Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number 17866/2011

In the matter of:

GRANCY PROPERTY LIMITED + 1 Other *Applicants*

and

LAW SOCIETY OF THE CAPE OF GOOD HOPE + 4 Others *Respondents*

JUDGMENT: 21 September 2012

LM OLIVIER, AJ:

[1] This is an application for the review of a decision of the Council of the Law Society of the Cape of Good Hope (the "Council" and "Society" respectively) to postpone a disciplinary enquiry into the alleged conduct of fourth respondent, Mr Gihwala who, at the time, was a practicing attorney and chair of Cliffe Dekker Hoffmeyr Inc ("CDH") and formerly the chair of

Hofmeyr Herbstein & Gihwala Inc. ("HHG"). The decision to postpone the enquiry pending the determination of civil proceedings was in the exercise of the discretion bestowed upon the Council by Section 71 (4) of the Attorneys Act, 1979 ("the Act"). Further consequential relief is sought.

[2] It is common cause that the Council has a discretion to postpone and that this discretion may be exercised where the jurisdictional facts, being if the conduct enquired into forms or is likely to form the subject of criminal or civil proceedings in a court of law, are present. Applicants contend that it is only once the jurisdictional facts have been established that the discretion arises. In the exercise of this discretion the Council is enjoined to consider additional factors which militate against the expeditious investigation, hearing and determination of the complaints. In the absence of such additional factors the decision cannot be justified. The Council, on the other hand, contends that where the jurisdictional facts are present it may exercise its wide discretion to postpone. As there are no additional requirements enunciated in the section, there are no requirements that need to be met for the Council to exercise its discretion.

THE DECISION TO POSTPONE

[3] From the record of proceedings of the Council (the "record") it appears that the decision to exercise the statutory discretion was based on the opinion of fifth respondent, Mr Koen, being the *pro forma* prosecutor appointed by the Disciplinary Enquiry Committee ("the DEC") of the Council in respect of the enquiry into the alleged conduct of Mr Gihwala. The relevant portion of the record in this regard reads as follows:

> *"On 12 October 2010 Mr Koen provided the Society with his opinion on the further conduct of the matter which, in essence, was that as the issues raised in the complaint were similar to the issues raised in the various civil proceedings before the high court, it would be practical and cost effective for these proceedings to be resolved before deciding whether charges of unprofessional conduct could be proved and accordingly he suggested that the Council exercise its powers in terms of Section 71 (4) and postpone the enquiry pending the determination of the civil proceedings.*
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> *On 8 November 2010 the Committee RECOMMENDED that Mr Koen's recommendation that the Council exercise its powers in terms of Section 71 (4) and postpone the enquiry pending the determination of the civil proceedings, be accepted, and that Mr Koen be mandated to advise the parties accordingly.*
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> *On 22 November 2010 Council CONFIRMED the above recommendation."* (my underlying)

HISTORY OF EVENTS PRIOR TO THE REFERRAL TO A DISCIPLINARY ENQUIRY

[4] First and Second *Applicants* are the First and Second complainants who on 29 September 2009 lodged complaints, supported by an eleven page affidavit with annexures, deposed to by Mr Mawji, wherein the factual background and complaints are set out in detail, against Mr Gihwala, CDH and HHG ("the complaints").

The complaints relate to improper and/or unlawful conduct in regard to the receipt, holding and use of funds as is set out in more detail below.

The complaints were registered as complaint no. 42923. From the heading of the record it appears that although the complaints were against Mr Gihwala, CDH and HHG and, as set out below, dealt with by and on behalf of all three, the complaints are dealt with by the Society as being against only Mr Gihwala, practicing as director of CDH; the complaints being failure to account and conduct bringing the attorneys' profession into disrepute. In this judgment I deal with correspondence sent to and received by the parties themselves or via their attorneys as having been sent or received by the parties unless otherwise stated. First, second and third respondents are jointly referred to as respondents.

[5] On 5 October 2009 the complaints were forwarded to Mr Gihwala. Negotiations that followed were unsuccessful and on 9 November 2009 Mr Gihwala responded by means of a thirteen page report wherein the complaints are dealt with by him personally and on behalf of CDH and HHG. From the outset Mr Gihwala wished to point out *inter alia* that:

> *"[t]he disputes arising between me and [applicants], or more particularly, Mawji, were/are the subject matter of litigation".*

In paragraph 10 to 12 of his report Mr Gihwala advises further:

> *"10. The matters raised in the complaint have been and are the subject matter of opposed application proceedings instituted by Grancy and MG in the Western Cape High Court. These include an application brought on 5 November 2007 under case no. 15757/07 relating to the Spearhead investment ("the Spearhead application") and an application brought on 1 July 2008 under case no. 10547/08 relating to the Scharrig investment ("the Scharrig application"). The Spearhead application was settled and the terms of the settlement agreement were incorporated in a court order made on 9 March 2009. There is however a further application relating to alleged non-compliance with the court order which is still to be heard. The application relating to the Scharrig investment is still pending. In these applications Mawji deposed to affidavits on behalf of Grancy and MG. I deposed to an answering affidavit.*

Supporting answering affidavits included affidavits by Narotam, who disputed may of the allegations made on behalf of Grancy and his former employer MG. Narotam confirmed that a full and proper account was furnished in respect of the Spearhead and Scharrig investments.

11. The complaints now raised, repeat allegations made in earlier court proceedings and which have already been answered some time ago.

12. In the circumstances I will refer to and summarise matters that have already been ventilated in opposed motion proceedings. I will in addition provide to the Law Society copies of the papers filed in the applications to which I have referred, should they require it."

[6] Mr Gihwala denied that he acted as an attorney and repeatedly advised that proper and full accounts had been provided in respect of the investments. He asked that the complaints be dismissed.

[7] The Gihwala report was forwarded to applicants, who on 15 February 2010 responded by means of a further affidavit in which it is contended that details supplied by Mr Gihwala in respect of the Spearhead and Scharrig investments were irrelevant and were intended to confuse. The complaint was the improper use of funds in an attorney's trust account. The kernels of the complaints are stated to be failure to account, failure to keep the

investors money in a trust account, failure to use the investors money for the investors' matters only, the total amount in the HHG trust account is less than the amount standing to the credit of investors, breach of anti-money laundering requirements and use of trust bank account as personal account all whereof are listed with reference to specific provisions of the Rules of the Society and legislation said to be applicable.

[8] The Spearhead and Scharrig Proceedings are dealt with as follows by Applicants:

> *"9. The extensive detail proffered by Gihwala relating to the Spearhead and Scharrig Proceedings, whilst often incorrect, is also generally irrelevant to the Complaint and clearly intended to mire the Law Society's process. The Complaint, unlike the Spearhead and Scharrig Proceedings, relates to Gihwala, HHG and CDH's unprofessional conduct and breaches of the Rules. The complaint concerns the improper handling and misuse of moneys in an attorney's trust account. The Spearhead and Scharrig Proceedings will not (and do not seek to) determine these matters. That there is some overlap in the facts between the Spearhead and Scharrig Proceedings on the one hand and the Complaint on the other, must not detract from the crisp issues to be decided by the Law Society.*
>
> *10. Contrary to Gihwala's assertion at paragraph 11 of Gihwala's response, the Complaint does not merely repeat allegations made in*

earlier court proceedings and which have already been answered some time ago. The Spearhead Proceedings, the application under rule 6(11) in the Spearhead Proceedings, Scharrig Proceedings issued out of the Western Cape High Court on 29 January 2010 sub nom Grancy Property Limited and another v DCM Gihwala and others (Western Cape High Court case number 1961/10) ***("the Action Proceedings"),*** *are ongoing. A copy of the combined summons in the Action Proceedings is annexed hereto marked "L", and clearly shows the distinct nature of and relief claimed in those proceedings. It is apparent that Gihwala's response merely seeks to divert attention from his multiple professional transgressions."*

[9] Applicants conclude:

"44. In the circumstances, the investors repeat their request that the Law Society investigates and takes appropriate measures in relation to the matters traversed in the Complaint. The issues traversed in the Complaint are ripe for expeditious determination. Please let the investors know the Law Society's proposed course of action as soon as possible."

[10] On 17 February 2010 the Society sent applicants' further affidavit to Mr Gihwala for his response and addressed a letter to applicants wherein applicants were informed thereof and it was recorded that *"[w]e hope to be*

in a position to adjudicate upon the complaint once [Gihwala's] comments are received. A copy thereof will of course be sent to you for your information". The letter then proceeds as set out below.

[11] *"We note from press reports that at least one of the [applicants] is litigating with Mr. Gihwala. Is the subject matter of the litigations the same as the subject matter of this complaint?"*. (my underlining)

[12] On 23 February 2010 applicants responded in writing that the subject matter was not the same, the complaint concerned improper handling and misuse of monies in an attorney's trust account. There would be some factual overlap, however the subject matter and the issues to be decided were unequivocally distinct and it was the statutory duty of the Society to deal with the professional misconduct referred to in the complainants' affidavits.

[13] On 1 March 2010 the Society acknowledged receipt and stated that Mr. Gihwala had *"not yet taken the point that responding to [complainants'] affidavit ...would prejudice him in the conduct of the litigation, and we are in the circumstances continuing with our investigation."*

[14] On 31 March 2010 Mr. Gihwala delivered his response wherein he

advised that there were pending legal proceedings. The complaints arose in connection with the Spearhead and Scharrig investments. The complainants had instituted actions against him which covered the same issues. In paras 9.4 and 9.5 Mr. Gihwala stated:

> *"Strictly speaking this amount of R1 million should have been transferred from the trust account to a trust account in the name of the trust and then utilized for the Scharrig investment. The fact that this was not done was simply an oversight but it did not cause any prejudice".*

[14] In regard to the R10 million paid by complainants into the attorney's trust account Mr. Gihwala stated that

> *"strictly speaking this amount should have been deposited into a trust account in the name of the trust, rather than in the trust account. This too was occasioned by an oversight which did not result in any prejudice".*

[15] In para 11.1 Mr Gihwala stated that he had *"fully and properly accounted to the [complainants] in relation to the Spearhead and Scharrig investments and in relation to all their funds."*

[16] Mr. Gihwala persisted that the complaints be dismissed.

[17] As in the past Mr. Gihwala's response was sent to the complainants. In their response they, inter alia, dealt with Mr. Gihwala's allegation that he had fully accounted by referring to a judgment, which was annexed, wherein the court had found that the account submitted by Mr. Gihwala was inadequate and that an improved account was to be delivered. The judgment was said to confirm that Mr. Gihwala had not provided adequate accounting in regard to the Spearhead investment.

[18] On 19 April 2010 complainants' attorneys Webber Wentzel ("WW") sent a further response to the Society the relevant part whereof reads as follows:

> *"2. In view of the latest correspondence and the inadequacy of Mr. Gihwala's further submissions ("Mr. Gihwala's further submissions"), it is clear that the Complaint should now proceed to a disciplinary hearing/formal enquiry, where this serious matter may be properly scrutinized and decided. Our clients wish to present oral argument at such a hearing/ enquiry, to contextualise the Complaint, and dissect the competing arguments and evidence which bear directly on our clients' interests.*

3. *Allaying any fears in your letters, Mr. Gihwala's further submissions do not allege that the Law Society proceeding to decide on the Complaint would prejudice him in the conduct of any litigation, nor are there any reasonable grounds to suppose that this will be the case. Indeed, Mr. Gihwala further submissions call for the Complaint to be (decided and) dismissed, not postponed."*

4. *We look forward to hearing from you at your earliest convenience."*

[19] On 3 May 2010 WW sent an e-mail to the Society wherein it is, inter alia, stated that in the complainants' submission the matter should now proceed to the Disciplinary Committee (the "Committee") under Rule 15.8.7 and it is requested that the Committee recommend to the Council under Rule 15.8.7.2 that a formal enquiry be held in relation to the complaints. The e-mail concludes with the following:

"It is premature to set out in detail why our clients and its representatives should actively participate in the formal enquiry. Once the matter is referred by the Council to the Disciplinary Enquiry Committee ("DEC"), our clients will make representations to the DEC setting out those grounds."

[20] On 31 May 2010 two senior functionaries of the Society and two

members of the Committee one being Mr. Alberts met to discuss the matter. It was decided that in view of the complaints' request for an enquiry and the complexity of the matter an agenda item was to be prepared.

[21] On 8 June 2010 Mr. Alberts requested that the two judgments ordering Mr. Gihwala to account be sent to him by the Society. This was done. On 9 June 2010 Mr. Alberts instructed that the trust ledgers of CDH (sic) had to be obtained. On the same day the Society sent copies of two pages which appeared to it to be an extract from the trust ledger of HHG in respect of Seena Marena Investments ("SMI") and one page which appeared to it to relate to a section 78(2A) investment with Peoples Bank in respect of SMI.

[22] On 9 June 2010 Mr. Alberts enquired from the Society if anyone had verified where the figures on the ledger sheets tally with those mentioned in the affidavits and in the accounting done by Mr. Gihwala. In his view the ledgers were, at a quick glance, not very informative. In an e-mail on the same day he stated:

> *"Further to my earlier note, surely there must be more ledger accounts? The papers make reference to payment and disbursements which I do not find on these ledgers- or am I wrong".*

[23] On 10 June 2010 Mr. Pearson, a senior functionary of the Society responded to the aforesaid e-mail as follows:

> *"The extract from the HHG trust ledger which I sent to you confirms the payments made by Taurin referred to by the complainant in his original complaint (R3,5M and R10M), the payments of R1,8M and R1 240 250 by HHG to Ngatana, the payment of R1M by HHG to the trust, the payments of R21 073,92 to US and R57 182,66 to the trust by HHG from interest earned on the R10M to Tarquin and the further payment to Tarquin of R2 764 118,24 (purportedly from the sale of the Scharrig shares), the interest earned figure of R78 265,55, and the receipt from the trust of the R50 000,00 which was paid to the complainant as agreed interest. There are also two debits for bank charges.*
>
> *What the ledger does not show is the payments made by Ngatana in respect of the Spearhead and Scharrig shares and the loan to Manala, nor does it show the movement of funds whilst in the hands of the trust. Do we have the right to delve into the financial affairs of Ngatana and the trust, and is there any evidence of misuse or abuse of HHG's trust account?*
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> *The extract from the investment account shows merely the receipt of the R10M, the accrued interest, and the payment out of capital and interest.*

In view of the informal discussion which Frank and I had with you and David Geard last week, and in view of the suggestion that this is a matter which may be more appropriately dealt with by way of a disciplinary enquiry, we have not called for any further documents from either the complainant or Mr. Gihwala."

[24] From the aforesaid it is apparent that Mr. Alberts and Mr. Pearson were at that time focused upon the complaints of misuse of trust accounts and funds therein and failure to account. The informal discussion alluded to in the last paragraph of Mr. Pearson's response is the meeting of 31 May 2010 referred to in paragraph 20 above.

THE REFERRAL TO A DISCIPLINARY ENQUIRY

[25] On 14 June 2010 the Committee recommended to Council that the matter be referred to Council's attorneys to draft charges and convene a disciplinary enquiry.

[26] On 22 June 2010 WW sent a copy of the further judgment against Mr. Gihwala by Dlodlo J to the Society in order to ensure that it be considered before the Council hearing on 28 June 2010.

[27] Dlodlo J ordered Mr. Gihwala and HHG to render a full and proper account to complainants in respect of the Scharrig investment and to provide a duly supported statement of account dealing with at least as to how, where, by when and for what purpose the R1m which was held in trust by HHG on behalf of First alternatively Second complainant and the R10m which was transferred to HHG's trust account was utilized. In regard to the section 78(2A) deposit in the name of SMI reflected in the HHG ledgers, which were as set out above sent to Mr. Alberts, Mr. Justice Dlodlo found that:

> *"In terms of that section Mr. Gihwala was obliged to deposit the funds in the name of [complainants] and not in the name of SMI"*

[28] From the record it appears that the Council was referred to the terms of the order to account and on 28 June 2010 the Council confirmed the Committee's recommendation.

EVENTS SUBSEQUENT TO THE REFERRAL TO A DISCIPLINARY ENQUIRY

[29] On 8 July 2010 the Society informed WW that the Council directed that the complaints be referred to a formal disciplinary enquiry and recorded that the Society would address WW *"further with regard to the further*

proceedings in the matter in due course".

[30] On the same day the Society instructed its attorneys Bisset Boehmke McBlain ("BBM") to proceed with the formal disciplinary enquiry.

[31] Mr. Koen was appointed as *pro forma* prosecutor in respect of the formal disciplinary enquiry.

[32] BBM did not draft charges against Mr. Gihwala. I shall return to this aspect below.

[33] On 1 October 2010 Mr. Koen of BBM held a telephone conversation with Mr. Movshovich of WW ("the conversation") wherein he raised two concerns which in his view, may give rise to certain difficulties when prosecuting the complaints to finality. First, he suggested that there may be an overlap in substance between the disciplinary proceedings relating to the complainants and the debatement of the accounts that were delivered in purported compliance with the judgments aforesaid against Mr. Gihwala as well as action proceedings instituted by complainants against Mr. Gihwala. Secondly, Mr Koen raised the concern that Mr. Gihwala may argue that the complainant were not clients or intended clients of HHG, the complainants

monies were not trust monies or intended to be trust monies and because the monies were in a third parties name whilst in the HHG trust account this might somehow have a bearing on the substance of the complaints. These concerns were discussed between Mr. Koen and Mr Movshovich who expressed the view, echoed in a later letter, that there was no substance in these perceived difficulties.

[34] On 12 October Mr. Koen on behalf of BBM sent a six page letter ("the Koen letter") to the Society wherein he gave a brief overview of the different proceedings and advised the Council to act as it is empowered to do so by section 71(4) of the Act and resolve to postpone the enquiry until the litigation referred to had been finalized. Not a word is said in the Koen letter about the conversation. Further and for a reason not explained by the Society, the by then established practice of affording the parties concerned an opportunity to be heard and to respond was not followed as a copy of the Koen letter was not sent to complainants or WW.

[35] On 21 October 2010 WW sent a 10 page e-mail to Mr. Koen of BBM, being the *pro forma* prosecutor and the Society's appointed attorneys. The e-mail dealt in detail with the concerns raised by Mr. Koen during the conversation. This e-mail is defined in the papers as "the October 2010

letter". A copy of the October 2010 letter was, again for an unexplained reason, not placed before the DEC or the Committee. The Committee therefore did not consider the contents of the October 2010 letter when it considered making and when it made the recommendation to the Council that Mr. Koen's recommendation be accepted. Significantly the letter was not placed before the Council before it, on 22 November 2010 confirmed the committees' recommendation.

[36] In para 68 of the Answering Affidavit it is admitted that the October 2010 letter was not considered by the Committee or the Council. This admission is then followed by a denial *"that this constituted an unlawful abuse of discretion or that the failure by the [Council] or the [Committee] to do so is fatal to the decision to postpone. The letter materially duplicates previous correspondence. The content of which was considered when the decision to postpone was taken."*

[37] In para 77 of the Answering Affidavit it is stated that the underlying facts are adequately summarised in the running agenda and in Mr. Koen's letter *"and the reliance on those summaries in the circumstances of this matter was lawful and reasonable"*.

[38] With the October 2010 letter was enclosed documents which would supplement the information that Mr. Koen already had in his possession being *inter alia* the *"improved"* account delivered by Mr. Gihwala on 7 May 2010 in what was stated to be purported compliance with the judgment of Binns-Ward J delivered on 15 April 2010, the accounting delivered by Mr. Gihwala and his Trust on 2 July 2010 in alleged purported compliance with the court order of Dlodlo J delivered on 18 June 2010, the accounting delivered on 2 July 2010 in alleged purported compliance with the same judgment, the *"improved"* statement of account and explanatory memorandum from Mr. Gihwala dated 27 September 2010.

[39] Para 2.6 of the October 2010 letter reads as follows:

> *"2.6 On a balance of interests, it is clear then that the disciplinary proceedings should not be stayed pending the finalisation of any and all issues which may arise out of the action proceedings or the debatement of the accounts. Mr. Gihwala has not objected to the continuation of the disciplinary proceedings; his rights to silence and non-incrimination are not implicated; and the public interest in having the Complaint finalised is paramount. Any rational exercise of discretion in this regard must, respectfully, result in the decision to continue with the disciplinary proceedings."* (my underlining)

THE RULES

[40] I digress to discuss the Rules applicable in regard to disciplinary proceedings so as to place the events and decisions in the appropriate framework.

[41] The Society's Disciplinary Rules[1] are enunciated in Rule 15 and, for present purposes, the relevant provisions are:

1. A Disciplinary Committee ("DC") has the duty, function and power (the "duty") to consider and investigate any complaint made against a member. It may require a complainant to verify the complaint by way of affidavit and to furnish evidence in substantiation of any complaint. (Rules 15.8.1 and 15.8.2)
2. Where a DC is of the opinion that the complaint does disclose a *prima facie* case of unprofessional or dishonourable or unworthy conduct it shall furnish the member with such particulars of the complaint as may be considered reasonably necessary to enable the member to appreciate the nature of the complaint and call on the member to furnish it with his explanation. (Rule 15.8.3)

[1] See Law Society v Nel 2012 (4) SA 274 (SCA) at 276A for the founding legislation of the Rules.

3. A DC then decides on the basis of the complaint and explanation and any other evidence available to it, whether or not the complaint establishes a case of unprofessional and dishonourable or unworthy conduct on the part of the member and where it is of the opinion that it does do so, the DC has the duty to notify the Council of its opinion and the facts upon which such opinion is based. At the same time it makes a recommendation to the Council that the Council either determine the complaint summarily or hold a formal enquiry into the complaint. In making any recommendation to the Council the DC shall furnish the Council with all relevant information in its possession to enable the Council to consider the recommendation. (Rule 15.8.7)

4. The Council shall consider any complaint forming the subject matter of a DC's recommendation and either determine such complaint summarily or resolve that a formal enquiry shall be held in which event it shall refer the complaint to a Disciplinary Enquiry Committee ("DEC") with an instruction that the DEC shall hold a formal enquiry. (Rule 15.9.2)

5. The DEC is charged with the duty, function and power of conducting a formal enquiry which is commenced by way of

the service on the member of a summons to attend at the enquiry. (Rule 15.11.1)

6. The duty, function and power ("the duty") of the DEC is to determine the manner in which the enquiry shall be conducted in which regard it shall be guided by the practice and procedure prevailing in High Court criminal trials (Rule 15.11.3.1). The DEC has the duty to appoint a practitioner or advocate to act as *pro forma* prosecutor in the leading of evidence and the presentation of the case against the member at the enquiry (Rule 15.11.3.2) and *mero motu*, or upon the application of any affected party, to adjourn the enquiry upon such terms as to costs, or otherwise, as it deems fit (Rule 15.11.3.5).

7. The DEC has the duty to do all things necessary to ensure that all disciplinary proceedings are dealt with justly, expeditiously and in accordance with the Rules. (Rule 15.11.3.9)

8. Upon a finding of guilty the member shall be obliged to pay the costs of the disciplinary enquiry. (Rule 15.14)

DISCUSSION

[42] Neither Mr. Gihwala nor Mr. Koen oppose the relief sought by applicants and Mr. Koen has not filed any affidavit in response to the

allegations made in the founding, supplementary founding or replying affidavits.

[43] The Society is in the true sense of the word the guardian of the prestige, status and dignity of the attorneys' profession and the public interests in so far as they are affected by the conduct of members of the profession.[2]

[44] In **Incorporated Law Society v Taute** 1931 TPD12 at 17 it was held that in disciplinary enquiries the Law Society has a difficult, delicate and responsible task which to a large extent, if not indeed wholly, is judicial. It is the duty of the Law Society to make full, detailed, thorough and impartial investigation of the charges against a member.

[45] It is so that Section 71 (4) of the Act does not postulate a further threshold requirement of substantial additional factors being present and which justify a postponement. This does not however mean that the Council has an unlimited free discretion to postpone when the jurisdictional facts have been established. The discretion has to be exercised with due regard the empowering legislation and the Rules. Principles of natural justice require of

[2] Kaplan v Incorporated Law Society, Transvaal 1981 (2) SA 762 (T) at 781 C.

a domestic tribunal to listen fairly to both sides, to observe the principles of fair play and to discharge its duties in good faith[3]

[46] I find it regrettable that not any of the Society, Committee, *pro forma* prosecutor or BBM offered any explanation as to why the October 2010 letter was not disclosed to the DEC, Committee or Council. BBM is the attorney of record in these proceedings for respondents. I would have expected a full and frank disclosure in this regard by a statutory body tasked with the important public duty that it has.

[47] It appears that the Koen letter was placed before the Committee on 8 November 2010. Mr. Alberts had in preparation for this meeting again reviewed the record and record of decisions, he considered the Koen letter and he telephoned Mr. Koen and debated his opinion with him at some length. Mr. Alberts deposed to a confirmatory affidavit. He however did not say what the content of this debate was and more importantly did not say that Mr. Koen had advised him of the conversation or the October 2010 letter let alone its content. I am convinced that this is not merely an oversight and that it can safely be accepted that neither the conversations nor the October 2010 letter was disclosed to Mr. Alberts. I say so as it is common

[3] Meyer v Law Society, Transvaal 1978 (2) SA 209 (T) at 212 H.

cause that neither served before the Committee or the Council and Mr. Alberts would no doubt have disclosed same had he been aware thereof.

[48] Prior to the Committee's recommendation to the Council that a formal disciplinary enquiry be held Mr. Alberts had called for copies of the trust account and raised questions in regard to the accounting of monies. It is clear from the contents of the October 2010 letter that further information which had not previously been at the disposal of Mr. Alberts or the Committee was made available by means of the letter. This further information related to *inter alia* the accounting by Mr Gihwala and the extent to which there had been a failure to comply with the judgment and order of Dlodlo J.

[49] Save for a covering letter to the Dlodlo J judgment the last correspondence between complainants and the Society was on 3 May 2010. The supplementary information contained in the October 2010 letter was and could not have been a duplication of previous correspondence as contended for by the Society as such information did not then exist.

[50] It is further not correct that the relevant underlying facts are adequately summarised in the running agenda (being the record) and in Mr.

Koen's letter as:

1 These documents make no reference to the conversation or the contents of the 21 October 2010 letter.

2. The further information referred to and presented by means of the October 2010 letter with annexures thereto is not contained in the record or Mr. Koen's letter. The further information in regard to accounting is the very kind of information Mr Alberts sought before the Committee recommended to the Council that a formal enquiry should be held.

3. The submissions made for and on behalf of the complainants in respect of a postponement of the enquiry are not contained in the record or Mr. Koen's letter.

4. The October 2010 letter included detail informing of the nature of the relationship between applicants and HHG which Mr. Koen concedes in the Koen letter he is unsure of, as well as detail supporting the contention that applicants' funds were always intended to be, and were in fact, trust monies.

5. Mr. Koen stated in his letter that the various disputes arising out of the administration by Mr. Gihwala/HHG and/or CDH of the investment funds are far reaching and have yet to be resolved

by the High Court. However at that point in time both Mr. Gihwala and HHG had already been ordered by this Court to account. Such an order would only have been made had there been a failure to do so. This Court had therefore already found that there was a failure to account. As far as trust monies are concerned not only did Mr. Gihwala himself say that strictly speaking the monies should have been dealt with differently but Dlodlo J had found that Mr. Gihwala was obliged to deposit the funds in the name of complainants and not in the name of SMI as was done. There were therefore no disputes to be resolved as far as the aforementioned issues are concerned.

6. The interests of the public, complaints and Mr. Gihwala are not dealt with in the Koen letter.

[51] The Society had, by the time that the decision to postpone was made, established a practice that the response of complainants was sought before any decision was made. The Koen letter was not sent to complainants or WW for a response thereby denying complainants the opportunity to be heard on the contents of the Koen letter. If complainants had no right to be heard why did Mr. Koen have the conversation? Mr. Koen was apparently acting as the Society's attorney at the time. He did not convey the content of

the conversation to his client. The Society did not address WW in regard to the possibility of a postponement as it had, on 8 July 2010, undertaken to do. There was therefore a failure to apply the principles of natural justice as set out above.

[52] The duration of the civil litigation and the time to the conclusion thereof was not considered by the Council at all. The Council does not say that it considered the public interest or the interests of the complainants or Mr. Gihwala when the question of a possible postponement was considered and there are no factual allegations made by respondents to support a general statement to the effect that all relevant factors were considered.

[53] From the Rules it appears that it is only where the DC is of the opinion that a complaint discloses a *prima facie* case that the member is called upon to furnish an explanation. The DC then considers all the relevant evidence and decides whether or not the complaint establishes a case against the member if it does the DC notifies the Council of its opinion and the facts upon which such opinion is based.

[54] In the present matter the Committee therefore not only decided that the complainants made out a *prima facie* case but after it had considered the

evidence came to the conclusion that the complaints established a case against Mr. Gihwala. This conclusion with the facts upon which it was based were placed before the Council which must have considered the facts before it when it accepted the recommendation that a formal enquiry be held. Both the Committee and the Council must therefore have been of the opinion that the facts establish a case against Mr. Gihwala before the matter was referred to the DEC and then to BBM to formulate charges against Mr. Gihwala.

[55] BBM did not formulate charges against Mr. Gihwala as instructed to do. Mr. Koen, apparently without being requested or instructed to do so and without any disclosed reason, instead conducted an investigation in respect of the legal proceedings between the complainants and Mr. Gihwala and advised the Council to resolve to postpone the enquiry until the litigation has been finalised. In his view it would be practical and cost effective for the factual questions to be resolved before deciding whether charges of unprofessional conduct can be proved. At this stage the Committee and Council had however already considered all the relevant facts and had decided that the facts do establish a case against Mr. Gihwala. At the time the Committee and Council must have been satisfied with the answer by the complainants in regard to the subject matter of the civil proceedings. The decision to charge Mr. Gihwala had already been made.

[56] The DEC is charged with the duty to ensure, that the enquiry is dealt with justly, expeditiously and in accordance with the Rules. It is not the function of the DEC to curtail costs or allow considerations of costs to interfere with the just and expeditious finalisation of the enquiry. A member who is found guilty shall pay the costs in connection with the enquiry (Rule 15.14) and Mr. Gihwala, being the member concerned, has not raised objection to the commencement of the enquiry on the basis of the costs implications thereof or on any other ground for that matter.

[57] From the answering affidavit and argument on behalf of respondents it appears that the decision that was taken was said to be to postpone and not to revise the decision to hold a formal enquiry. This being so the decision to postpone was said to be merely procedural and did not affect the rights of complainants. The reason given for the decision under review was that it would be practical and cost effective for the civil proceedings to be resolved before deciding whether charges of unprofessional conduct could be proved. According to Mr. Koen the decision was motivated by the Society's concern that material facts are in dispute and that it is undesirable and inappropriate for disputes of fact to be tried in parallel. The Society concluded for this reason that it is more appropriate that the litigation between complainants

and Mr. Gihwala run its course before it further considers what to do about the disciplinary enquiry. The decision whether charges could be proved had however already been taken and the motivation for the decision, being the resolution of disputes before considering what to do about the disciplinary enquiry is therefore clearly wrong. A reconsideration of whether charges could be proved or what to do with the enquiry would clearly affect the rights of applicants as would the postponement thereof. Applicants have the right to have their complaints dealt with expeditiously which right was affected by the postponement.

[58] In **Pepcor Retirement Fund and Another v Financial Services Board and Another** 2003 (6) SA 38 (SCA) at para 47 Cloete JA held:

> *"In my view a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should.....be reviewable."*

[59] This is not a case where the Council decided that the conversation and the October 2010 letter were irrelevant to the making of the decision. Mr. Koen was not entrusted with the power to determine what facts are relevant to the making of the decision to postpone the enquiry. The recognition of a material mistake of fact as a ground of review would, given the circumstances of this case, not blur the fundamental distinction between appeal and review.

[60] As the Council did not consider the contents of the conversation and the October 2010 letter, the supplementary information and the submissions made in regard to a postponement by complainants and did consider irrelevant issues such as an overlap of disputes and costs when making its decision to postpone it laboured under a material mistake of fact and the decision to postpone falls to be set aside on this ground.

[61] The charge against a member in a formal disciplinary enquiry must be formulated with adequate particularity to enable the member to answer the charge, and the enquiry must be restricted thereto. The Council is bound by the charges which it prefers against a member[4]. Applicants contend that there is no real or substantive overlap of factual and legal issues and there is no

[4] Nel (*supra*) at 278 F-G.

cause for the disciplinary proceedings to be suspended pending the outcome of the civil proceedings whereas Mr. Koen's contentions are as set out above. In my view it is without duly formulated charges not at this stage possible to decide whether or not there is a real or substantive overlap. It appears as if the horse had been placed before the cart as the correct approach would, in my view, have been to formulate the charges and then to consider the facts against such charges. Nowhere does Mr. Koen formulate the charges with reference to the Rules as complainants had done in their February affidavit. It further does not appear from the Koen letter that he had, or from the record that the Council had, considered the complaints at the hand of the provisions of the Rules that complainants say were transgressed prior to the advice being given and accepted.

[62] With respect I am however of the view that the question is not whether there is an overlap or not.

[63] The question is rather whether the unprofessional or dishonourable conduct of Mr. Gihwala is the subject of the pending civil proceedings or not. To my mind it is not.

[64] According to the Oxford Dictionary *"subject"* means *"a thing that*

gives rise to something". The Society enquired from applicants whether the subject matter of the civil litigation was the same as the subject matter of the complaints to which applicants responded that it was not. Thereafter the investigation continued. The enquiry shows that the Society was at that time alive to the provisions of Section 71 (4) and the investigation continued thereafter which can only mean that the Society was satisfied with the answer to the enquiry notwithstanding the reference to the civil proceedings in response by Mr Gihwala. The Society's letter of 1 March 2010 tends to suggest that the investigation would continue unless Mr Gihwala raised the point that he would be prejudiced by responding. This he never did.

[65] The subject of the civil proceedings is not the transgression of rules of professional conduct and the relief sought therein does not require a finding in regard to the honourability and professionality of Mr. Gihwala. The unprofessional and dishonourable conduct does not give rise to applicants' claims in the civil proceedings. It is not the focus of those proceedings. The breaches of the Rules are incidental and not the subject of the disputes between the parties. It is the conduct of Mr Gihwala that is the subject matter of the civil proceedings and not whether or not such conduct constituted breaches of the Rules.

[66] I am therefore of the opinion that the Council asked itself the wrong question and the decision to postpone was not consistent with the requirements of section 71 (4). In the circumstances the Council did not exercise its discretion lawfully and the decision to postpone falls to be set aside.[5]

[67] In the circumstances it is not necessary to deal with the further alleged grounds for review and the defences raised thereto.

The appointment of Mr Koen as *pro forma* prosecutor.

[68] Applicants allege that they have a reasonable apprehension that Mr Koen would not prosecute Mr Gihwala and conduct the enquiry in the manner that could be expected from an impartial prosecutor as Mr Koen acted for the Executive Officer of the Financial Services Board ("FSB") upon whose application Mr Gihwala was appointed as one of the Curators of the Fidentia Group of Companies. Mr Koen, as an attorney is duty bound to do, would act in the best interest of his client being the FSB. As any finding against Mr Gihwala would impact negatively on the FSB and its nominee a reasonable apprehension of prosecutorial bias in favour of Mr Gihwala exists. It is then concluded that the decision to appoint Mr Koen as *pro forma* prosecutor should therefore be set aside.

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[5] SA Jewish Board of Deputies v Sutherland and Others 2004 (4) SA 368 (W) at paras 26 to 30.

[69] Mr Koen did not depose to an affidavit in response to these allegations made by applicants. Respondents deny that there is any basis for any apprehension of bias and further deny any bias whatsoever. This denial is made by the President of the Society who does not have personal knowledge of the facts which applicants allege show that they have a reasonable apprehension of prosecutorial bias.

[70] In paragraph 67 of the founding affidavit it is stated that in view of Mr Koen's long-standing involvement in the Fidentia proceedings and the FSB's concomitant exercise of oversight powers over the joint curators, it was plainly improper for him to act as *pro forma* prosecutor in respect of the complaints and his personal conflict of interest gives rise to a reasonable apprehension of bias. These allegations are met by a bare denial by the President. The facts are such that Mr Koen "must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate". Respondents did not present an affidavit by Mr Koen wherein he deals with the facts and chose to rest their case on a bare denial. In the circumstances this denial does not create a real,

genuine and *bona fide* dispute of fact.[6]

[71] Applicants further say that they, as complainants, are affected and interested parties in the matter and their consent to Mr Koen acting was neither sought nor obtained. Respondents deny that applicants have the right to be consulted with respect to the identity of the prosecutor. I agree that applicants do not have such a right. The Rules do not create such a right and there is nothing to show that any representation by respondents was made whereupon a legitimate expectation to be heard before the appointment of the prosecutor, could be based.[7]

[72] Respondents contend that there is no basis or authority to apply the apprehended bias principle (being applicable to a criminal prosecutor), without more ado, to a *pro forma* prosecutor in disciplinary proceedings.

[73] Disciplinary proceedings are not ordinary civil proceedings but are rather *sui generis* in nature[8] and are not to be conducted as if they were a criminal case.[9] The task of a DEC is judicial and it is obliged to make full,

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[6] Wightman t/a J W Construction v Headfour (Pty) Ltd and another 2008 (3) SA 371 (SCA) at paragraph 13, Malan and another v Law Society, Northern Provinces 2009 (1) SA 216 (SCA) at 222 B-C.
[7] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) paragraph 80.
[8] Nel (*supra*) at 278B.
[9] S A Veterinary Council v Veterinary Defence Association 2003 (4) SA 546 (SCA) at 556 E-F.

detailed, thorough and impartial investigation of the charges against a member.[10] It is the duty of the *pro forma* prosecutor to lead evidence and present the case against the member at the enquiry.

[74] It is expected of the member to co-operate and obstructionism is not appropriate. A member is not permitted to rely on denial upon denial and instead of meeting allegations to deflect therein, and, as part of the culture of blame, always blame others.[11] As was stated by Van Dijkhorst J in Prokureursorde van **Transvaal v Kleynhans.**[12] "Uit die aard van dissiplinêre verigtinge vloei voort dat van 'n [lid] verwag word om mee te werk en die nodige toeligting te verskaf waar nodig ten einde die volle feite voor die [kommittee] te plaas sodat 'n korrekte en regverdige beoordeling van die geval kan plaasvind".

[75] A member is not, as an accused is, entitled to remain silent and has to co-operate in the disciplinary proceedings.

[76] There are material differences between criminal and disciplinary proceedings, the most obvious being that it is the duty of a DEC to

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[10] See paragraph 44 above.
[11] Malan (*supra*) at 222 C.
[12] 1995 (1) SA 839 (T) at 853 G-H.

investigate it is inquisitorial and not, as in criminal proceedings, accusatorial in nature. Further a *pro forma* prosecutor does not represent the State, the community at large and the interest of justice in general. I therefore agree that the appropriate test is whether there is any real prospect of any rights of applicants being infringed by the participation of Mr Koen in the disciplinary hearing.

[77] As is set out in paragraphs 18 and 19 above, applicants said that they wished to present oral argument at the enquiry to contextualize the complaints and dissect the competing arguments and evidence which bear directly on their interests. The Society have not denied applicants this wish. Applicants further contended that they and their legal representatives should actively participate in the enquiry and said that they would make representations to the DEC setting out the grounds for such contention. They are still at liberty to do so.

[78] Applicants do not seek to impugn the ethics or professionalism of Mr Koen. Applicants do not contend that Mr Koen has caused any delay or has been remiss in his duties as *pro forma* prosecutor. There is no evidence that Mr Koen will not act without fear, favour or prejudice. An apprehension in this regard is not sufficient. That Mr Koen incorrectly advised the Council to

postpone may give rise to an apprehension of bias but does not show that there is a real prospect of any infringement of rights. The same hold true for the fact that Mr Koen acts for the FSB. Whether it is advisable to appoint Mr Koen as *pro forma* prosecutor in circumstances where he may be conflicted is not the test.

[79] On applicants' own version they did not look towards Mr Koen as being the representative of their interests as a complainant in criminal proceedings does.

[80] Under the circumstances it can not be said that there is a real prospect of any rights of applicants being infringed by the participation of Mr Koen and there is no basis for the review of the decision to appoint him as *pro forma* prosecutor.

Substitution of the decision.

[81] Applicants seek an order directing the Society and the Council to proceed with the disciplinary enquiry without delay.

[82] Generally a review court when setting aside a decision of an administrative authority will not substitute its own decision for that of the

administrative authority unless exceptional circumstances exist.[13]

[83] I have already found that the decision to postpone should be set aside. Without a decision to postpone the disciplinary enquiry will proceed. It is further not strictly speaking a case of substitution of the Court's decision for that of the Council. Should I however be incorrect in this regard I am of the view that the end result is in any event a foregone conclusion and it would merely be a waste of time to order the Council to reconsider the matter. Further delay would also cause unjustifiable prejudice to applicants.[14]

[84] Under the circumstances I am of the view that the Society and Council should be directed to proceed with the disciplinary enquiry without delay.

[85] The aforesaid finding of course does not mean that the Council or DEC are not permitted or entitled to exercise their discretions to postpone the disciplinary enquiry in future.

Costs.

[86] Applicants seek a punitive costs order. I do not think that such an

[13] S A Jewish Board (*supra*) at 390 B-C.
[14] University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others 1998 (3) SA 124 (C) at 131 D-J.

order is warranted. I do however agree that the costs of two counsel should be granted.

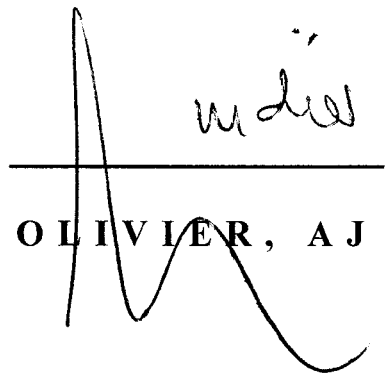
Conclusion.

It is therefore ordered that:

1. The decision by the third respondent on 22 November 2010, under section 71 (4) of the Attorneys Act, 1979 ("the Attorneys Act"), to postpone the first respondent's disciplinary enquiry into the conduct of the fourth respondent (the first respondent's reference 42923/Gihwala/PP/je) ("the disciplinary enquiry"), pending the finalization of the Western Cape High Court cases of Grancy Property Limited and another / Seena Marena Investment (Pty) Ltd and others (case number 15757/07); Montague Goldsmith AG and another / Dines Chandra Manilal Gihwala and others (case number 10547/08); and Grancy Property Limited and another / Dines Chandra Manilal Gihwala and others (case number 1961/10), is reviewed and set aside;

2. The first and third respondents are to proceed with the disciplinary enquiry under sections 71 and 72 of the Attorneys Act and rule 15 of the Rules of the Law Society of the Cape of Good Hope without delay;

3. The first to third respondents are to pay, jointly and severally, the one paying the others to be absolved, the applicants' costs of suit including the costs of two counsel.



OLIVIER, AJ