by him as an advance deposit of fees for work to be performed as trust funds. Accordingly B the respondent is under an obligation to
>
> 45.1 deposit such funds into a separate interest bearing banking account to the credit of his client; and
>
> 45.2 keep proper books of account in respect of such trust accounts.
>
> 46. Inasmuch as the respondent has taken receipt of a deposit paid by his client and/or failed to maintain and operate a trust C account in respect of the deposit paid by Mr Lusawana, the respondent has breached the provisions of s 78 of Act 53 of 1979 and has rendered himself guilty of professional misconduct.'

[28] The respondent's response is as follows: D

> '35. The deposit of R2 500 (hereinafter referred to as ''the deposit'') which I admit I received from Mr Lusawana was an advance payment of part of my fees in his appeal.
>
> 36. The applicant alleges that I have breached the provisions of s 78 of Act 53 of 1979 (hereinafter referred (*sic*) as the ''Attorneys Act'') by receiving the deposit and failing to maintain E and operate a trust account in respect thereof. In this regard, I respectfully draw the above honourable Court's attention to the fact that s 78 of the Attorneys Act imposes certain obligations on a ''practitioner'' and that ''practitioner'' is, in turn, defined in s 1 of the said Act as ''attorney, notary or conveyancer''. I respectfully contend, in the circumstances, that the provisions of F s 78 of the Attorneys Act are not applicable to me in that I am not an attorney, notary or conveyancer. I accordingly deny the applicant's allegation that I have breached the provisions of the said section.
>
> 37. Further, in terms of Rule 7.6.1 of the applicant's ''Uniform Rules of Professional Conduct'', to which I respectfully refer, an advocate may require his fees to be paid in advance. A copy of the said G rule is annexed hereto marked RM3. IAASA [ie the Independent Advocates Society of South Africa, of which the respondent was, at the time, a member] has a similar rule in its ''Code of Professional Conduct and Ethics''. The rules of ethics of both the applicant and IAASA therefore expressly sanction the payment of an advocate's fees in advance. I respectfully submit, in the H circumstances, that there is nothing unethical in an advocate requiring his fees to be paid in advance.
>
> 38. I respectfully contend, further, that if an advocate's fees are paid in advance, the money paid over to

the advocate is his property and no longer the property of the client. This is borne out by the fact that, as far as I am aware, advocates have never been required to keep trust accounts, do not keep trust accounts and do not deposit fees paid in advance into a separate interest-bearing account to the I credit of the client as the applicant suggests I should have done. There is simply no rule which requires an advocate to treat fees paid in advance as trust funds.

39. It is not clear on what basis the applicant contends that I was under ''a legal and ethical obligation to deal with the moneys received'' from Mr Lusawana ''as trust funds''. I respectfully submit that there is no legal or ethical J

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obligation on an advocate to treat fees paid in advance as trust funds and that there was no A obligation on me to deal with the deposit ''as trust funds''.

40. As I mention in annexure JJ159 to the applicant's founding affidavit, after I was instructed by Mr Lusawana not to proceed with the appeal I went to the Grahamstown prison with the express purpose of refunding the deposit to him. I was, however, informed by an official at the said prison that Mr Lusawana had since been transferred to B another prison. The said official could, however, not tell me to which prison Mr Lusawana had been transferred. I respectfully contend that the *onus* was on Mr Lusawana to advise me of his whereabouts. Had he done so, I would have refunded the deposit to him without delay. I assumed that Mr Lusawana would, in due course, contact me and advise me of his new address. He did, however, not do so and I could therefore not refund the deposit to him. C

41. Mr Lusawana has since furnished me with his banking account details and I intend to refund the deposit to him in full.'

[29] It requires to be noted that the respondent's answering affidavit was attested on 19 February 2001.

[30] At the hearing of the application on 14 June 2001 a supplementary affidavit by the respondent, dated 14 June 2001, D was handed in. Para- graphs 3 and 4 thereof read as follows:

'3. I confirm that on 5 June 2001 I paid an amount of R2 500 to Mr Lusawana by depositing same into his bank account. The details are clear from annexure RM4 hereto. E

4. The reason for the delay in the refunding of the amount is due to the fact that when I got the account details of Mr Lusawana my cash flow situation was such that it was impossible for me to make the repayment. As soon as I came into funds, I deposited the amount due.'

J. Charge of accepting instructions direct from a member of the public without the intervention of an attorney F

[31] This count relates to the respondent having acted on the direct instructions of the appellant in the appeal referred to in para [13](1) above. Not only did the respondent, acting on such direct instructions, note the appeal on behalf of the appellant, but he also, subsequent to the striking of the appeal from the roll, filed an application for the reinstatement of the appeal on the roll. The G accompanying supporting affidavit of the client reflects that the services of the respondent were engaged without the intervention of an attorney.

[32] The further contention of the applicant is that the respondent acted in contravention of s 83(1) and/or s 83(8)*(a)*(iv) (*sic*) of the Attorneys Act 53 of H 1979 in that the respondent, for, or in expectation of, a fee, drew up pleadings and performed functions usually reserved for an attorney.

[33] In his answering affidavit the respondent, after admitting that he drafted the notice of appeal, special power of I attorney, notice of motion and the supporting affidavit of the client, continued as follows:

'16. At the time I was acting for the appellant in the appeal in question (hereinafter referred to as ''the appeal'') I was a member of the Independent Association of Advocates of South Africa (hereinafter referred to as ''IAASA''). IAASA is a voluntary society of advocates much like the J

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constituent societies of the advocates of the applicant. IAASA has its own code of professional A conduct

and ethics. Rule 15 of the said code specifically authorises an advocate to accept a brief or instructions (with or without the intervention of an attorney) from any client. A copy of the said rule is annexed hereto marked RM1.

17. The members of IAASA hold the view that it is both lawful and ethical for an advocate to accept instructions directly from a lay client without the intervention of an attorney. At all times material B to this application I held and still hold the same view. The reasons why the members of IAASA and I hold the said view appear from the judgments in *Society of Advocates of Natal v De Freitas and Another (Natal Law Society Intervening)* 1997 (4) SA 1134 (N) (hereinafter referred to as ''the *De Freitas* case'') and *General Council of the Bar of South Africa v Van der Spuy* C 1999 (1) SA 577 (T) to which I respectfully refer. IAASA was the second respondent in the *De Freitas* case. The said reasons are summarised in annexure RM2 hereto. The respondents in the *De Freitas* case have petitioned the honourable Chief Justice for leave to appeal. I have been advised by the Registrar of the Supreme Court of Appeal that the said petition was argued before the Supreme Court of Appeal on 15 February 2001 and that judgment in the D petition has been reserved. Inasmuch as the *De Freitas* case is the subject of an appeal I do not consider same to be binding on me at this stage. If leave to appeal is granted by the Supreme Court of Appeal I will abide by the decision of that honourable Court on the merits. If leave to appeal is refused and the judgment in the *De Freitas* case comes into effect I will abide by the decision of the E Natal Provincial Division of the High Court in that case.

18. In the premises, I contend that I was entitled to accept instructions directly from the appellant in the appeal without the intervention of an attorney. I contend, further, that the functions which I performed in the appeal fall within the scope of the functions which an advocate is entitled to perform. I accordingly deny that I F contravened s 83(1) and/or s 83(8)*(a)*(iv) of Act 53 of 1979 by performing the functions which I performed in the appeal.

19. I certainly did not intend to act improperly or contravene s 83(1) or s 83(8)*(a)*(iv) of the said Act by accepting instructions directly from the appellant in the appeal without the G intervention of an attorney and/or by performing the functions which I performed in the appeal. I still believe that in terms of the law of South Africa I was entitled to accept instructions directly from the appellant in the appeal and perform the functions which I performed in the appeal.'

K. Assessment of the respondent's conduct and determination of the appropriate censure H

[34] At the outset, it should be noted that it is permissible for the Court, when assessing the effect that the respondent's conduct has on the question whether he is a fit and proper person to practise as an advocate, to have regard to the explanations tendered by the respondent for his conduct, either to the applicant when it called for an explanation or in the papers filed by the respondent in the I application. Thus, in *Kekana* at 655D - G and 656B it was held that a practitioner's perjury in resisting an application for his striking-off and the fact that he gave false information to a committee of the Society of Advocates of which he was a member bore on the question whether the practitioner had the personal integrity J

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and scrupulous honesty demanded of an advocate. See, too, Joubert (ed) A *The Law of South Africa* vol 14 (first re-issue) para 269, where the following passage occurs:

'The decisions are not unanimous on the question whether, in an application for the suspension or disbarment of an advocate, the Court is limited to a consideration of the specific charges brought against B him or whether the conduct of the respondent in relation to the application made against him, and the facts emerging from his explanation to the Court, may be taken into account in determining whether he is a fit and proper person to continue to practise as an advocate.

It is submitted that in determining whether an advocate is a fit and proper person to continue to practise, all relevant facts proved should C be taken into account whether they form the subject of specific charges against the respondent or are contained in the respondent's answer. The fact that the Court finds that he has given false evidence is part of the material facts.'

[35] That leads me to pass certain comments on what is demanded of an advocate in the matter of personal integrity and scrupulous honesty. D

(1) In *Swain* at 434H James JP said the following:

'Furthermore, it is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice E could not easily survive if the professions were not scrupulous of the

truth in their dealings with each other and with the Court. The applicant has demonstrated that he is unable to measure up to the required standard in this matter.''

(2) In *Kekana* at 655D - 656F Hefer JA is reported as follows:

'Then there is the matter of the applicant's perjury which the Court *a quo* rightly took into account as an aggravating F feature of the case and which undoubtedly tipped the scale in the decision to strike his name from the roll.

. . .

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 G is a fit and proper person to continue practising. I also support Heher 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.'' H

This is why there is a serious objection to allowing an advocate to continue practising 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 interests 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 I 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 J

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personal integrity and scrupulous honesty are demanded of each of them and, secondly, that a practitioner A who lacks these qualities cannot be expected to play his part.

The applicant has been exposed as precisely such a person in a particularly illuminating way. He gave false information to a committee of the professional society to which he belonged. He committed perjury in his opposing affidavit. And he repeatedly did so again when he testified in Court. His counsel argued in mitigation of his conduct B that all these incidents must be viewed as one ''episode''. I am not sure that I quite understand what counsel tried to convey or how such a view can assist his client. Nor do I accept that the untruths in his replies to the committee of the Bar Council's questions had set him on a course from which he could not retreat. On the contrary, when he received the founding affidavit he should have realised that the time for telling the truth had arrived. He did not do so. When the C matter later went to Court he had another opportunity to make a clean breast. He did not use it. Instead he allowed his counsel to cross-examine witnesses on instructions which to his knowledge were false. Finally he lied to the Court. His lies were premeditated and obviously well rehearsed. That he did so in an attempt to protect his own interests and not in his professional capacity is no excuse. Should he be allowed to continue practising and should he ever as an advocate D find himself in a position where he can prevent a witness from misleading the Court, I have no confidence that he will do so.'

(3) In *Jasat* at 52B (para [12]) Scott JA expressed himself thus:

'[12] This Court has in the past stressed that the profession of an attorney is an honourable one and as such demands ''complete E honesty, reliability and integrity from its members''. (*Vassen v Law Society of the Cape of Good Hope (supra* at 538G).) Similar statements have been made with regard to advocates. (See, for example, *Kekana v Society of Advocates of South Africa (supra* at 655G - H).) But this does not mean that any untruthfulness however trifling will render an attorney unfit to practise and liable to be struck off the roll. As important as the F requirements of honesty, reliability and integrity are, each case must undoubtedly be examined in the light of its own facts and circumstances.'

(4) In *Society of Advocates of Natal and Another v Merret* 1997 (4) SA 374 (N) Howard JP, after quoting the passage from *Swain* set out in (1) above, continued at 383D - G as follows: G

'That judgment was upheld on appeal *sub nom Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A). It is worth quoting from the argument of counsel for the respondent in that appeal (at 786E):

> ''The appellant's lack of truthfulness, apart from anything else, is a fatal barrier to his admission as an advocate. The simple fact seems to emerge that, if the appellant were admitted, the Court could never implicitly trust in or believe what it was told by him from the Bar.'' H

After his performance before Niles-Dunèr AJ on 28 March 1996 and in this Court on 14 February 1997 I could never implicitly trust in or believe what the respondent told me from the Bar, notwithstanding his protestations that he has learnt his lesson and will never repeat what he chooses to call his ''error''.

> The requirement that advocates should be honest and truthful in their dealings with each other and the Court applies equally to attorneys. I (See Lewis *Legal Ethics* (1982) at 11 - 12.) In view of his demonstrable lack of integrity I consider that the respondent's name should be struck from the roll of attorneys.'

[36] It remains to determine what conduct the respondent made himself guilty of, what effect such conduct has on the question whether he is a fit J

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and proper person to continue to practise as an advocate and, if the latter question is answered against the A respondent, what disciplinary action should be taken against him. For this purpose I propose to consider the charges against the respondent *seriatim*. I voice the rider, however, that, whatever the effect of the conduct constituting the basis of a particular charge, it is permissible for this Court to have regard to the totality of the respondent's conduct and the cumulative effect B thereof.

[37] The conduct referred to in para [11] above:

(1) In my judgment, it was not, as the respondent would have it, simply a case of his having failed to advise Mpati J that he was also engaged in the appeal Court on the day in question. I consider that the C unavoidable conclusion is that the respondent did mislead Mpati J and that he did so deliberately - even if it be accepted that he did need to peruse the police docket and consult further with his client before the trial commenced.

(2) The respondent's averment, referred to in para [11](4)*(b)* above, that the fact that he told Leach J that D he was to appear in the criminal matter after tea shows that he had no intention of misleading Mpati J or concealing from him the fact that he had accepted clashing briefs, holds no water. The respondent had not introduced himself to the appeal Judges prior to appearing before them. He was accordingly obliged to tender an explanation of his failure to do so. He therefore had no alternative but to disclose the E fact, integral to his explanation of the said failure, that he had accepted a brief to appear in the criminal trial.

(3) The respondent himself acknowledges that his conduct in accepting clashing briefs was improper and inexcusable. He had not seen fit to clear his acceptance of the clashing brief with Mpati J prior thereto as, he must have known, would have been the proper procedure. F He must also have been aware that, had he disclosed to Mpati J that he was also appearing in the appeal Court, he would immediately have been taken to task and required to account for his actions. The inference is inescapable: by his silence he designedly misled the learned Judge in order to avoid the above consequences. G

(4) That such conduct is deserving of severe censure is not to be gainsaid.

(5) The conclusion must be that the respondent is not a fit and proper person to continue to practise as an advocate.

(6) I am persuaded, however, that the conduct, by itself, was not sufficiently serious to merit an order that the respondent's name H be struck from the roll of advocates, although his suspension from practice (itself possibly suspended) would be justified. However, the transgression is part of the overall picture and contributes to the cumulative effect of all the transgressions.

[38] The conduct referred to in para [12] above:

(1) On the premise that the respondent's version, as set out in I his answering affidavit (see para 12 thereof, quoted in para [12](4) above), is in fact correct, then on his own showing he took a calculated and deliberate decision to lie to, and mislead, the regional court magistrate as to the tenor of his instructions. In short, he wittingly pursued the bogus J

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defence of an alibi and in terms falsely advised the magistrate that the fact of the robbery itself was not in A dispute.

(2) One is constrained, however, to question whether the version set out in the answering affidavit is in fact correct, ie insofar as it reflects that the respondent's instructions from the outset were that the accused had stabbed the complainant in self-defence. The version is irreconcilable with the explanation tendered by the B respondent to the magistrate at the time - as to which see para [12](1)*(j)* above. The respondent has not seen fit to explain this glaring contradiction. It seems that he is hoist with his own petard: either he lied to the magistrate when he tendered that explanation or he is lying in the version contained in his answering affidavit. The latter, on a preponderance of probability, appears to be C the position: having regard to the detail contained in the explanation given to the magistrate, there was an initial consultation with the accused at the respondent's office and it was then that the respondent secured the bald instructions that the accused denied that he robbed the complainant; the subsequent consultation at court, as conveyed in the explanation, ie after the close of the State D case, ties up with the accused's statement to the magistrate that it was at the court that he consulted with and gave the respondent the instructions which, in substance, his evidence in court echoed.

(3) I further fail to understand the respondent's denial (contained in para 10 of his answering affidavit, quoted in para [12](4) above) that he cross-examined witnesses and presented a E version of events, the veracity of which he failed to establish or knew to be in conflict with his instructions. On the premise of the explanation he gave to the magistrate at the time (ie that until the close of the State case his instructions were merely that the accused denied the charge of robbery) he did present a case, including the acceptance thereof that a robbery took place, the veracity of which F he had not established. On the premise of the version set out in his answering affidavit, he again presented a case, including the acceptance referred to, that conflicted with his instructions.

(4) An aggravating feature is the circumstance that, when required by the applicant to respond to the magistrate's complaint concerning his conduct of the case, the respondent dished up a mendacious G explanation: the accused's instructions to him were that he knew nothing about the alleged robbery and the accused's subsequent evidence took him by surprise (see para [12](2) above).

(5) The respondent's conduct in lying in his answering affidavit or, alternatively, in lying to and misleading the regional court H magistrate can only be veiwed in the most serious light.

(6) An application of the approach set out in the authorities referred to in paras [34] and [35] above leads inexorably to the finding that the respondent is not a fit and proper person to practise as an advocate and that the proper censure is that his name be struck from the roll of advocates. I

[39] The conduct referred to in para [13] above:

(1) The conduct of the respondent in lying to an officer of the Court and, through him, to the Court itself cannot, in my judgment, be put J

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down, as Mr *Daubermann* (who appeared for the respondent) sought to argue, to an act of impetuosity. The A respondent had received earlier warning that the Judges sitting in the appeal were seeking to investigate his conduct in the matter of the appeal. He knew that he had to answer for his conduct. It was in an endeavour to avoid that obligation that he resorted to the mendacity in question. At no stage did he seek to rectify his lie. It is a fair inference that, had Mr Henning not observed his vehicle in town and B thereby discovered his mendacity, the lie would not have been uncovered and the respondent would have been content with that situation.

(2) Even if the lie was born of a measure of impetuosity, the real danger exists, having regard to the other instances where the C respondent has been untruthful, that the respondent is a man

readily given to resorting to the telling of lies where he perceives that this would be to his advantage or that of a client. Using the phraseology in one of the cases referred to earlier, one can have no confidence that he will not again lie to, or mislead, a Court, or be a party to a client of his doing so. D

(3) The respondent's conduct is exacerbated by the following features:

(a) the fact that his conduct in the matter of the appeal in question fell short of what is required of a legal practitioner and he was legitimately called upon to explain his conduct;

(b) his failure, despite his undertaking to do so, ever to furnish the explanation of his conduct that Erasmus J directed he E should give;

(c) his explanation as to why he resorted to the lie so as to avoid having to attend Court to explain his conduct merely compounded his conduct; in short, his averment that he considered that Erasmus J required his attendance in Court so that he could be belittled in open Court was a scurrilous one that ill-behoves an F officer of the Court.

(4) The remarks in para [38](5) and (6) above are *mutatis mutandis* of application. Again, the appropriate censure is that the respondent's name be struck from the roll of advocates.

[40] The conduct referred to in para [14] above:

(1) I have little difficulty in endorsing the conclusion of the G magistrate of Adelaide that the respondent's explanation that he confused the matter in question with another matter in which he did indeed intend to seek the recusal of the magistrate is to be rejected as false and that the respondent had employed a ploy to avoid his self-created predicament resulting from his having accepted clashing H briefs:

(a) In the first place, it is difficult to see how the alleged confusion could have arisen at all; the question immediately arises: what did the respondent think would happen that day to the matter in question? I

(b) Secondly, the magistrate correctly draws an adverse inference from the fact that neither on 29 April 1999 did the respondent tell the prosecutor of the alleged confusion, nor on 11 June 1999 did he so advise the magistrate; on both occasions he merely intimated that he would no longer be seeking the magistrate's recusal. J

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(c) Thirdly, it is not in dispute that on 29 March 1999 when, at 11h00, the prosecutor contacted the respondent at the A Alexandria court the latter was advised that he was to attend at the Adelaide court at 14h00 to move his application for the recusal of the magistrate in the matter in question; similarly, it was later on that day agreed between the prosecutor and the respondent that the matter would be postponed to 29 April 1999 for the specific purpose of the hearing of the application for recusal. In these B circumstances there was simply no room for the alleged confusion.

(d) Fourthly, the respondent has not seen fit to tender any explanation of the facts detailed in *(b)* and *(c)*. C

(2) In the circumstance the charge that the respondent lied to an officer of the court and, through him, to the court itself must be sustained.

(3) It does not stop there. In seeking, in his answering affidavit, to persist in the false allegation of the alleged confusion, the respondent has been untruthful to this Court. D

(4) Again, the remarks in para [38](5) and (6) above apply *mutatis mutandis.*

[41] The conduct referred to in para [15] above:

(1) The respondent admits the charge in that, as appears from the extract from his answering affidavit (paras 12 and 13 thereof, quoted in para [12](4) above), he concedes that he acted

unprofessionally by E failing to take full and proper instructions from his client prior to the commencement of the trial in question and in intentionally misleading the court as to the nature of the accused's defence. F

(2) The respondent has, however, not sought to take this Court into his confidence and set out precisely in what respects his taking of instructions from his client was deficient. To the extent that he seeks to convey that the instructions he received were restricted to a statement by the client that he stabbed the complainant in self-defence, I refer to the comments in para [38](2) above and reiterate the finding, made on a balance of probabilities, that when G the respondent embarked on the defence of the accused he did so merely on the strength of instructions that the client denied having committed the robbery.

(3) I further repeat the comments in para [38](3) above, which further sustain the charge that the respondent failed to act in the best interest of his client. H

(4) That the respondent could have embarked on the defence of a client in a regional court, where the charge was the serious one of robbery, merely on the strength of instructions that the client denied the charge (or even on the strength of instructions merely that the client stabbed the complainant in self-defence) is simply astounding. It reflects such a fundamental breach of the duty that a practitioner I owes to his client, and such a grave dereliction of that duty, that no other conclusion is possible but that the respondent is unfit to practise as an advocate and that his name should be struck from the roll of advocates.

[42] The conduct referred to in para [16] above: J

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(1) The respondent concedes that his conduct in not arriving at court or in arriving late on days when matters in which he was to A appear had been set down for hearing was improper, as indeed it was. It was not only disruptive, if not subversive, of the administration of justice, but also constituted extreme discourtesy and a disservice to the court, the prosecutor, his client and the witnesses involved, and was indeed contemptuous of the court. B

(2) The conduct was aggravated by the respondent's admitted failure to apologise to the court or to tender any explanation for his non-arrival or late arrival. This, too, was extremely discourteous and reflects an attitude towards the court that cannot be countenanced.

(3) The statement by the respondent, made with reference to his failure to appear in the Adelaide court on 29 April 1999, viz that C he was mindful of the view of High Court Judges that matters in their Courts take precedence (see para [16](4)*(b)* above), evokes two comments:

(a) I know of no Judge who holds that view;

(b) even had the respondent's perception of the views of Judges been correct, that would in no way have justified his D conduct (without so much as a by your leave or any contact with the magistrate's court in which he was due to appear) in simply not arriving at that court on the appointed days.

(4) The respondent's conduct, in my view, renders him unfit to practise as an advocate. E

(5) The submission that the repetitive nature of his transgressions requires that his name be removed from the roll of advocates is not without merit. I am persuaded, however, that, had this charge been the only one faced by the respondent, the exigencies of the matter would have been met by an order suspending him from practice for a F period. Again, however, the conduct contributes to the overall picture and to the cumulative effect of the whole of the respondent's conduct.

[43] The conduct referred to in paras [17] to [21] above:

(1) I am not aware of the alleged practice (referred to in the extract from the respondent's answering affidavit, quoted in para G [21] above) in terms of which High Court matters are accorded precedence over matters in the district or regional magistrate's court.

(2) The comments in para [42](4) and (5) above apply *mutatis mutandis* to the conduct presently under discussion.

[44] The conduct referred to in paras [22] to [25] above: H

(1) The rule against an advocate accepting clashing briefs is a time-honoured and fundamental one - for obvious and understandable reasons.

(2) The respondent concedes that his indulging in the practice of accepting clashing briefs was improper and inexcusable, as indeed it I was.

(3) The alleged exigencies of the matters which were the subject of the later briefs, which clashed with briefs already held by the respondent, do not impress me. They do not, in my judgment, ameliorate the respondent's conduct.

(4) The comments in para [42](4) and (5) above apply *mutatis mutandis.* J

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[45] The conduct referred to in paras [26] to [30] above: A

(1) I do not propose entering into the debate concerning the questions whether it was improper for the respondent to have accepted a fee in advance for work to be performed by him, or whether the deposit he received from Lusawana constituted trust funds.

(2) It is, correctly, not in dispute that on the termination of his mandate, prior to his having performed the services that he was engaged B to perform, the respondent became obliged immediately to refund the whole of the deposit to Lusawana.

(3) There is no justification for his failure to do so until 5 June 2001:

(a) I am not impressed by the respondent's claim that he was unable to ascertain from the local correctional facility C details of the prison to which Lusawana had been transferred; he does not say to which official he spoke; there must surely have been a record of the transfer at the local prison; with a little perseverance the respondent could, and would, have obtained the information he required. D

(b) As a result of the correspondence that passed between the Society of Advocates and the respondent (see para [26](6) and (7) above) the latter had become aware, by 11 April 2000, of where Lusa- wana was being detained; that notwithstanding, and despite the fact that Lusawana's grievance had been raised with him and despite his statement that he would gladly and immediately E return Lusawana's money to him, the matter was not attended to.

(c) Despite his statement (in para 41 of his answering affidavit, quoted in para [28] above) that Lusawana had since furnished him with his banking details and that he intended to refund the deposit in full (which affidavit was attested on 19 February 2001), the respondent was still not galvanised into action. F

(d) His statement in his supplementary affidavit (quoted in para [30] above) that lack of funds prevented him from repaying Lusawana does not, and cannot, furnish justification for his conduct.

(4) The last-mentioned statement further means no more and no less than that the respondent utilised funds to which he was not G entitled and he thereby placed himself in the position where he could not fulfil his legal and moral obligation to his former client.

(5) His conduct was improper and is sufficiently deserving of censure for it to be found that he is not fit to practise as an advocate. An appropriate censure would be an order suspending him from practice for H a period. Again, however, the conduct contributes to the cumulative effect of the whole of his conduct.

[46] The conduct referred to in paras [31] to [33] above:

(1) The Supreme Court of Appeal has now given judgment in the '*De Freitas* case', referred to by the respondent in para 17 of his answering affidavit (quoted in para [33] above). It is I reported *sub nom De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA) (2001 (6) BCLR 531). It was held, *inter alia,* that leave to De Freitas (an advocate and member of IAASA) to appeal against a decision of the Full Bench of Natal, in terms of which the rule prohibiting an J

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advocate from accepting a brief or instructions from a client without the A intervention of an attorney was sustained and it was held that disobedience by an advocate of the rule amounted to unprofessional conduct, should be refused.

(2) It follows that the respondent's conduct in accepting instructions from, and performing services for, the client in question without the intervention of an attorney must be found to have been B unprofessional.

(3) I am not persuaded that the fact that at the time of the respond- ent's transgression the decision of the Full Bench in *De Freitas* was, as it were, the subject of an appeal is mitigatory of the respondent's conduct. As Mr *Buchanan* for the applicant put it, the respondent was not entitled to ignore the decision of the Full Bench and did so at his peril. C

(4) In the light of the other features mentioned by the respondent, however, I am not persuaded that the respondent's infraction was a serious one. Whilst it nevertheless would justify a finding that the respondent is not fit to continue to practise as an advocate, I would not have thought that a censure more severe than a suspension from practice (itself possibly suspended) would have been D warranted. Again, however, the conduct contributes to the cumulative effect of the whole of the respondent's conduct.

[47] (1) I place on record that I have given consideration to Mr *Daubermann's* arguments:

(a) that the respondent's papers contain an apology for his conduct, and he has expressed remorse therefor; E

(b) that the applicant was guilty of delay in taking action against the respondent, that, had the applicant pulled the respondent up at an earlier stage, later transgressions would probably not have taken place; F

(c) that the respondent has, since the date of the latest conduct which is the subject of a charge faced by him in these proceedings, not been guilty of any further transgressions, as is evidenced by the fact that no subsequent conduct has been the subject of a charge of misconduct against him; he has therefore demonstrated his reformability. G

(2) I am unable to uphold the submissions:

(a) As to the respondent's intimations of remorse, the answer thereto is a two-fold one: firstly, while remorse, if genuine, is a mitigating feature, the nature of and the circumstances surrounding the transgressions which have been established against a H practitioner may nevertheless be such that he merits the severest censure this Court can impose, and I am persuaded that the present is such a case; secondly, the genuineness of the respondent's professed remorse is somewhat tainted by the feature, as appears elsewhere in this judgment, that even in these proceedings he has not I been completely frank and open with this Court.

(b) I am unpersuaded that it lies in the respondent's mouth to contend that his moral blameworthiness in respect of later transgressions is lessened by the alleged delay on the part of the applicant to take action against him in respect of earlier transgressions; J

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moreover, by way of illustration, it may be pointed out, firstly, that the earliest transgression laid at the A respondent's door (ie his conduct in and about the appeal before Erasmus J and Mpati J, including his lie to Mr Henning and, through him, to the Court) was in fact taken up with him by the Registrar of this Court and yet the later transgressions followed and, secondly, the respondent persisted up to 5 June 2001 in his unprofessional conduct in failing to refund Lusawana's money to him. B

(c) The comments in *(a)* and *(b)* apply *mutatis mutandis* to the fact that no conduct on the part of the respondent subsequent to that which is the subject of the present proceedings has been invoked by the applicant against him. It would also be apposite to quote the following passage in *Cigler* at 358D - E: C

'It was argued in the instant case that the Court must look at the respondent's present state. He has had his shock and he can now no longer be said to be a person who must be disbarred. I do not think that the Court should, in coming to a decision as to his D fitness, consider him in his present situation only. I think it is necessary for the Court to take all the facts into consideration and then to decide whether he is a fit and proper person to continue practising as an advocate. If he is not such a person then the Court must remove him and so guard against the abuse of its officers and ensure the integrity of the administration of justice. In this case the Court has considered the seriousness of the transgressions as well as the mitigation.' E

I repeat that, in my judgment, the respondent is not a fit and proper person to practise as an advocate and that he should be disbarred.

L. Costs

[48] Mr *Daubermann,* correctly, did not dispute that the respondent should be ordered to pay the applicant's costs (a F concession which, he intimated, would still operate even if the order of the Court was only one suspending the respondent from practice as an advocate), or that such costs should include the costs of two counsel.

M. Orders G

[49] (1) The name of the respondent is struck from the roll of advocates.

(2) The respondent is ordered to pay the applicant's costs, such costs to include the costs occasioned by the employment of two counsel.

Jones J concurred. H

Applicant's Attorneys: *Wheeldon, Rushmere & Cole*, Grahamstown. Respondent's Attorneys: *Basson & Mili.*

A