



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 672/2021

In the ex parte application:

GAONE JACK SIAMISANG MONTSHIWA

APPLICANT

Neutral Citation: *Gaone Jack Siamisang Montshiwa (Ex Parte Application)*

(Case no 672/2021) [2023] ZASCA 19 (3 March 2023)

Coram: DAMBUZA ADP, VAN DER MERWE and NICHOLLS JJA and
CHETTY and SIWENDU AJJA

Heard: 18 November 2022

Delivered: 3 March 2023

Summary: Application for leave to appeal — section 17(2)(d) of the Superior Courts Act 10 of 2013 — leave to appeal against a decision of two judges sitting as court of first instance — referred for oral argument — order refusing leave to appeal by single judge — Court invoking inherent powers to consider the application — application dismissed with costs.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Olivier J and Mbhele J, sitting as court of first instance):

The application is dismissed with costs.

JUDGMENT

Siwendu AJA (Van der Merwe JA concurring):

[1] The applicant, Mr Montshiwa sought to be admitted by the North West Division of the High Court, Mahikeng (the high court) as a legal practitioner in terms of s 24 of the Legal Practice Act No 28 of 2014 (LPA).¹ A practice has developed in certain Divisions of the high court that matters concerning the admission of legal practitioners are heard by two judges. Over a sustained period, Mr Montshiwa had made disparaging allegations against the majority of the judges of the high court. As a result, the Judge President of the high court specially constituted a full bench comprising of judges from outside the division to hear his application for admission.²

[2] The facts are briefly that on 1 September 2014, Mr Montshiwa entered into a contract of articles for five (5) years with Mr Lavelle Winston Vere of Vere

¹ Section 24(1) provides:

‘A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.’

² Section 14(1)(a) of the Superior Courts Act 10 of 2013 provides;

‘Save as provided for in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine.’

Attorneys as his principal³ while studying towards his LLB (the first contract). He resigned from the firm after a period of a year and 11 months. The departure was not on good terms. He entered into a contract of articles with Moetsi Maredi Attorneys Inc, and Mr KA Moetsi was his new principal (the second contract).

[3] The first contract was registered in terms of s 5(1) of the Attorneys, Notaries and Conveyancers Act 29 of 1984 with the then Law Society of Bophuthatswana under contract No. 24/2014 (Bophuthatswana)⁴. The second contract, regulated by the Attorneys Act 53 of 1979 (AA) as amended, was registered with the Law Society of Northern Provinces on 17 May 2017 under contract number 1531/2017, approximately 9 months after its conclusion.

[4] It bears mentioning that under the AA, unlike under the LPA, where articles were not registered within two months of the commencement of service as required by s 5(3) of the AA, a court had a discretion under s 13(2) to condone an irregular service performed prior to registration, provided the service was rendered under a valid contract of articles as defined in s 1 of the AA⁵. To ensure continuity and a recognition of the unregistered period of service, an applicant had to register the contract together with the cession of articles within two months of commencement in terms of s 11(1) of the AA. Furthermore, a principal had an obligation to inform the Law Society in writing of the cancellation, abandonment or cession of the contract.

[5] Mr Montshiwa left the employ of Moetsi Maredi Attorneys Inc. in March 2018. At the time of his application for admission, the LPA had come into effect,

³ Mr Montshiwa matriculated from Mascom Training College in 2010 and thereafter enrolled for a Bachelor of Laws (LLB) at the University of South Africa (Unisa). He also applied for a certificate of full exemption in terms of section 7(1)(e) of Act 61 of 1995, which was issued with effect from 1 January 2011.

⁴ That Act has since been repealed by section 100 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

⁵ *Ex Parte Gird (Prokureursorde, Transvaal, Toetredend)* SA 1985 (3) SA 514 (T); *Ex Parte Singer: Law Society, Transvaal, Intervening* 1984 (2) SA 757 (A)

the upshot being that s 24⁶ read with s 26 applied to the requirements for his admission. These provisions prescribe the requirements for admission and enrolment of legal practitioners in the Republic. They include South African citizenship, minimum academic qualifications, fitness for admission as a legal practitioner, and the necessary practical vocational training as a candidate legal practitioner. It is the last three requirements that became contentious in relation to Mr Montshiwa.

[6] In his application for admission as a legal practitioner Mr Montshiwa sought the following order in the high court:

‘1. Joinder of the two contracts of articles registered with Law Society of Bophuthatswana under article number 24/14 and the Law Society of the Northern Provinces under the registration number 1531/2017;

Condonation for the three (3) years and seven (7) months service of period for articles.’

This order was sought on the basis that the two contracts of articles of clerkship covered the period prescribed to qualify for admission as a legal practitioner. According to Mr Montshiwa the contract that he concluded with Mr Vere was registered with the Law Society on 2 September 2014 and was interrupted when he resigned from Mr Vere’s employment on 5 August 2016. The second contract was concluded with Mr Moetsi on 6 August 2016 and was registered with the Law Society ‘within two months’ of the date of conclusion thereof. According to Mr Montshiwa Mr Vere refused to sign the cession of the first contract to Mr Moetsi, hence there was no evidence in relation to the relevant period as to whether he was a fit and proper person for admission as a legal practitioner.

⁶ Section 24(2) provides:

‘The High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she- (a) is duly qualified as set out in section 26; (b) is a – (i) South African citizen; or (ii) permanent resident in the Republic; (c) is a fit and proper person to be so admitted; and (d) has served a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules.’

[7] The high court found that Mr Montshiwa had failed to explain certain discrepancies regarding the dates on which his contracts of articles of clerkship were concluded. It also was not satisfied that Mr Montshiwa had met the requirement for a structured work course during the period of serving articles or 12 months thereafter. The high court found that on the evidence Mr Montshiwa was not a fit and proper person to be admitted as a legal practitioner.

[8] For these reasons on 3 September 2020, in a judgment by Olivier J (Mbhele J concurring), the high court dismissed Mr Montshiwa's application for admission. Dissatisfied with the outcome, he approached the high court for leave to appeal, which was similarly dismissed. The record shows that on 29 March 2021, Mbhele J, solely considered the application for leave to appeal and refused it in a judgment delivered on 31 May 2021. The dismissal of the application for leave to appeal led to a petition to this Court.

[9] On 26 August 2021, the application was referred for oral argument in terms of s 17(2)(d)⁷ of the Superior Courts Act 10 of 2013 (the Superior Courts Act). Mr Montshiwa was directed to address the Court on the merits of the appeal. In addition, at the request of the Judges who considered the petition, the Registrar despatched a directive to the Legal Practice Council (the LPC) to make representations on the merits of the application. At the hearing of the application, counsel representing the LPC referred to the fact that the court that dismissed the admission application was not constituted in the same manner as the court that heard and dismissed the application for leave to appeal. He argued that the application was not properly before this Court.

⁷ Section 17(2)(d) provides that:

'The judges considering an application referred to in paragraph (b) may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.'

[10] Thus, the controversy is about whether there is ‘a valid decision’ refusing leave by the high court within the contemplation of the Superior Courts Act, and whether the application is properly before this court. Put differently, it is whether the denial of the leave to appeal by Mbhele J, sitting as a single judge, rendered her decision and order a nullity, and whether, as a consequence, this Court lacks the jurisdiction to consider the application. This, in turn, casts a shadow of doubt on the validity of the directive issued on 26 August 2021 inviting Mr Montshiwa to address it in terms of s 17(2)(d).

[11] The right to appeal to this Court is not automatic, and is regulated by ss 16 and 17 of the Superior Courts Act. Audience before this Court on appeal is predicated ‘upon leave having been granted’ by the court first seized with the matter or by this Court.⁸ Principally, s 16(1)(a)(ii) states that an appeal against the judgment of any Division as a court of first instance lies with this Court if the court consisted of more than one judge. The provisions in s 17 apply to evaluating whether leave to appeal should be granted.

[12] Section 17(1) of the Superior Courts Act informs the challenge before us and states that ‘the judge or judges’ who heard the case at first instance may only grant leave to appeal if they are of the opinion that the appeal would have reasonable prospects of success, or that there is some other compelling reason why the appeal should be heard. The constitution of the high court that presided over the application for leave is determined by s 17(2)(a), which reads:

‘Leave to appeal may be granted by the *judge or judges* against whose decision an appeal is to be made or, if not readily available, by any other *judge or judges* of the same court or Division.’ (Emphasis added.)

⁸ Section 16(1).

[13] Section 17(2)(d) prescribes the constitution of the court which may validly consider an application for leave to appeal. The section bestows competence on ‘a judge or judges.’ The conclusion that the application for leave to appeal heard in terms of s 17(2)(a) is to be heard by the same number of judges that heard the main application is fortified by analogy of s 14(5) of the Superior Courts Act that applies to matters heard by a full court by virtue of s 14(6). Section 14(5) reads:

‘(5) If, at any stage during the hearing of any matter by a full court, any judge of such court is absent or unable to perform his or her functions, or if a vacancy among the members of the court arises, that hearing must –

(a) if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such remaining judges; or

(b) if the remaining judges do not constitute such a majority, or if only one judge remains, be commenced *de novo*, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges or of the one remaining judge as the decision of the court.’

[14] The provision provides support for the conclusion that where a matter is heard by a full bench (two judges), leave to appeal must be determined a court that is constituted in the same manner. Importantly, in *S v Gqeba*,⁹ this Court held that if a court is not properly constituted, the proceedings before that court constitute a nullity.¹⁰ Most recently, in *Matamela v Mulaudzi*¹¹ the high court granted leave to appeal to this Court when special leave should have been sought by way of application to this Court. Answering an invitation to exercise its inherent jurisdiction, the court, referred to another decision by this Court in

⁹ *S v Gqeba & Others* [1989] ZASCA 60; 1989 (3) SA 712 (A). After one of the assessors was relieved from duty and the appeal, the court set aside a conviction and sentence on account of the fact that the judgement handed out was not properly authorised by the section.

¹⁰ See also *S v Malindi & Others* [1989] ZASCA 114; 1990 (1) SA 962 (AD); [1990] 4 All SA 433 (AD).

¹¹ *Matamela v Mulaudzi* [2022] ZASCA 71.

Tadvet Industrial (Pty) Ltd v Anthea Hanekom & Others,¹² and held that the decision of the high court was a nullity. It refused to entertain the appeal.

[15] There can be no doubt that an improperly brought appeal will have repercussions for an applicant who wants to have his case finally determined. He may need to re-approach the high court for proper leave to appeal and apply for condonation. Given the unfortunate history alluded to above, it is not permissible for this Court to deal with the matter in terms of s 17(2)(e)¹³ of the Superior Courts Act. This provision does not stand alone and cannot be relied upon to leapfrog the requirement for a valid judgment or order, a precondition for a leave to appeal. Doing so would be antithetical not only to the Superior Courts Act but to the jurisprudence of this Court.

[16] The point of departure is whether despite the nullity of the decision by the high court, this Court has an inherent power under s 173¹⁴ of the Constitution to deal with the application for leave to appeal. The judgment by my colleague Dambuza ADP stresses that the Constitution gives this Court the power to regulate its processes and we should do so to prevent prejudice to Mr Montshiwa, as the matter would be ultimately referred back to it. It moves from the premise that an application for leave to appeal engages the ‘procedures and processes’ of this Court.

¹² *Tadvet Industrial (Pty) Ltd v Anthea Hanekom & Others* [2019] ZASCA 19 para 8.

¹³ Section 17(2)(e) provides:

‘Where an application has been referred to the court in terms of paragraph (d), the court may thereupon grant or refuse it.’

¹⁴ Section 173 of the Constitution of the Republic of South Africa, 1996, (Constitution) provides:

‘The Constitutional Court, Supreme Court of Appeal and High Courts each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.’

[17] The first hurdle is the subsidiarity principle in *My Vote Counts NPC v Speaker of the National Assembly*¹⁵ which prohibits the direct reliance on the Constitutional provision where national legislation has been enacted to give effect to a right. This Court functions in terms of the Superior Courts Act, the national legislation envisaged by s 171¹⁶ of the Constitution which prescribes (a) the jurisdictional requirements; (b) the process and (c) the threshold for granting an application for leave to appeal to this Court. Secondly, in *New Clicks v Minister of Health*¹⁷ (*New Clicks*) this Court, affirmed that although ‘like the Constitutional Court and High Courts, [it] has the inherent power to protect and regulate its own process, that “does not extend to the assumption of jurisdiction not conferred upon it by statute.”’¹⁸ The circumstances in *New Clicks* which involved ‘a constructive refusal’ to render a judgment by a lower court are not comparable. The pathway through which the provisions of the Superior Courts Act can be overlooked to confer this Court’s jurisdiction absent a valid judgment by the high court is not defined.

[18] Significantly, several decisions by this Court consistently affirm that absent leave being granted, it lacks the jurisdiction to entertain an appeal.¹⁹ The decision in *Absa Bank Ltd v Snyman*²⁰ (*Absa Bank*) illustrates this point. There, the court confirmed another decision by this Court in *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd*²¹ (*Newlands*) where under the rubric

¹⁵ *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC) para 54: ‘. . . where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.’

¹⁶ Section 171 of the Constitution provides:

‘All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.’

¹⁷ *Pharmaceutical Society of South Africa and Others v Minister of Health and Another; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang and Another* [2004] ZASCA 122; 2005 3 SA 238 SCA.

¹⁸ *Ibid* para 19.

¹⁹ Section 16(1) of the Superior Courts Act; see also, *Absa Bank Ltd v Snyman* [2015] ZASCA 67; [2015] 3 All SA 1 (SCA); 2015 (4) SA 329 (SCA) (*Absa Bank*) at para 10.

²⁰ *Ibid Absa Bank*.

²¹ *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* [2015] ZASCA 25; 2015 (4) SA 34 (SCA) (*Newlands*) paras 12-14. The Court in *Newlands* quoted Hefer JA in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A).

of an ‘inherent reservoir of power to regulate its procedures in the interest of proper administration of justice’ the court deliberated on whether it may entertain a matter not the subject of the order granting leave to appeal. Confirming the often-cited decision of this Court in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*²² (*Moch*), it held that such a power does not extend to an assumption of jurisdiction not conferred upon it by statute. The upshot of these decisions, which have not been set aside, is that this Court’s inherent power to regulate its affairs, condone an irregularity or address prejudice predominantly applies to matters regulated by its rules and not to matters not expressly provided by the governing statute. Even there, the power will be exercised sparingly. In this instance, the prejudice Mr Montshiwa will suffer is partly self-created as it should have been evident to him at the hearing of the application for leave to appeal that the court was not properly constituted.

[19] In sum: this Court could only have jurisdiction in terms of s 17(2)(b) of the Superior Courts Act. The jurisdictional requirement is that leave was refused by a properly constituted court, in fact or constructively. As there is no dispute that there was no constructive refusal of leave and that the order purporting to refuse leave is a nullity, the necessary jurisdictional requirement is absent. The improper composition of the court dealing with the leave to appeal renders the judgment a nullity, which cannot be sanctioned. The same applies to the order referring the application for leave to appeal for oral argument.

[20] In the result I would have struck the application from the roll with costs.

²² *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (SCA).

N T Y SIWENDU
ACTING JUDGE OF APPEAL

Dambuza ADP (Nicholls JA and Chetty AJA concurring)

[21] I have read the judgment prepared by my colleague Siwendu AJA. Although I agree that the proceedings in the application for leave to appeal were irregular and the consequent order of the high court is a nullity, I do not agree that Mr Montshiwa should be sent back to the high court for a fresh application for leave to appeal. In my view this is a case in which this court should exercise its inherent powers under s 173 of the Constitution to regulate its process by considering the merits of the application for leave to appeal and, if it deems appropriate, the appeal, and make a decision thereon.

[22] Section 17 of the Superior Courts Act regulates the process of approaching this court to appeal against a judgment of a Division of a high court. The section builds upon the provisions of s 16(1)(a)(ii) of the same Act which confers appeal jurisdiction on this court and regulates the process of exercising the right of appeal as follows:

‘(a) an appeal against any decision of a Division as a court of first instance lies; upon leave having been granted –

(i) . . .

(ii) . . . if the court consisted of more than one judge, to the Supreme Court of Appeal.

[23] Section 17(1) prescribes the threshold that must be met for an appeal to be heard by this court. Section 17(2)(b), in terms of which Mr Montshiwa approached this court, provides opportunity to an applicant whose application for

leave to appeal under s 17(1) has been refused, to approach this court for the same purpose.

[24] The purpose for the threshold and procedure laid out in s 17 is to regulate the appeal process in this court for the court's benefit, by ensuring that this court's resources are not wasted on meritless appeals or cases that are not sufficiently important to occupy the attention of this court. Hence the following remarks by Chaskalson CJ in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (New Clicks South Africa)*:²³

'The granting of leave to appeal by an appeal court in such circumstances [where there had been unreasonable delay in rendering a judgment on an application for leave to appeal] does not cause any prejudice. If the application for leave had been dismissed by the lower court the litigant would have been entitled as of right to apply to the appeal court for leave. The only prejudice caused is to the appeal court which will have been burdened with an unnecessary application in cases where the lower court would have given leave in any event'.²⁴

[25] The underlying principle is that courts are bestowed with inherent powers to administer justice, including avoidance of multiple fruitless court proceedings between the same parties. Under the first judgment Mr Montshiwa must return to the high court for that court to comply with the relevant statutory prescriptions. Whatever judgment the reconstituted high court will render, the matter will, in all probability, return to this court, either for a further application for leave to appeal or for an appeal. All this in circumstances where Mr Montshiwa did comply with the requirements under the Superior Courts Act in relation to the application for leave to appeal process. It seems to me that grave injustice will result from such a judgment, and the waste of both his and the courts' resources will be completely unjustified.

²³ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC).

²⁴ *Ibid* para 70.

[26] Recently this court has exercised its authority to override irregularities occasioned in the application for leave to appeal process. Apart from *New Clicks South Africa*, in *National Credit Regulator v Lewis Stores (Pty) Ltd*²⁵ it did so in circumstances where leave had incorrectly not been sought from the court of first instance. Instead, leave had been sought and granted by this Court on the basis that the applicant had to prove special circumstances justifying the grant of leave to appeal. The correct standard was that of reasonable prospects of success.²⁶ This court held that to strike the appeal from the roll, only for the appellants to retrace their steps to the high court for leave to appeal and, if refused leave, back to this Court for a repeat hearing of an issue that had been fully argued would be a gross technicality and waste of resources.

[27] Indeed, as illustrated in the following judgments of this court, the courts' reservoir of power to regulate its process and procedure in the interests of proper administration may not be used by the court to appropriate to itself jurisdiction that is not conferred to it by statute or where a statute grants exclusive jurisdiction to another court.²⁷ In *Moch* this Court refused to hear an appeal against a provisional sequestration order because no leave had been sought from the court which granted that order. In addition, s 150 of the Insolvency Act 24 of 1936 precluded an appeal against a provisional sequestration order. In this case however, leave to appeal was sought by Mr Montshiwa in the court of first instance, and the appeal jurisdiction of this Court is not excluded in respect of the subject of the dispute between the parties.

[28] This application is also distinguishable from *Matamela v Mulaudzi*²⁸ in a number of respects. In that case the full court had removed the appeal from its

²⁵ *The National Credit Regulator v Lewis Stores (Pty) Ltd* [2019] ZASCA 190; 2020 (2) SA 390 (SCA)

²⁶ *Ibid* para 58.

²⁷ *Snyders v De Jager* [2015] ZASCA 137; 2016 (5) SA 218 SCA.

²⁸ See footnotes 11 and 23 of the first judgment.

court roll, leaving in place only the order of eviction granted by the magistrates court. The appeal was only against the ruling removing the appeal from the full court roll. The magistrates court order could not be appealed in this Court. Further, in that case this court did not have before it an application for leave to appeal. In addition, the appellant was at fault in having brought an application for leave to appeal in the incorrect court.

[29] In *Newlands*²⁹ the high court had granted leave to appeal on only one of two issues in respect of which leave had been sought. On appeal the appellant urged this court to consider its submissions on the second issue as well. This Court refused to do so on the basis that its jurisdiction on appeal was limited to the grounds on which leave to appeal has been granted. Importantly, no application for leave to appeal had been brought in the court of first instance on the second issue.

[30] In *Social Justice Coalition and Others v Minister of Police and Others*³⁰ there had been a delay in the granting of a relief by the Equality Court, although the court had already given a judgment and a declarator that a system employed by the SAPS to allocate human resources in the Western Cape unfairly discriminated against black and poor people. The applicants had also sought orders that the Provincial Commissioner of Police had the power to determine the distribution of police resources between stations within the province. The Equality Court refused to grant the full extent of the order sought on the basis that it did not have sufficient evidence on that aspect. It then postponed the hearing on the remedy to a date that was to be arranged between the parties. In the intervening appeal the Constitutional Court distinguished the court order granted

²⁹ See footnote 21 above.

³⁰ *Social Justice Coalition and Others v Minister of Police and Others* [2022] ZACC 27; 2022 (10) BCLR 1267 (CC) This judgment was recently handed down on 19 July 2022

by the Equality Court from *New Clicks* and held that the court's power to regulate its own processes did not extend to making decisions in respect of matters pending in other courts.³¹

[31] A distinction must also be drawn between this case and *S v Malindi*³² wherein this court set aside the decision of a criminal trial court because of the dismissal of an assessor during the course of the trial. This Court found that the change in the constitution of the court to have been grossly irregular. Unlike in this case, the court in *Malindi* was not concerned with a process that was intended for the courts' benefit. The prescribed court constitution was intended for the benefit of the accused. As discussed earlier, no prejudice will be suffered by Mr Montshiwa in this case if this court considers this application for leave to appeal. On the other hand, the prejudice resulting from re-starting the leave to appeal process is manifest.

[32] The submission on behalf of the LPC that consideration and adjudication of this application would amount to stultification of the clear vision of the s 17 and would lead to the opening of doors to litigants to approach this court directly without a prior application to the court of first instance is not persuasive. The peculiar circumstances of this case have been discussed, including the irregularity attributable to the court, and the absurdity that would result if Mr Montshiwa would be denied audience by this Court. Indeed, the courts have cautioned that the power provided for under s 173 of the Constitution must be exercised sparingly and carefully in instances where, otherwise grave injustice would result.³³ I am satisfied that this is a proper case where such power should be exercised.

³¹ *Ibid* para 87.

³² *S v Malindi and Others* [1989] ZASCA 175; [1990] 4 All SA 433 (AD).

³³ *Enyati Colliery Ltd & Another v Allesen* 1922 AD 24 at 32.

[33] Has Mr Montshiwa then made out a proper case for an order granting leave to appeal? I am not persuaded that another court would reach a different decision from that of the high court. The requirements specified in the LPA for admission as a legal practitioner are set out in the first judgment. The courts in this country and elsewhere have identified certain qualities for a fit and proper person as envisaged in the LPA. These include integrity, hard work, dignity, honesty, fairness and respect for legal order.³⁴

[34] The expression ‘fit and proper’ is not defined in the LPA. There is also no single test for determination of what constitutes a fit and proper person for purposes of admission into the legal profession. Section 5 of the LPA, however, sets out one of the objectives of the Act as to ‘determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners’. In terms of s 24(2)(c) of the LPA only fit and proper persons may be admitted by courts as legal practitioners.

[35] In *Australian Broadcasting Tribunal v Bond*³⁵ the court described the expression fit and proper as follows:

‘The expression “fit and proper person”, standing alone, carries no precise meaning. It takes its meaning from context, from the activities the person is or will be engaged in and the ends to be served by those activities. The concept of ‘fit and proper’ cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of those activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it indicates that, in certain contexts, character (because it provides indication of likely future

³⁴ *General Council of the Bar of South Africa v Jiba and Another* [2019] ZACC 23; 2019 (8) BCLR 919 (CC).

³⁵ *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321.

conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.’³⁶

[36] As a legal practitioner and an officer of the court Mr Montshiwa would be expected to conduct himself with the highest degree of integrity, to ensure that the dignity and decorum of the court is maintained and to have the highest respect for legal order. Insulting, vulgar and disparaging language by a legal practitioner cannot be tolerated. ‘The effective functioning of our courts and the proper administration of justice are highly dependent on how legal practitioners go about discharging [their duty to the court].’³⁷

[37] As it appears from the record, apart from the discrepancies relating to his vocational training, Mr Montshiwa’s conduct, as demonstrated throughout his application for admission as a legal practitioner, and prior thereto, falls far short of the degree of integrity, dignity, honesty and respect expected of an officer of the court. The LPC referred to numerous instances of conduct that has no place in the application for admission as a legal practitioner. It is apparent from these that Mr Montshiwa’s appreciation of the processes, procedures, and decorum of our courts is woefully deficient. When Mr Jerry Sithole, an attorney practicing in Mmabatho, filed a notice to oppose his application for admission, Mr Montshiwa responded with an ‘Opposing affidavit to the Notice to Oppose’ in which he contended that Mr Sithole’s opposition was premature, resulted from ‘bitterness and stupidity’, and was an ‘idiotic move . . . motivated by stupidity’.

[38] In addition, when Mr J Nkomo, another attorney from Mmabatho, filed an application to intervene in the proceedings before the high court, in order to place

³⁶ Ibid para 36.

³⁷ R Seegobin ‘Restoring dignity to our courts: the duties of legal practitioners’ 14 September 2022 *Groundup*. Available at <https://www.groundup.org.za/article/restoring-dignity-to-our-courts-the-duties-legal-practitioners/>. Accessed on 16 February 2023.

on record certain conduct by Mr Montshiwa in the maintenance court, the latter referred to Mr Nkomo's application as 'idiotic', 'barbaric' and exhibiting the level of substance expected from 'a passionate first year law student'. Mr Montshiwa also addressed a letter to the Minister of Justice and Correctional Services requesting him to establish a Commission of Enquiry to investigate the relationship 'between Mr Nkomo and the North West High Court Bench.'

[39] The Judge President of the North West Division of the High Court at the time, Madame Leeuw JP was not spared from Mr Montshiwa's tirade. Mr Montshiwa berated the JP for constituting a Full Bench of judges from outside her Division. He complained that the JP's leadership was 'a mockery' and undertook to ensure that 'Mashangu Leeuw JP, my enemy will never get away with any unlawful conduct that she may try.'

[40] The papers filed by Mr Nkomo and Mr Sithole revealed Mr Montshiwa's personal attacks on the Judge President and a criminal complaint that he laid against her. The removal of his application for admission from high the court roll on 20 March 2022 by Pietersen AJ led to a complaint by Mr Montshiwa against the judge to the Minister of Justice and the Judicial Services Commission. Mr Montshiwa also directed insults at the judges who heard his application for admission and accused them of bias and collusion with the Judge President against him.

[41] His vitriolic attacks did not only dominate the proceedings in the high court. In this Court, Mr Montshiwa demanded an explanation from the two judges who directed that the LPC participate in this application for leave to appeal. He castigated Ms Dineo Motaung for the contents of the affidavit filed on behalf of the LPC. All this conduct demonstrates his lack of appreciation of the ethos and principles that govern the legal profession and the courts of this country.

[42] Mr Montshiwa does not dispute the conduct and utterances attributed to him. He only maintains that his conduct is not inappropriate. That cannot be so. His conduct demonstrates a predisposition to bouts of extreme anger and disrespect. Against this background no other court would find differently from the decision of the high court.

[43] Consequently,

The application for leave to appeal is dismissed with costs.

N DAMBUZA
ACTING DEPUTY PRESIDENT

Appearances

For Applicant:

In person

For LPC:

T Tshavhungwa

Instructed by:

Damons Magardie Richardson Attorneys, Pretoria
Phatshoane Henney Attorneys, Bloemfontein.