

Ex Parte: **LPC INVESTIGATION COMMITTEE**

In Re: **ADVOCATE ANTHONY ROBIN BRINK**

REPORT

A. INTRODUCTION

1. I have been asked to provide a report into the conduct of Mr. Anthony Robin Brink (“Brink”) and whether such conduct contravenes the provisions of the Legal Practice Council Code of Conduct, notice 198 of 2019 and the grounds for application of his striking off the roll of Legal Practitioners.

B. FACTUAL BACKGROUND

2. On 12 April 1983, Brink was admitted as an Advocate. According to the General Council of the Bar (“GCB”), he is now employed as an Additional Magistrate stationed at the Eshowe Magistrates Court in KwaZulu-Natal.
3. In November of 2009, Brink applied for a vacant position of Senior Litigator at Legal Aid South Africa (“LASA”), in the Pietermaritzburg Justice Centre.

4. He was subsequently interviewed by a duly constituted selection panel.¹ He was then recommended to proceed to the second round of interviews which was to be held at Johannesburg, consisting of Senior Executives of LASA including the Chairperson of the Board of Legal Aid of SA, Judge President D. Mlambo.²
5. The second round of interviews did not proceed as a result of budget uncertainties facing LASA at the time. The budget uncertainties led to the freezing of all recruitment of senior litigators. All candidates that were recommended for the second round of interviews were informed.³
6. Brink addressed several letters to LASA enquiring into the progress of his recruitment. These emails were responded to.⁴
7. However, in august of 2010, he resorted to request access to the record of the selection panel's recommendation in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA").⁵
8. Despite the responses given to him in terms of PAIA, he instituted action against LASA in the Durban Labour Court. The matter was heard on 18

¹ Found at Paragraph 20 of Page 4 of complaint 1 of brinks complaints to the judicial service commission of gross misconduct by Mlambo JP.

² Found at paragraph 3.1 of page 2 of LASA affidavit.

³ Found at paragraph 3.2 of page 2 of LASA affidavit.

⁴ Found at paragraph 4.1 of page 2 of LASA affidavit.

⁵ Found at paragraph 21 of page 5 of complaint 1 of brinks complains to the judicial service commission of gross misconduct by Mlambo JP.

September 2014. The crux of his case was that he was not appointed to the position of Senior Litigator because of his stance against the provision of anti-retrovirals and race.⁶

9. Honourable Judge Cele dismissed his claim with costs. An application for leave to appeal, launched by Brink, was also dismissed on 27 November 2014. Brink subsequently filed a petition on 7 December 2014, which subsequently dismissed on 18 February 2015.⁷
10. On 7 October 2015, an urgent application was launched by Brink, seeking to interdict the Taxing Master from finalizing taxation of the Labour Court case to enable LASA to get their *allocator*. In his urgent application, Brink made unwarranted allegations against the Honourable Judge President Waglay.⁸
11. The urgent application was dismissed with costs accompanied by concerns by the Honorable Judge Pillay about the conduct of Brink.
12. A complaint by LASA was laid against Brink concerning his conduct.
13. Following the receipt of the complaint, a decision was taken by the GCB to proceed with a striking off application against Brink.

⁶ Found at paragraph 4.2 at page 2 of LASA affidavit.

⁷ Found at paragraph 4.3 at page 3 of LASA affidavit.

⁸ Found at paragraph 4.4 of page 3 of LASA affidavit.

14. When Brink was informed of this decision, he demanded the right to respond to the allegations made about him by LASA. This had not been afforded to him before the decision to strike off was taken.
15. Brink's request was then acceded to, and he was invited to make submissions in response to the allegations made by LASA. He then submitted his representations which consist of eight complaints that he has submitted to the Judicial Service Commission concerning the conduct of the Honourable Justice Mlambo.
16. The matter was referred to the Legal Practice Council on 15 February 2020, with the recommendation that Brink be struck from the roll.
17. I will now turn to deal with the specific complaints of LASA.

C. COMPLAINTS OF LASA AGAINST BRINK

18. The conduct that the complainant refers to stems largely from allegations that Brink made in his "Statement of Claim" in the Labour Court.
19. In the Statement of Claim, Brink, inter alia, stated that:

- 19.1 Mr. Justice Dustan Mlambo (“Judge Mlambo”), the Chairperson of LASA, and the CEO of LASA, had been motivated by unlawful political prejudice, alternatively racial prejudice, directed at Brink.⁹
- 19.2 Judge Mlambo had orchestrated a cover up in order to disguise the true reason why Brink was not appointed to the position in LASA.¹⁰
- 19.3 Judge Mlambo had lied about the matter when reporting the matter to the Minister of Justice and Constitutional Development in order to cover up his and the CEO’s unfair discrimination against Brink.¹¹
- 19.4 The Judge lied to the Chairperson of the Parliamentary Portfolio Committee when reporting to it on the matter and thereby misled, inter alia, parliament.¹²
- 19.5 The financial justification for not appointing him was a bogus reason concocted by the Judge.
20. Whilst under cross examination at the labour court hearing, Brink was forced to retract all the allegations that he had made against the Judge.¹³

⁹ Found at paragraph 4 of the Record under case number D529/11.

¹⁰ Found at paragraph 4 of the Record under case number D529/11.

¹¹ Found at paragraph 5 of the Record under case number D529/11.

¹² Found at paragraph 5 of the Record under case number D529/11.

¹³ Found at paragraph 5.3 of page 5 of LASA Affidavit.

21. As a result of this, he indicated that he exonerated the Judge from any accusations of dishonesty and discrimination. He then stated that another person was responsible for concocting the plot against him, namely, Brian Nair, who was the National Operations Executive of LASA.¹⁴
22. Brink then claimed that his statements about the Judge were based on misconceptions. He also stated that he had made the allegations against the Judge inadvertently.¹⁵

Unfounded Defamatory, Demeaning, and Insulting Allegations made by Brink in his Petition for Leave to Appeal to the Labour Appeal Court under Case number D529/11, against Mlambo JP, Cele J, V. Vedalakar and B. Nair:

23. Notwithstanding the retractions of his allegations against the Judge during cross-examination, he stated the following in his petition to the Judge President of the Labour Court:

23.1 That the matter continued to involve the personal and professional integrity of a sitting former Judge President, and that of the most senior management executives of a major public entity. This is evidently directed to the Judge.¹⁶

¹⁴ Found at Page 133, at lines 2 to 5 of the Record under case number D529/11.

¹⁵ Found at page 137, at lines 7 to 9 of the Record under case number D529/11.

¹⁶ Found at paragraph 2 of the record for leave to appeal under case number D529/11.

- 23.2 That as a consequence of multiple, objectively demonstrable lies, there had been a perversion of separate Ministerial Parliamentary enquiries.¹⁷ This again, refers to a proposition which he had retracted in his cross examination.
- 23.3 That the Judge had known that a new explanation that the Judge had advanced was false, and that the budgetary constrained reason advanced by him was another lie.¹⁸
- 23.4 That the Judge had participated in a grossly irregular, prejudicial, and unlawful recruitment process.¹⁹
- 23.5 The Judge and the CEO concocted a false explanation to cover the true reason for aborting his recruitment.²⁰
- 23.6 That the Judge would later consciously and deliberately tell the same lies and more lies of his own, to the Minister of Justice and Constitutional Development, which lies he repeated some months later to the Chairperson of the Portfolio Committee of Parliament.²¹

¹⁷ Found at paragraph 31 of the record for leave to appeal under case number D529/11.

¹⁸ Found at paragraph 34 of the record for leave to appeal under case number D529/11.

¹⁹ Found at paragraph 41 of the record for leave to appeal under case number D529/11.

²⁰ Found at Paragraph 24 of the record for leave to appeal under case number D529/11.

²¹ Found at Paragraph 33 of the record for leave to appeal under case number D529/11.

23.7 That Honourable Judge Cele, who heard the matter in the Labour Court, was guilty of gravely prejudicial misconduct that resulted in him thwarting a full and proper ventilation of the issues and had made several errors in law.²²

23.8 That Honourable Judge Cele's judgement against him was a deplorably inattentive, glib, crude, and perfunctory judgment.²³

Unfounded Defamatory, Demeaning and Insulting Allegations made by Brink in his supporting affidavit in the Urgent Application at Pietermaritzburg High Court under Case Number 12977/15 against Waglay JP:

24. In his supporting affidavit, Brink stated that:

24.1 That in his draft complaint to the JSC, he includes similar fact evidence of the surreptitious perversion, by dint of multiple easily demonstrable lies, of separate Ministerial and Parliamentary Enquiries that he has caused to be initiated, including the subordination of perjury, and other grave corruption.²⁴

²² Found at Paragraph 3 of the record for leave to appeal under case number D529/11.

²³ Found at Paragraph 2 of the record for leave to appeal under case number D529/11.

²⁴ Found at Paragraph 21 of Brink's supporting affidavit under the urgent application Case number 12977/15.

24.2 That the order granted by Cele J is demonstrably fake and a phony dismissal order.²⁵

24.3 That Waglay J intentionally violated his fundamental right to due process envisaged in section 34 of the Constitution by blocking his access to the Labour Appeal Court to appeal and remedy the complete hash that Cele J made of his case.²⁶

24.4 That the order granted by Cele J is bogus.²⁷

25. It is the submission of LASA that Brink is not befitting of an officer of the Court, more so to act as a Magistrate. The language used by him is unprofessional. The manner he relates to colleagues and Judges requires sanction.²⁸

D. CONTRAVENTION OF THE LEGAL PRACTICE CODE OF CONDUCT 198 OF 2019

26. Part IV of the code of conduct relates to conduct of Advocates contemplated in Section 34(2)(a)(i) of the Legal Practice Act.²⁹ It is binding upon every

²⁵ Found at paragraph 22 of Brink's supporting affidavit under the urgent application case number 12977/15.

²⁶ Found at annexure A of Brink's supporting affidavit under urgent application case number 12977/15.

²⁷ Found at annexure A of Brink's supporting affidavit under urgent application case number 1297715.

²⁸ Found at paragraph 5.1 of page 3 of LASA Affidavit.

²⁹ Act 28 of 2014.

person who has been admitted and enrolled to practice as an advocate in South Africa. Hereinafter referred to as “Counsel”.³⁰

27. The interpretation of Part IV of the code of conduct is aimed to give the fullest effect to the fundamental principles that guide, shape, and express the essence of the profession of advocacy, which are principles that:

27.1 Counsel understand that the profession of advocacy is primarily vocational and serves the public interest and accordingly acknowledges fiduciary duties towards the courts and to their clients and to all professional colleagues.³¹

28. The allegations made by Brink are of a serious nature. He has called a Judge dishonest; he has demonstrated his disdain for the Bench. He has willfully impugned another’s integrity in a profession where integrity is crucial.

29. The allegations made by Brink ought not have been made in the absence of evidence justifying them. Further to this, his withdrawal of the allegations was not a true withdrawal, as in his petition, he appears to have persisted in the scandalous allegations he had *allegedly* withdrawn.

³⁰ Rule 22 of the Legal Practice Code of Conduct 198 of 2019.

³¹ Rule 22 of the Legal Practice Code of Conduct 198 of 2019.

30. This constitutes a breach of his fiduciary duty towards the courts and towards his professional colleagues, as envisaged in the Legal Practice Code of Conduct.

E. APPLICATION TO STRIKE OFF

31. Section 7(1)(d) of the Admission of Advocates Act³² allows the court to suspend any person from practice as an Advocate or to order that his or her name be struck off the roll of Advocates if the court is satisfied that he or she is not a fit and proper person to continue the practice of an Advocate.

32. Section 44 of the Legal Practice Act,³³ states too, that the Act does not derogate from the power that the High Court has to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner.

33. It is trite that there are three steps in the enquiry of whether such action should be taken.

34. In *Jasat v Natal Law Society*³⁴ the Supreme Court of Appeal placed the following guidelines in place which were followed with the approval in *Malan & another v Law Society of the Northern Provinces*³⁵:

³² Act 74 of 1964.

³³ Act 28 of 2014.

³⁴ 2000 (3) SA 44 (SCA).

³⁵ 2009 (1) SA 216 (SCA) Para 4.

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

34.2 Second, it must consider whether the person concerned is not a fit and proper person to continue practice. This involves a weighing up of the conduct complained of against the conduct expected of a legal practitioner, to this extent, is a value judgment

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

F. FIT AND PROPER

35. The onus rests with the applicant to establish that he is a fit and proper person to be an advocate. The question of whether he or she is fit and proper is not one to be decided as an objective question of fact, and not as a matter of discretion by the court.³⁶

36. In addition, the profession of an advocate requires the utmost good faith from practitioners and from all aspirant practitioners. An advocate, whose main duty it will be to represent his clients before the court, must be a person

³⁶ *Hayes v The Bar Council* 1981 (3) SA 1070 (ZA).

in whose reliability and integrity the courts must be able to place complete trust. An advocate owes a duty at least as much to the court as to his client. And the court must be satisfied that that he will not by his behavior do anything to bring the courts or the profession into disrepute.³⁷

37. LASA contends that Brink is not befitting of an officer of the Court, more so to act as a Magistrate. The language used by him is unprofessional. The manner he relates to colleagues and Judges requires sanction.

38. His language toward several Judges is tantamount to an attempt to bring the courts and profession into disrepute.

39. Therefore, it may be argued that Brink is not fit and proper to practice.

G. STRIKE OFF OR SUSPEND

40. As pointed out in *Jasat*, the third enquiry is also a matter for the discretion of the court, and whether a court will adopt the one or the other depends upon facts such as:³⁸

40.1 The nature of the conduct complained of.

³⁷ 1981 (3) SA 1070 (ZA).

³⁸ 2009 (1) SA 216 (SCA) Para 6.

40.2 The extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession.

40.3 The likelihood of repetition of such conduct.

40.4 The need to protect the public.³⁹

41. Logic dictates that if a court finds that someone is not a fit and proper person to continue practice as an Advocate, that person must be removed from the roll. However, the Act contemplates a suspension. This means that removal does not follow as a matter of course. If the court has grounds to assume that after the period of suspension, the person will be fit and proper to act as a legal practitioner in the ordinary course of events, it would not remove him or her from the roll but order an appropriate suspension.⁴⁰

42. The implications of an unconditional order removing a practitioner from the roll for misconduct are serious and far-reaching. The court which makes such an order visualizes that the offender will never again be permitted to practice his profession because ordinarily such an order is not made unless the court is of the opinion that the misconduct in question is of so serious a

³⁹ 2009 (1) SA 216 (SCA) Para 6.

⁴⁰ 2009 (1) SA 216 (SCA) Para 8.

nature that it manifests character defects and lack of integrity rendering the person unfit to be on the roll.⁴¹

43. However, it is seldom, if ever, that a mere suspension from practice for a given period in itself will transform a person who is unfit to practice into one who is fit to practice.⁴²

44. It follows that Brink, who has shown disrespect not only to executives of LASA but to Judges in the profession, should be struck off the roll and that an order for suspension would not be appropriate.

H. CONCLUSION

45. This report leads to the conclusion that Brink:

45.1 has contravened the provisions of the Legal Practice Code of Conduct.

45.2 Is not fit and proper to continue practice.

45.3 Should be struck off the roll of practicing advocates and that the necessary proceedings be instituted and continued.

⁴¹ *Ex Parte Wilcocks* 1920 TPD 243 at 245.

⁴² 2009 (1) SA 216 (SCA) Para 8.

DATED AT DURBAN ON THIS THE 13TH DAY OF MAY 2024

A handwritten signature in black ink, consisting of a large, loopy initial 'W' followed by a smaller 'N', all contained within a large, irregular oval shape.

WILLIAM AJ NICHOLSON

LPC INVESTIGATION COMMITTEE