

***Chetty v Perumaul* (AR313/2020) [2021] ZAKZPHC 66 (21 September 2021)**

A cautionary note on the self-inflicted injury of disastrous and careless cross-examination

1 Introduction

The Deputy Judge President of the Gauteng Local Division of the High Court recently commented on the functional interrelationship between judicial and legal professional ethics (Sutherland “The Dependence of Judges on Ethical Conduct by Legal Practitioners: The Ethical Duties of Disclosure and Non-Disclosure” 2021 SAJEJ Vol 4, Issue 1 47-64). Sutherland appropriately states that a culture of ethical conduct by legal practitioners is critical to ensure expeditious litigation and just outcomes (Sutherland 2021 SAJEJ 48). Many others also stress the general importance of professional ethics in legal education, practical legal training, and practice. Nonetheless, unprofessional, dishonourable, and unworthy conduct occurs with sufficient regularity to evoke widespread criticism of the legal profession. The Legal Practice Council listed the names of 123 legal practitioners who were either struck off the roll or suspended in 2022 for unethical conduct. The majority of reported violations were variations on well-known themes. Here some legal practitioners neglected to carry out legal work in a competent and timely manner, while others practiced and appeared in court without obtaining a practice management certificate or a Fidelity Fund Certificate. An advocate accepted instructions and payments directly from clients without a brief from an attorney and later used the details of attorneys without their consent. Some reported judgments, however, describe less common or novel examples of unethical conduct, such as defeating or obstructing the course of justice, misleading the court and forgery. In one instance, a legal practitioner placed a matter on an unopposed roll to secure a default judgment by intentionally removing the notice to oppose and the answering affidavit from the court file. This same legal practitioner assaulted and intimidated members of the South African Police Service (“SAPS”) and was later interdicted from intimidating, threatening, victimising and harassing members of the SAPS and State attorney’s offices.

As a result of these repeated violations, the judiciary has become increasingly outspoken in its condemnation of harmful and unethical conduct by legal practitioners. An example of widely published comments by judicial officers on the conduct of legal practitioners may be found in the ruling of 2 July 2018 by retired judge Nugent, sitting as the Commissioner of the Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service. Nugent described a legal practitioner’s submissions to the Commission as “littered with abuse, invective, and sinister” and the inferences made by the legal practitioner as “half-baked” and a “disgrace” (paras 11 and 27). The

comments of Nugent, in which he describes the conduct of two other legal practitioners as exemplary, skilled, dedicated, and diligent, did not garner the same level of media attention. These types of controversies are not unique to South Africa. The Supreme Court of Canada, in *Groia v Law Society of Upper Canada* (2018, SCC 27), described one trial as toxic due to personal attacks and sarcastic outbursts by the legal practitioner that resulted in “a near standstill” of the hearing (para 12). A judge in the Bombay High Court in India found the conduct of a legal practitioner to be “extremely offensive and disrespectful” and “incomprehensible”. Kulkarni, J accepted the legal practitioner’s written apology and undertaking that such conduct would not occur again in any court. However, Kulkarni, J also made an unusual order that forbade the legal practitioner from appearing before his court again on any matter in the future (Kulkarni, J in *Zenobia Poonawala (Nee Ginwalla) v Rustom Ginwalla*, 27 April 2022, paras 3 – 5). There are, as a result, also numerous publications that confirm that the public has a negative perception of the legal profession (Sarkin “Promoting Access to Justice in South Africa: Should the Legal Profession Have a Voluntary or Mandatory Role in Providing Legal Services to the Poor” 18 S. AFR. J. on HUM. Rts. 630 (2002)). Indeed, Swift, as long ago as 1726, stated that “my lawyer, being practised almost from his cradle in defending falsehood, is quite out of his element when he would be an advocate for justice, which is an unnatural office he always attempts with great awkwardness, if not with ill-will”. Swift thus argued that legal professionals are trained to defend anything as “ignorant” and “avowed enemies to all knowledge and learning” (Jonathan Swift, *Gulliver’s Travels* (1726) at pt. IV, c. V.).

A specific instance of potentially unethical or, at the very least, harmful conduct by a legal practitioner during litigation was reported in a judgment by the Pietermaritzburg High Court (“the High Court”) in *Chetty v Perumaul* AR313/2020 [2021] ZAKZPHC 66 21 September 2021 (*Chetty v Perumaul*), on appeal from the Pietermaritzburg Regional Court. The cause of action emanated from the alleged defamation of the respondent, who also happened to be a practicing attorney at the time. The High Court observed that any impingement of “the good name of an attorney remains a serious matter” as a legal practitioner’s reputation and integrity constitute valuable assets and once “lost ... is seldom recovered” (*Chetty v Perumaul* para 46). However, the High Court, at the same time, expressed concern about the “complete lack of respect” for the court’s integrity and the proper administration of justice due to the unprofessional conduct of the appellant’s legal representative, which manifested as hostility, especially during cross-examination (*Chetty v Perumaul* para 54). The High Court, as a result, also considered and commented on the primary duty of legal practitioners in general, as officers of the court, to protect the legitimacy of the court and “to assist . . . in the [proper] administration of justice” (*Chetty v Perumaul* para 54). As a result, this note does not intend to evaluate the merits of the matter except for brief comments on the decision to lodge the appeal and the

outcome thereof. Instead, the note will explore the legal representative's harmful and potentially unethical conduct during cross-examination. The first part of the note will summarise the facts of the dispute. After that, the general purpose of litigation and cross-examination will be considered, with some comments on the implications of harmful cross-examination strategies for litigants.

2 Factual background and salient features of the case

The High Court was requested to consider whether the regional magistrate correctly found that the appellant had defamed the respondent (*Chetty v Perumaul* para 46). The High Court, in a unanimous judgment (Mossop AJ and Seegobin J), found that no fault or material misdirection existed in the reasoning of the regional magistrate (*Chetty v Perumaul* para 60). The words used by the appellant were designed and published to impugn the respondent's reputation and integrity and were "clearly defamatory" (*Chetty v Perumaul* paras 18 & 20). The High Court accordingly confirmed the judgment of the regional court and dismissed the appeal with costs (*Chetty v Perumaul* para 60).

The High Court then considered and commented on the behaviour of the legal representative during the hearing. The continued disruptive, unruly, disrespectful, and aberrant behaviour of the legal representative created an "unduly tense" atmosphere and a "sense of disquiet" (*Chetty v Perumaul* para 53). The legal representative was "openly hostile and discourteous" by repeatedly interrupting and preventing the respondent from providing a meaningful response and "by simply laughing at her for no apparent reason" during cross-examination (*Chetty v Perumaul* para 48). This behaviour necessitated frequent interventions by the presiding officer, whom the High Court commended for remaining calm, rational, patient, and tolerant (*Chetty v Perumaul* para 53). Despite these interventions, the presiding officer was eventually obliged to adjourn the unproductive proceedings to maintain the legitimacy and integrity of the court process and the public's confidence in the effective administration of justice (*Chetty v Perumaul* para 49).

3 The obligations of legal practitioners during litigation

The collective and individual sustainability of the legal profession demands that legal practitioners diligently and meaningfully observe and adhere to the profession's ethical rules. Professionalism requires experts to best serve their clients as part of their larger contribution to society. These obligations are specifically apparent during litigation. The Code of Conduct for Legal Practitioners (GN 168 GG 42364 of 28 March 2019; GN R 198 GG 42364 of 23 March 2019, published under the Legal Practitioners Act 28 of 2014) ('the LPCC'), as a result, expressly states that "the profession of advocacy is primarily vocational and serves the public interest and accordingly acknowledges fiduciary duties towards the courts, to their clients, and all professional colleagues" (LPCC, Rule 22.3.2). The LPCC also stipulates that "a legal practitioner shall not abuse

or permit abuse of the process of court or tribunal and shall act in a manner that shall promote and advance the efficiency of legal process” (LPCC, Rule 60.1; 3.14 & 3.15).

Legal practitioners must also protect and advance their clients’ proper and lawful legal interests “with zeal, vigor and determination” (*Chetty v Perumaul* para 60). The duty to pursue the client’s best interests emanates partly from the fact that the services that legal practitioners provide for their clients are of great importance and consequence to the client. The client is, however, generally unable to adequately analyse their own needs or differentiate among the scope of possibilities available in law since they typically lack the expert knowledge and competence of the artificial reason of the law. Even with legal representation, a client might still be unable to effectively assess the competency and quality of the professional legal services already rendered or the attention with which the legal practitioner is pursuing their instructions and interests. The client is, therefore, obligated to accept the professional judgment of the legal practitioner. This reality creates a power dynamic between the legal practitioner and the client that must be informed by trust. The legal practitioner should, therefore, avoid “any conduct calculated to deflect from acting in the best interest of the client ...” (LPCC, Rule 25.1). The LPCC, however, qualifies this obligation and confirms that legal practitioners shall “treat the interests of their clients as paramount provided that their conduct shall be subject always to their duty to court; the interests of justice; observance of the law; [and] the maintenance of ethical standards prescribed by this code, and any ethical standards recognised by the Profession” (LPCC, Rule 3.3). The rule effectively subordinates the paramountcy of the client’s interests to the interests of the law, justice, and court (Sutherland, 53).

The ethical conduct of legal practitioners in the pursuit of expeditious and fair hearings is also critical in actively contributing to the sound administration of justice by assisting “the court in the doing of justice according to law” (*Chetty v Perumaul* para 53). The supportive role of legal practitioners is intended to assist judicial officers in maintaining order and a “courteous” adjudication process (see the South African Norms and Standards for the Performance of Judicial Functions GN R147 GG 37390 of 28 February 2014, para 5.1(ii) and the South African Judicial Code of Conduct (“the JCC”), issued in 2012, pursuant to the Judicial Service Commission Act 9 of 1994, section 12, GN R865 GG 35802 of 18 October 2012, article 10(1)(c)). This obligation is confirmed by the notes to article 10 of the JCC, which states that “[a] pattern of intemperate or intimidating treatment of lawyers and others or conduct evidencing arbitrariness and abusiveness is prejudicial to the effective administration of justice and should be avoided” (JCC, 10(i)). Judicial officers must, therefore, be supported by legal practitioners in order to ensure that the dispute is resolved “efficiently, effectively, and expeditiously” (JCC, para 5.1(ii)). Therefore, achieving a just and expeditious outcome to litigation depends partly on the legal

practitioner's supportive role and the judicial officer's managerial function during the hearing.

The fundamental right to have a dispute resolved by a court of law and the right to a fair trial thus create an amorphous collection of competing obligations that require the professional, ethical, honest, and fair treatment of those exercising this right (Constitution of the Republic of South Africa, 1996, S34 and S35(3); *Rondel v Worsley* 1967 UKHL 5 2). Ultimately, the goal is the effective operation of legal proceedings and the proper administration of the court process by creating a symbiotic and mutually supportive relationship between the legal representatives and the presiding officer.

4 Cross-examination

The dynamic and artificial nature of the trial produces an intimidating and confusing atmosphere for those unfamiliar with the adversarial process. A trial is designed to interpret past events through a sequence of evidence, cross-examination, and argument to construct, deconstruct, and reconstruct the narrative presented during the trial (Burns *A Theory of the Trial* (1999) 60-67). Legal practitioners must use these conversations and every other opportunity available to extract beneficial testimony, explore biases, filters, and predispositions, expose contradictions, reduce distortions, and specifically, to the extent reasonably possible, expose that part of the narrative that is significant, incomplete, or fabricated (MacFarlane *The New Lawyer: How Settlement is Transforming the Practice of Law* (2008) 126).

The distress inherent in a trial is magnified during cross-examination. Legal practitioners describe the experience of a witness during a hearing as 'trying'. However, witnesses argue that adjectives such as terrifying, intimidating, confusing and stressful are more appropriate to express their experiences in court (Wheatcroft and Ellison "Evidence in Court: Witness Preparation and Cross-Examination Style Effects on Adult Witness Accuracy" 2012 30 BEHAV. Sci. & L. 825). Wellman portrays a witness under cross-examination as an "unfortunate" person who is "entitled to sympathy and commiseration". Accordingly, Wellman describes witness examination as a process in which a person is "arraigned before [a] legal gentleman, one of whom smiles blandly because you are on his side, the other eyeing you savagely for the opposite reason". The gentleman who smiles, proceeds to pump you of all you know; and, having squeezed all he wants out of you, hands you over to the other, who proceeds to show you that you are entirely mistaken in all your supposition ...". Cross-examination is terrifying and comparable to being "bullied" after which "everybody you have fallen out with is put on the stand to swear that you are the biggest scoundrel they ever knew, and not to be believed under oath". The witness is then released as "a suspected man-all because of your accidental presence on an unfortunate occasion!" (Corboy "Cross-Examination: Walking the Line

between Proper Prejudice and Unethical Conduct” 1986 10 AM. J. Trial Advoc. 1 3).

Nonetheless, cross-examination is still regarded as the best vehicle to determine the truth or its reasonable approximation despite the inherent risk of humiliation, stress, and even abuse during this process. The notes to article 9 of the JCC, therefore, stipulate that a presiding officer must keep “a firm hand on proceedings”, which includes a duty on the presiding officer to curtail cross-examination “if it exceeds reasonable bounds” (JCC, 9(i)). This obligation on the presiding officer addresses the potential for abuse by a cross-examiner, who should not be allowed to opportunistically exceed the bounds of reasonableness during cross-examination and to induce undue stress aimed at provoking emotions in the witness that unreasonably diminish cognition and memory retrieval (Conrad *The Handbook of Stress: Neuropsychological Effects on the Brain* (2011) 91). Presiding officers are expected to monitor cross-examination in a content-specific manner as the same stressor may evoke various coping strategies in different people (Cuvillier *Stress and Social Anxiety: Psychobiological Effects of Stress on Social Interaction in Social Anxiety Disorder* (2017) 9).

5 Discussion

The relevant professional and ethical standards that regulate the conduct of legal practitioners did little in the matter under discussion to discourage the abuse of the processes. The hearing presented as a contest between opposing antagonists, wherein the pursuit of the truth became subordinate to the personal agenda of the appellant and possibly that of the legal representative. The legal representative used the cross-examination to embarrass, insult, and annoy the respondent. The cross-examination neither amounted to “intense and probing interrogation” to test the respondent’s account nor did it achieve any semblance of minimal contradiction to expose just enough difference between the competing versions. As a result, the court could not meaningfully react to the respondent’s testimony as its attention was directed at the inappropriate conduct of the cross-examiner. The legal representative, therefore, failed to successfully communicate a reasonable dominant or alternative inference consistent with the appellant’s version. The interactional goal of cross-examination was not realised and served only to obfuscate and delay the fact-finding process. These failures suggest that the legal representative was only superficially aware of the factors that actually influence the decision-making of a presiding officer. In reality, judicial officers do not approach a dispute between litigants as a contest but as a problem to be solved by an impartial and fair arbiter.

The cross-examiner’s actions may also have been motivated by his own anxieties. Based on the undisputed facts, the legal representative should have known that there was realistically only a limited chance of success at trial. The appeal was also pursued even though there appears to be no realistic basis on which another court could have arrived at a

different conclusion than the court *a quo*. The appeal thus ultimately served no real purpose but to delay the inevitable, further expose the unprofessional conduct during the hearing, and add to the appellant's legal expenses. The limited prospects of success also create the impression that the legal representative and client did not meaningfully agree on a desired outcome. Nonetheless, the appellant and/or the legal representative, despite this, must have harboured an idealistic but unrealistic expectation of the possible favourable impact that may be achieved through cross-examination. The legal representative may also have laboured under the impression that the client, who was emotionally invested in the dispute, would be impressed by the dramatic but ultimately ineffective cross-examination. This misplaced confidence in the outcome of the cross-examination is not unique to this matter. Numerous adverse judgments have been attributed to an excessively optimistic expectation of the possible positive impact of cross-examination despite the ever-present risk and uncertainty inherent in any attempt at assessing the observation, memory, and ability of a witness (McElhaney "Cross-Exam Surprises" 2006 *ABA J.* 22; Melilli "Risk Management in Cross-Examination" 2014 *American Journal of Trial Advocacy* 318). The legal representative did not deem it necessary during the trial or appeal to tender an apology to his colleague, who appeared as a witness, or to the court *a quo*. He merely suggested during the appeal that he may have been a "little over-zealous" during the hearing. This justification confirms that, after "mature reflection," he still did not appreciate the harmful consequences of his actions. (*Chetty v Perumaul* para 52). It would be irrational to retrospectively justify this conduct as mere enthusiasm emanating from his devotion to the client's legitimate interests. These actions, on a broader level, were ultimately detrimental to the client's interests, the reputation of the legal representative and the administration of justice and, therefore, brought the legal profession into disrepute.

Judicial officers, for their part, are best placed to determine whether a legal practitioner's conduct has crossed the line from resolute client advocacy to inappropriate and unreasonable within the specific context of the dispute and hearing. The role of presiding officers further allows them to control the cross-examination instantaneously. Presiding officers are, in this process, thus expected to balance the rights of litigating parties and ensure that the witness' inherent dignity and moral worth are respected and that the vulnerability of witnesses is not exploited during the adversarial interactions in court (*S v Azov* 1974 1 SA 808 (T) 810G). In compliance with these duties, the magistrate intervened on several occasions during the trial to manage the legal representative's harmful conduct. These interventions were required, as inaction would have created the impression that the magistrate sanctioned the unfair treatment of the witness (*S v Nisani* 1987 3 All SA 254 (O) para 26). The High Court did not comment further on this issue as note 9(iv) to the JCC limits the expression of "critical views" in a judgment "in regard to a recalcitrant or overzealous party". This

approach is probably rational when drafting judgments. It may, however, be prudent for presiding officers to include some comments on the detrimental effect of harmful behaviour by legal practitioners during the hearing to describe, inform, and educate others on the standard expected from legal practitioners. Judicial officers should also specifically address instances of unethical behaviour by legal practitioners, as this is an important factor when the LPA considers possible disciplinary action against legal practitioners alleged to be violating their ethical duties during a trial.

6 Conclusion

Legal practitioners enjoy a high degree of autonomy and professional discretion in navigating the complex challenges, including ethical dilemmas, inherent in legal practice. The competing values and interests often encountered during litigation introduce unique ethical challenges that require a high level of moral reflection from legal practitioners. The legal profession provides guidance in the form of ethical rules to assist practitioners in making these decisions. It is imperative that legal practitioners adequately understand and demonstrate knowledge of legal ethics to ensure content-specific ethical outcomes. Legal practitioners must also pay constant attention to what degree of ethical conduct is required, and whether or not their response is adequate in specific circumstances, they may encounter. This awareness must, in addition, also translate into actions beyond mere compliance with the rules of professional conduct.

Nonetheless, it must be appreciated that the formal rules of professional conduct alone cannot realistically provide all the resources necessary for ethical legal practice. This reality will sometimes result in the unintentional failure of legal practitioners to practice with genuine ethical restraint, especially within the adversarial culture that values ‘winning’ at all costs. These circumstances have, at times, produced blatantly unethical and harmful decisions by legal practitioners, even though their actions ostensibly conform to the letter of procedural and evidentiary rules when viewed in isolation from the context in which they occurred. Legal practitioners may also, unfortunately, be well aware of their intentionally unethical behaviour in specific instances and attempt to justify this behaviour by subconsciously ignoring the moral, ethical, and legal components of their behaviour. Ethical legal practice must, as a result, also be supplemented by consistent introspection by legal practitioners to anticipate and reflect on the full range of their capabilities and potential responses to ethical dilemmas to ensure that they can respond in a morally reflective manner.

The comments above must be qualified and interpreted in light of the fact that the majority of legal practitioners have predominantly preserved their credibility by remaining fit and proper to practice law. These legal practitioners have also performed their professional functions admirably during countless interactions, professional relationships, and disputes

between opposing parties. These constructive interactions have effectively maintained the integrity of the legal profession and the judicial system. However, this exemplary conduct is generally discounted or even ignored in favour of specific, well-publicised unethical conduct. The natural tendency to focus on the exception to the norm serves to cultivate the notion that ethical behaviour is prevalent and that the legal profession is in a steady decline. This conclusion may be reasonable based on the perception created by the misaligned focus. However, perception and reality are far removed, and individual instances of unethical conduct should not be projected onto the legal profession as a whole.

Arthur van Coller

*BA (Law), LLB, LLM, HDipTax, LLD
Associate Professor University of Fort Hare, Faculty of Law*