IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case no. 14154/17

In the matter between:

THE CAPE LAW SOCIETY Applicant

(formerly the **LAW SOCIETY OF THE CAPE OF GOOD HOPE**)

and

DINES CHANDRA MANILALA GIHWALA Respondent

JUDGMENT DELIVERED ON 29 JANUARY 2019

SHER, J (BOQWANA J concurring):

Introduction

1. We have the unenviable task of sitting in judgment of the respondent, a senior practitioner who was admitted as an attorney in 1978, some 40 years ago, and who retired from active practice in 2011 due to ill-health, after a long and distinguished career. His *curriculum vitae* makes for impressive reading and it is worth quoting from it, as it will illustrate the startling disparity between the heights to which he soared in his professional life and the depths to which he has fallen. Unfortunately, as in the case of many before him he seems to have been lured

from the path of righteousness by the attraction of big and easy money, and the Cape Law Society has brought an application that he be struck from the roll on the grounds that he has made himself guilty of unprofessional and dishonourable conduct.

2. The respondent attained a B.Proc degree in 1977, after studying part-time while completing his articles, and following upon his admission became managing partner of Wilkinson, Van Der Ross & Joshua, a law firm well-known at the time for its selfless service to local communities at the height of the *apartheid* struggle. In this regard the respondent made his own valuable contribution as a founder member of the National Association of Democratic Lawyers (NADEL). In 1986 he became an executive member of the organization and later also served as its treasurer.

3. In 1988 he obtained a post-graduate diploma in company law from the University of Cape Town and in 1997 he was awarded a higher diploma in tax practice by the (then) Rand Afrikaans University.

4. Over the course of time the respondent rendered many hours of service to the profession. He regularly served as an examiner for the attorneys' admission examinations and was a member of the Taxing Committee of the Law Society and the Association of Law Societies' Committee in Continuing Legal Education. In 1996 he was appointed to the Standing Advisory Committee on Company Law. In 1997 he served as an acting judge of the Free State and Western Cape divisions.

5. His service to the public was not confined to the legal profession. In 1998 he was appointed to represent the Minister of Agriculture and Land Affairs on the Perishable Products Export Control Board. In 2001 he was appointed as Vice-Chair of the Council of the University of the Free State, and co-curator of the Medicover medical aid scheme. In 2003 he served as the Chair of the disciplinary committee of the Public Accountants' and Auditors Board, and he subsequently also served as Chair of its successor Board, the Independent Regulatory Board for Auditors. In 2007 he was appointed as one of the curators of the Fidentia

group of companies, after their well-publicised multi-million rand collapse at the hands of their flamboyant founder, one Arthur J Brown, who was convicted of the wholesale criminal plundering of pension funds monies belonging to beneficiaries, including widows and orphans, which he used to finance his enterprise.

6. Between 1978 and 2011 the respondent served as managing partner or chairman of many prominent legal firms: from Wilkinson, Van Der Ross & Joshua, which later became Wilkinson, Joshua & Gihwala and then Gihwala Abercrombie (after it merged with Abercrombie & Sonn), to Hofmeyr, Herbstein and Gihwala which for the sake of convenience will be referred to as 'HHG' (after the merger between Hofmeyr Van Der Merwe in Johannesburg, Hersteins in Cape Town and Gihwala Abercrombie in Cape Town), and then finally Cliffe Dekker Hofmeyr (after the merger of DLA Cliffe Dekker and HHG), currently one of the largest and most well-known and respected law firms in South Africa.

The factual background

7. The current application follows a number of complaints of alleged professional misconduct which were lodged against the respondent in 2009 and 2011 by one Karim Mawjii, the Chief Executive Officer of Montague Goldsmith AG[1] (hereinafter 'MG'), a Swiss asset management company based in Zurich. Mawjii was introduced to the respondent in 2001 by a long-standing friend of his, one Anil Narotam, who was employed as MG's Chief Operating Officer. MG acted as investment advisor and agent of Grancy Property Limited ('Grancy'), an investment company (incorporated under the laws of the British Virgin Islands), which traded principally out of Lichtenstein, and which was used by Mawjii and Narotam as a vehicle to take up two investments which the respondent introduced them to in 2005.

8. The first of these was known as the 'Spearhead' investment. It concerned an offer to subscribe for so-called 'linked' units (ie shares linked to debentures) in

[1] In liquidation since 2009.

Spearhead Property Holdings Ltd a commercial property loan stock company which was listed on the Johannesburg Securities Exchanges. The offer was part of a 'BEE' (Black Economic Empowerment) opportunity, as Spearhead was desirous of attracting black investors and wished to raise additional capital. In order to take up this opportunity the respondent proposed making use of a 'black empowerment company' Ngatana Property Investments (Pty) Ltd, which had been conceived by a business partner of his, one Lancelot Manala. Manala and the respondent together held a 58% shareholding in Ngatana, and Prescient Real Estate (Pty) Ltd a real estate and asset management company, held the balance.

9. The proposal which was put forward by the respondent was that Grancy, the Dines Gihwala Family Trust ('DGFT') and Manala would jointly subscribe via Ngatana for 58% of 3.5 mil Spearhead linked units, which were available at a price of R15.50 per unit, a significant discount to the prevailing market price at the time which was in the region of around R20 per unit. As Standard Bank was prepared to finance 75% of the price, ie approximately R12.75 per unit the investors in the scheme needed to finance the balance of approximately R2.75 per unit, and the costs of the transaction.

10. In order to effect the investment it was proposed that use be made of another entity which had been specially set up for this purpose, Seena Mareena Investments (Pty) Ltd ('SMI'), in which Manala and the respondent each held a 50% shareholding. It was envisaged that Manala and the respondent would forgo a third of each of their respective shares in SMI, in favour of Grancy, the idea being that each of the three participants would then have a third shareholding in SMI. In return for Grancy's shareholding in SMI Mawjii was to provide loan funding in an estimated amount of R3.5 mil, which would be used by SMI to acquire a 58% stake in Ngatana. In addition, as Manala apparently did not have the necessary financial means to meet the cost of his one-third contribution to the venture, it was proposed that Grancy and the respondent would each lend him half of the cost thereof.

11. Although one would have expected that as experienced asset managers Mawjii and Narotam would have ensured that the necessary written contracts which would give effect to the parties' understanding (including a shareholders agreement) were prepared beforehand by the respondent, who had offered to have this done via HHG, the law firm of which he was Chairman at the time, surprisingly the deal was done on the basis of a simple handshake in a hotel room in Johannesburg on 3 February 2005, as Mawjii was led to believe that time was of the essence. And as will become apparent, funds were subsequently transferred by MG/Grancy to HHG in anticipation of both investments being realized, without such contracts being in place. Mawjii said that he went ahead because the respondent held out that he was a member of an honourable profession, which subscribed to a code of ethics which would make it 'unthinkable' for him to act in an unprofessional, let alone a wrongful or fraudulent manner. He said he derived his assurance of this by virtue of the fact that at the time the respondent was Chairman of one of South Africa's largest and most well-known law firms, which had an unblemished reputation.

12. The second investment opportunity to which the respondent introduced Mawjii and Narotam was a BEE investment in Scharrig Mining Ltd, a local mining company which was also listed on the JSE. Mawjii and Narotam had initially been interested in investing in Scharrig via Interactive Capital, a company of which the respondent was the Chairman. It was part of a consortium of investors which had an opportunity to acquire 22.2 mil shares at a discounted price of R2.25 per share, for a total consideration of R49.95 mil, with an option to thereafter acquire a further 34.38 mil shares. Discussions were held in Zurich on 11 March 2005 between Narotam and a representative of Interactive Capital but Mawjii had reservations about certain terms of the proposed deal, which would require MG/Grancy to make a significant capital contribution and would result in it not having sufficient control over its share of the investment, so it declined the offer. However, a month later the respondent approached Narotam with his own proposal, which was attractive, as it was simpler in its structure and required a relatively minor capital investment of only R1 mil. The respondent indicated that

there would be a further option to acquire more shares at the same price in due course. Mawjii and Narotam consequently arrived at an agreement with the respondent in terms of which Grancy and the respondent, via the DGFT, would each put in R1 mil to acquire a proportionate holding of Scharrig shares. The reason why the investment was to be facilitated via the DGFT was because MG/Grancy's involvement was not to be disclosed, presumably because of its earlier failed negotiations via Interactive Capital.

13. Pursuant to the agreements which were arrived at in respect of the two investment opportunities, MG/Grancy made a number of payments.

14. In the first place, in respect of the Spearhead transaction on 9 February 2005 it transferred an amount of R3.5 mil into HHG's trust account, based on an estimate which was provided by the respondent. One would have thought that this amount would have been credited in HHG's ledgers to SMI, as it was the entity to whom MG/Grancy was advancing the funds, in the form of a loan, for the purposes of the investment, and it was to be the entity in which it would have a one-third shareholding. However, instead of this at the instance of the respondent the monies were credited to a loan account of Manala in SMI, which account would otherwise have been in debit. This later allowed Manala to draw considerable sums of money out, via his loan account.

15. On 21 February 2005 the respondent sent an email to Narotam in which he acknowledged receipt of the R3.5 mil and confirmed details of the proposed transaction including the number of units which were to be acquired and the price, together with a calculation of the estimated cost thereof. Because of the importance of this email it is necessary to quote briefly from it. For the sake of later reference I have highlighted certain passages.

"We have acquired 58% of the 3.5 M units. Accordingly a rough financial assessment is as follows: 58% x 3.5 million x R2 .75 x R 600k = R5 930 500.

Each of us ie Montgold (MG), Lance (LM) and I (DG) is responsible for R1 976 833.33. MG and DG will lend LM his share by contributing R988 416.66 each on the basis aforesaid.… **I propose drafting an agreement in due course whereby LM and DG will acknowledge your**

one third share in our holding company which is Seena Mareena Property investments (Pty) Ltd (SM). SM has incurred costs of R225k approximately in setting up this deal. MG is accordingly liable for R75k.

MG's financial position is therefore as follows:

Amount remitted R3.5m

Less- R1 976833.33 (your share)

-R988416.66 (loan to LM)

-R75,000 (costs).

Balance R459 750.01.

Please check these calculations and let me have any comments which may be relevant. Please also let me know what you require me to do with the balance. You may want me to keep this in trust for the next deal which LM is working on.

Warm regards

Dines Gihwala

Chairman

Hofmeyr Herbstein & Gihwala Inc.

16. On 14 May 2005 respondent sent Narotam an email in which he confirmed their discussions as to the R1 mil which MG/Grancy was to contribute in respect of the Scharrig investment, and confirmed details of the Spearhead transaction and that each of the parties would have a third share therein. To this end the proposed contribution which was to be made by each party for the Spearhead deal was in the order of R3 040 250, being R2 965 250 in respect of the cost of the units and R75 000 in lieu of transaction costs. The respondent pointed out that as it had been agreed that he would be utilising R1 mil of the R3.5 mil which HHG was holding (as an advance on the Spearhead transaction), for the Scharrig deal, an amount of R540 250 was required in order 'to balance the books'. On 16 May 2005 MG/Grancy duly paid over this further amount into HHG's trust account.

17. As it turned out therefore, of the total of R4 040 250 mil which MG/Grancy paid over R3 040 250 was utilised in respect of the Spearhead transaction, and the balance of R1 mil was utilized in the Scharrig deal. On 14 April HHG drew a cheque for R1 mil in favour of the DGFT for the Scharrig investment. This was done pursuant to an email which Narotam had sent to the respondent,

authorising him to utilize R1 mil from the available funds which were being held on MG/Grancy's behalf.

18. In the meantime, respondent offered MG/Grancy a further opportunity to take up more Scharrig shares, and in anticipation of this on 20 June 2005 an amount of R10 mil was transferred by MG c/o Taurin Management, Zurich into HHG's trust account. On 28 June Narotam similarly confirmed via an email that these funds could be used by the DGFT for the acquisition of Scharrig shares at R2.25 per share. However, he instructed that in the event that the transaction could not be concluded by 25 July the funds were to be returned immediately.

19. On 22 June 2005 respondent caused the R10 mil to be transferred from HHG's trust account to an interest-bearing investment account which HHG had opened[2] with People's Bank. Once again, although one would have expected that the account would have been opened in the name, and held for the credit of MG/Grancy as investor, as the monies were being held on its behalf (or at the very least in the name of the DGFT through which the Scharrig investment was to be placed), it was instead opened in the name of SMI, the corporate entity in respect of which the respondent and Manala were still the only, joint shareholders and in respect of which they were directors. As such, the funds resorted under their immediate control and were theirs to do with as they pleased.

20. For reasons which are not pertinent to this judgment the acquisition of the additional tranche of Scharrig shares did not take place. It seems as if the parties were no longer of one mind and cracks had started to appear in their relationships.

21. On 3 August 2005 Narotam asked the respondent to provide details of any borrowings made on the strength of their original acquisition of 2.263 mil Scharrig shares for R1 mil, and he gave notice that MG/Grancy wished to exit the Scharrig investment at the earliest available opportunity. The respondent was therefore

[2] In terms of s 78(2A) of the Attorneys Act 53 of 1979.

requested to provide an ‘update’ (sic) on the return of the R10 mil, together with the interest earned thereon. On the same day Narotam sent an email to the respondent reminding him to arrange for registration of ‘ownership of one third’ of SMI in the name of MG, and reminding him to prepare the necessary loan agreement with Manala, in respect of the advancement of his contribution of the Spearhead investment.

22. On 8 August the respondent caused the funds which were held with the People’s Bank to be repatriated to HHG, together with the interest which had been earned thereon, which came to R78 256.58. Two days later he duly arranged for the capital amount to be refunded to MG (via Taurin), but despite repeated requests in this regard he did not refund the interest. Understandably, as far as MG was concerned it was entitled to the interest, as it had been earned on monies which belonged to it and which were transferred and held on its behalf in a South African bank, pending a possible investment in the acquisition of Scharrig shares, which never materialized.

23. MG claimed that the interest which had been earned was exempt from tax in South Africa, as neither it nor Taurin carried out any business in the country. The respondent, on the other hand, claimed that it was subject to tax as it was interest earned on funds which were to be used by DGFT to acquire Scharrig shares on a local stock exchange. But the respondent did not take any steps to obtain a tax directive in this regard from SARS or pay over any tax and in fact immediately when the interest was received by HHG on 8 June he caused it to be disbursed, in two payments: R21 073.92 was paid to the University of Stellenbosch, in settlement of certain university fees which were due in respect of his daughter (a beneficiary of the DGFT), and the balance of R57 182.66 was paid over to the DGFT. In effect therefore, the respondent appropriated the interest which had been earned on funds which belonged to MG, for the DGFT, an entity in which he and his family had an interest. The propriety of his actions in this regard is considered later. In April 2006, almost a year after MG had paid

over the capital sum of R10 mil the DGFT paid R50 000 over to SMI in lieu of the interest which had been earned, which in turn paid it over to Grancy.

24. As far as its return on the capital sum of R1 mil which MG had invested is concerned, an amount of R2 764 118 was paid over to it by SMI on 29 March 2006 (after this amount had in turn been paid to it by the DGFT).

25. In the meantime, it appears that MG/Grancy had become dissatisfied with how certain aspects of the Spearhead transaction had been effected via SMI and Ngatana. For the purposes of this matter it is not necessary to go into any detail in this regard, and it will suffice to say that on 27 June 2006 a decision was taken to exit this investment as well. Narotam consequently informed the respondent of this and invited him to make a proposal in regard to the acquisition of MG's share of the investment, or alternatively, to bring in a third party which would buy it out. From the responses which followed it is apparent that the respondent was annoyed by this. In his view the investment needed to be held and only realized at a later stage, as there were further lucrative investment opportunities which could be leveraged off it, in due course. In an angry email which he fired off on 28 June he pointed out that MG/Grancy had not initiated the transaction, and had been given an opportunity to invest in it via Manala. Consequently, he suggested that Narotam should let him have MG's 'exit proposal', which Narotam duly did, but nothing came of it.

26. Early in September 2006 Narotam sent the respondent an email in which he reiterated what the principal terms of the agreement between the parties in relation to the Spearhead investment had been and pointed out that notwithstanding his undertaking to draft an agreement acknowledging MG's one third shareholding in SMI, no such agreement had yet been concluded or executed. Consequently, he requested that the necessary shareholders' and loan agreements be prepared as soon as possible. He pointed out that MG's investment had been made 'at very short notice on good faith' and on the understanding that the requisite formal agreements (as promised in the

respondent's email of 21 February of the previous year), would be prepared shortly thereafter. As this had not happened yet he asked that the matter be 'regularised immediately'.

27. Once again, this email resulted in an angry response from the respondent. On 11 September 2006 he wrote as follows (only the portions relevant for this judgment have been referred to, and I have highlighted certain passages which are important for what follows later):

"Dear Anil

I refer to our several discussions in the above regard.

You were never to be a shareholder in our company. You came in behind us for 630K units. It was always so that you would be subject to the decisions of SMI. You were certainly not an independent party as you now try to suggest. When you make investments you expect priority interest on your capital. Why should I bind my credit and take risk for no reward? The position is unnecessarily complicated by your unilateral decision to realise this investment and above all on your terms and conditions. I am afraid it will not happen in this instance.

I shall conduct the affairs of SMI as I deem fit. You have no say in its affairs. You are NOT a shareholder. You were never intended to be one. You will never be one……. I drafted an agreement some time ago and asked my secretary to forward it to you. If she has not done so I can only assume that she wanted me to check it before dispatching same. I will ask her to send it off immediately even though I have not had a chance to check it. **The idea of a shareholders' agreement is a little disingenuous and deployed to obtain a position of advantage you are not entitled to**. Do you think I could not have personally funded the amount of money you put in or raise it from family and friends et cetera?

The current situation has developed because for reasons you are well aware of and which require no repetition it was your choice to want to realise your investment. I then thought it proper to make an offer based on current yields rather than the trading price. That offer is now hereby formally withdrawn…….

I have no intention of dealing with your letter under reply in any more detail. I reserve the right to do so if and when it may become necessary. My failure to do so now should therefore not be interpreted as an acknowledgement of the correctness or otherwise thereof. You should soon be in possession of the agreement I drafted some time ago. You are at liberty to sign such

agreement or not. I shall nevertheless act in accordance with that agreement. I can assure you that the realisation of the SMI investment in Ngatana is not imminent unless something dramatic or spectacular happens. **Rest assured you will receive a proper accounting** for the 630K units or its equivalent… I reserve the right to charge a fee for my services I have rendered and continue to render for SMI. You are liable for a portion of those and other operating expenses based on your 630K units. If and when I need your share I shall call for it and expect you to make payment promptly. This matter is now closed as far as I am concerned. "

The litigation

28. A mind-boggling plethora of law suits and expansive and costly litigation ensued between the parties, over many years, following the termination of their business relationship. As will be apparent, most of this was totally unnecessary and could probably have been avoided had the respondent been transparent and co-operative at the outset instead of obdurate and unhelpful in relation to the record of the transactions involved in both investments, and had he not played loose and fast with certain loan repayments which were made by Ngatana to SMI as the sizeable return on the Spearhead investment flowed in, utilising these monies to repay himself and Manala in respect of their portion of the investment in Spearhead without doing the same in respect of MG/Grancy (appropriating its share for an unauthorised and speculative investment[3] in which the DGFT and his wife had an interest), and paying himself and Manala unwarranted and extragavant fees and other monies instead of using the funds for the payment of dividends to all 'shareholders', including MG/Grancy.

29. For the purposes of this judgment it is not necessary to set out chapter and verse of each of the various legal proceedings which took place, and a brief conspectus of the salient aspects thereof will do.

30. On 31 January 2007 Webber Wentzel Bowens attorneys addressed a letter to the respondent on behalf of MG/Grancy in which his attention was drawn to the undertaking which he gave in February 2005 to account fully for the monies which had been deposited into HHG's trust account, in respect of the Spearhead

[3] In an entity known as Scarlet Ibis Investments (Pty) Ltd.

investment. The attorneys demanded that in accordance with his legal obligations he should accordingly furnish full details 'of the purposes and endeavours' (sic) for which MG/Grancy's funds had been utilised. In addition, as Spearhead had been taken over by the Redefine Property Income Fund, he was asked to provide full details of any monetary benefits which might have accrued to Spearhead unitholders and in particular the number of Redefine linked units which were exchanged for Spearhead linked units, as well as the nature and extent of SMI's and Ngatana's resultant holdings in Spearhead and Redefine. It should be mentioned that at the time the respondent was Chairman of the Board of Redefine.

31. This letter was followed a few days later by a similar letter of demand in respect of MG/Grancy's investment in Scharrig, in which a comprehensive accounting was requested, including copies of all documents pertaining to any transactions or investments which were concluded as well as an explanation for why the further Scharrig share options were not taken up, and details of when and to whom portions of any holdings of Scharrig shares were onsold and what profits were made as a result of such transactions.

32. One would have expected common sense and reason to have dictated that, as a co-investor at least, and in the light of the undertakings he had given in February 2005 and September 2006, the respondent would accede to the requests for an accounting in respect of the fairly substantial funds which had been received by HHG, and with which he had dealt on MG/Grancy's behalf. But this was not to be, and contrary to his later assertions that he always 'faithfully, accurately and timeously'[4] accounted for all monies which came into his possession the respondent adopted the stance that MG/Grancy had no right to ask him to account in any way. Consequently, on 14 February 2007 HHG responded to the letters of demand on his behalf by stating that it was 'not clear' on what legal basis MG/Grancy demanded information and records pertaining to the

[4] Para [12.5] of the respondent's answering affidavit.

investments and requesting clarification in this regard, in order that the demand might receive 'proper consideration'.

33. In response, on 20 February MG's attorneys pointed out that throughout the course of his dealings the respondent had acted as a partner of HHG and as an agent of MG/Grancy in relation to the investment of the funds, and in his own correspondence in February 2005 had confirmed his 'legal, professional and relational duties' (sic) to account. There was no response to this email, and a further entreaty was met with a response from HHG on 26 April 2007 to the effect that the respondent had never acted in his professional capacity in his dealings with MG/Grancy and had not rendered any professional services to them, either on his own or as a director of the firm. Consequently, the request for information and an accounting was declined, and the respondent contended that he had already accounted to the extent that he was legally obliged to do so.

34. On 11 May 2007 MG and Grancy launched an application out of this court[5] (the 'Spearhead application') in which they sought an order declaring that Grancy was entitled to a direct equity shareholding in SMI, as per their 'one-third' share agreed upon in 2005, and directing the respondent, Manala, HHG and the trustees of the DGFT to account to them comprehensively in respect of their investment in the Spearhead deal, and compelling them to debate the account after rendering it. In addition, the applicants sought an order directing the respondents to make payment to them of any amount which might be owing to them, after debatement.[6] The respondents opposed the application and resisted the relief which was sought for almost two years, until 9 March 2009, the day before the matter was due to be heard, when they capitulated and agreed to an Order declaring that Grancy was entitled to a 31% shareholding and directing them to render a 'full and proper' statement of account to the applicants, together

[5] Under case no 15757/07.

[6] In addition, they also sought payment of an amount of R988 416.66 plus interest thereon from 11 February 2005, as well as payment of a further amount equivalent to 25% of the amount by which the price of the 700 000 Spearhead units which were held indirectly by Manala exceeded a value of R18 per unit. The latter amount was allegedly due in terms of an agreement which they parties arrived at in respect of compensation for the loan of Manala's half-share of the investment.

with supporting documents and vouchers, which account would thereafter be debated.[7]

35. Subsequent to the grant of the Order the respondent rendered a perfunctory one-page so-called statement of account, which contained a four-line calculation, together with some brief notes in respect thereof. To say that it added nothing to the information which was already common knowledge, would be charitable. Predictably, this resulted in a further application being made in June 2009 to compel the respondents to render a proper account, which was similarly opposed.

36. In the meantime, in July 2008 MG and Grancy lodged a similar application[8] (the 'Scharrig application') for an accounting in regard to the Scharrig investment, which was also opposed.

37. On 15 April 2010 Binns-Ward J found that there was merit in the complaint that the accounting which had been rendered in relation to Spearhead was little more than 'a bald and insufficiently narrated recital' of payments made by the applicants and little effort had been made to set out how these payments were allocated and appropriated between SMI, Ngatana and Spearhead, nor had a proper breakdown been given of how the transaction costs had been computed. As a result, he ordered the respondents to render an improved account.

38. A few months later Dlodlo J came to a similar conclusion in regard to the Scharrig application. He too found that the 2 page account which had been rendered was inadequate and ordered the respondents to provide a revised account.

39. In response to the Orders made in the two applications the respondents rendered further accounts in respect of the Spearhead and Scharrig investments, in May and July 2010 respectively, which they insisted should then be debated. As far as

[7] They also agreed to an order directing them to make payment of the two amounts referred to in n 6.
[8] Under case no. 10547/08.

MG and Grancy were concerned these accounts were still deficient and inadequate in numerous respects. They were of the view that only once an adequate account had been rendered could the parties proceed to debate the accuracy thereof. In their view the debatement process had to take place in two stages: first a debatement had to occur in relation to the sufficiency of the account which had been supplied, and only once this process had been satisfactorily completed could the parties then proceed to debate the accuracy thereof. In the absence of any concession to what was clearly a sensible way of dealing with the matter a further application for a declarator had to be brought, which went against MG and Grancy a *quo,* but which succeeded on appeal to the SCA [9] which ordered that the debatement should take place in two stages, and after making certain directions as to how this was to be done by way of evidentiary examination, referred the matter back for rehearing as to the adequacy of the accounts which had been rendered.

40. This resulted in a hearing before Traverso DJP at which the respondent and other witnesses were examined at some length in regard to the accounts that had been furnished. In her judgment which was handed down on 29 February 2016 she was critical of the evidence given by the respondent and held that the explanations he had given were unsatisfactory, and the accounts which he had rendered were still deficient in a number of material respects. She found that his assertions of 'helplessness and inability to account' did not accord with the facts. She accordingly granted an Order directing the respondent to render a further detailed accounting in respect of both investments, which included a full reconciliation and breakdown of, as well as an explanation for, a number of transfers and transactions and particulars as to costs allegedly incurred, and ordered the respondent to provide a range of supporting documentation. We were informed from the bar that the respondent has complied with this Order and the further Order for disclosure of certain financial records which was made by

[9] Reported *sub nom Grancy Property Limited & Ano v Seena Marena Investments (Pty) Ltd & Ors* [2014] 3 All SA 123 (SCA).

the SCA on 24 March 2016[10] and consequently the second stage of the debatement process is due to take place sometime this year.

41. In January 2010 and June 2011 MG and Grancy launched two separate actions in this Court which were subsequently consolidated[11] and in which they claimed repayment of 31% of various amounts which allegedly comprised unauthorised and wrongful payments which were made by the respondent via SMI between 2005 and 2009, including amounts paid as 'promotional' fees (R225 000), directors and 'suretyship' fees (of approximately R4.64 mil), and monies paid as 'loans' (R1 976 533) to Manala. They also claimed payment of an amount of R2 051 833 which constituted Grancy's 31% share of an amount of R6 637 673 which had been repaid by Ngatana to SMI in March 2007, as a return on its Spearhead investment, and which had allegedly been appropriated by the respondent for a speculative investment in an entity known as Scarlet Ibis Investments (Pty) Ltd in which his wife and the DGFT had an interest, and which investment had subsequently failed. In addition, they sought an Order directing that a further and better account be rendered as well as an Order[12] declaring both the respondent and Manala to be delinquent directors.

42. The applicants were substantially successful in their claims. After a lengthy trial in which only Mawjii and an accounting expert testified and the respondent elected not to give evidence Fourie J (as he then was) held[13] that the respondent and Manala had breached the agreements which they had entered into with MG and Grancy, in numerous respects, and had grossly abused their position as directors and he consequently made an Order awarding the applicants almost all the relief sought, including their principal monetary claims and the declaration of delinquency, together with costs on a punitive attorney-client scale.

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[10] In *Gihwala & Ors v Grancy Property Ltd & Ors* [2016] 2 All SA 649 (SCA).
[11] Under case no. 1961/10.
[12] In terms of s 162(5)(c) of the Companies Act 71 of 2008.
[13] The matter is reported as *Grancy Property Ltd & Ano v Gihwala & Ors; In re: Grancy Property Ltd & Ano v Gihwala & Ors* [2014] ZAWCHC 97.

43. He found that the respondent had made unfair use of information and opportunities which became available to him in his position as director, in order to gain personal advantage at the expense of Grancy, to whom he owed a fiduciary duty, and his conduct constituted the repeated, wrongful misappropriation of substantial sums of money.[14] What aggravated matters, in his view, was that the respondent had steadfastly refused to allow access to financial records and documentation pertaining to his management and control of the Spearhead investment and the affairs of SMI.[15]

44. Save in certain minor respects, the SCA[16] confirmed the findings and judgment of Fourie J and upheld both the declaration of delinquency as well as most of the monetary claims which he awarded. In doing so it confirmed that the respondent had not only breached the agreement he had with MG and Grancy but also the fiduciary duty he owed them, and had acted improperly, in numerous respects. In total, the aggregate capital value of the amounts which the SCA confirmed the respondent was obligated to pay came to approximately R5.7 mil, together with interest thereon.

45. In his answering affidavit the respondent states that he unequivocally accepts the findings of the SCA and of the various High Courts, in the decisions I have referred to. Given this admission, it is necessary to refer to some of the findings of the SCA in particular, inasmuch as they impact materially on our assessment of the respondent's misconduct and character, and his fitness to continue to serve as an officer of this Court.

46. The SCA found[17] that from the 'very start' there were 'wholesale' breaches of the agreement the respondent had concluded with Mawjii and Narotam. Foremost of these was a (dogged and deliberately) persistent refusal by him to acknowledge that Grancy had a right to a one third shareholding in SMI, despite his clear

[14] *Id* paras [203] and [205].
[15] *Id* para [204].
[16] Note 10.
[17] *Id,* at para [62].

acceptance and understanding thereof at the time when the agreement was concluded, as is evidenced by the emails he sent Narotam on 21 February and 14 May 2005. He adopted this attitude belligerently, well-knowing that it was not justified, for a period of about 4 years, until he was forced to capitulate on the doors of the Court in March 2009.

47. The respondent's obdurate refusal to recognise and implement the terms of the agreement was accompanied by an 'equally obdurate' refusal to allow Grancy and MG access to the books and records of SMI. In my view the obvious reason for this was that if he did so it would have allowed them to ascertain what the inner transactional workings of the deals were, and how the monies which they had invested had been used by him, to profiteer at their expense. In the case of this breach too, the respondent fought tooth and nail against any disclosure or accounting, dragging the applicants through the Courts time and again. It is no surprise that the SCA was of the view that the respondent adopted every possible stratagem to avoid discharging his fiduciary obligation to account properly to Grancy for its investment in SMI.[18]

48. The SCA found that there were significant breaches of the agreement in relation to the investments and payments which were made by Ngatana. In October 2005 the respondent caused it to acquire an additional 2 mil Spearhead units, without the knowledge or consent of Grancy or MG, thereby significantly increasing Ngatana's indebtedness from an original amount of R38.5 mil to R93.6 mil. This exposed Grancy to a significantly greater risk, but it was never consulted about this beforehand, as a co-investor. It was also never consulted in relation to the decision which was taken that Ngatana should accede to the offer by Redefine to acquire linked units in Spearhead, nor was it consulted over the subsequent decisions to acquire another 20 million Redefine units and thereafter to dispose of them. As co-investors Grancy and MG were thereby excluded from the significant profits which were made from these transactions, which they should ordinarily have shared in. The SCA described the failure to consult them in

[18] At para [130].

relation to these transactions as an egregious breach of the investment agreement which resulted in Grancy being engaged in an entirely different investment to the one which it had initially agreed to, without its knowledge. This constituted a 'fundamental breach of the principles of trust and good faith' on which the agreement rested.[19] In October 2008 Ngatana paid a dividend of R5 272 727 to SMI which respondent caused to be immediately paid out as a dividend in equal shares to Manala and the DGFT. Once again, Grancy did not share in the bounty. The SCA was of the view that the respondent's attitude in this regard was clearly that Grancy only had an indirect interest in the dealings of SMI and Ngatana and the Spearhead units it had acquired and until the overall investment had been realized only the DGFT and Manala were to benefit and Grancy was 'not entitled to anything at all'.[20] The SCA concluded that the respondent had exploited his position as the person in control of the affairs of SMI in order to prefer himself and Manala over Grancy.[21]

49. From the outset, the respondent used SMI to advantage and enrich himself and Manala at the expense of Grancy. This commenced already in 2005 when Grancy made its first payment of R3 .5 million to HHG. These monies were lent to SMI for the purposes of the Spearhead investment and should have been reflected as such in HHG's ledgers. But instead, the monies were credited to a loan account for Manala. This loan account was also credited at various stages with director's fees in an amount of R2.75 mil and R750 000 and 'promotion' and so-called 'surety' fees in an amount of R225 000 and R1 114 539 respectively. Of course, the respondent also credited himself with the selfsame fees. The 'surety' fees were contrived fees raised as 'compensation' for the suretyships which Manala and the respondent had been required to provide to Standard Bank. As the SCA pointed out[22] these fees were 'utterly unjustifiable'. During argument counsel for the applicant drew our attention to the contents of an email which the respondent sent to Manala on 13 March 2009, at the time when he raised the

[19] At para [64].
[20] At para [67].
[21] At para [68].
[22] At para [70].

directors 'fees' of R2.75 mil, in which he said he thought he had found a solution which 'claws back our loss' (sic). At about the same time a decision was also taken by Ngatana to pay a 'management' fee of R1.5 mil to Prescient as a 'reward' for their efforts in setting up the Spearhead transaction, without including Grancy, thereby also prejudicing it financially. On the face of it, the raising of directors' fees in March 2009 was nothing more than a cynical attempt to recover the financial loss the respondent and Manala were to incur, as a result of the Order which was made on 9 March 2009, which included an Order that they were to pay over R3 mil to the applicants. On 24 June 2009, a few months after the Order had been granted, the respondent caused a further amount of R2 mil to be credited to Manala's loan account in SMI. It was said that this amount was a 'loan' which was made by SMI to Manala, although the resolution which was passed in this regard by the respondent and Manala as directors stated that it was a payment to be made in reduction of Manala's loan account. As the SCA pointed out, by crediting Manala's loan account (which would otherwise have been in debit) with these considerable amounts, Manala was able to withdraw some R9 million from SMI between 2007 and 2009, to which he was not entitled. The award of this 'loan' also depleted the reserves which would have been available in SMI, for the payment of dividends to shareholders. The SCA came to the 'inescapable' conclusion that in the light of these payments and credits, as a result of the respondent's connivance Manala was permitted to treat SMI as a 'personal piggybank'.[23]

50. A further, gross breach of the investment agreement occurred when Ngatana repaid the original loan it had received from SMI in March 2007, which together with the profit which was made came to a sizeable return of R6 637 673. The respondent then appropriated this money by utilising it to repay the loan portion of his and Manala's contribution towards the investment, without doing the same in respect of Grancy, to whom an amount of R2 057 678 should similarly have been refunded in respect of its portion of the investment. Instead the respondent

[23] At para [69].

took R2 million of the money which was due to it and, without its knowledge or consent, invested it in a speculative property investment in Scarlet Ibis Investments (Pty) Ltd in which his wife and the DGFT had an interest. This investment failed and the money was lost. The SCA was of the view that the respondent's actions similarly constituted a flagrant breach of the agreement, which had correctly been described by Fourie J as a misappropriation.[24]

51. Finally, to add insult to injury, it appears from the judgment of the SCA[25] that the respondent caused certain bills for personal legal services which had been rendered to him and the DGFT in 2009 and 2010 (in relation to the ongoing legal proceedings between the parties), to be paid by SMI. This too was improper and prejudiced Grancy, which succeeded in reclaiming 31% of the sum which was paid.

52. Aside from its damning findings in relation to the respondent's gross violation of the investment agreement, the SCA also made a number of other equally serious findings of misconduct in relation to the respondent's delinquency as a director.

53. It pointed out that not only had the respondent refused to register Grancy as a shareholder for 4 years but had also failed to ensure that SMI kept proper accounting records as required by law, and even after Grancy was duly registered the respondent produced 'hopelessly inaccurate and incomplete' annual financial statements which he represented as fairly reflecting the company's financial position.[26]

54. The SCA held that the failure to properly reflect Grancy's loan in the company's ledgers and instead to credit the R3.5 million which was received, to Manala's loan account, could only have occurred as a result of false information which the respondent deliberately and knowingly gave.[27] Furthermore, the two additional 'loans' which were granted to Manala were not only unlawful but resulted in a

[24] At para [66].
[25] At para [86].
[26] At para [134].
[27] At para [135].

loss to SMI because it was not able subsequently to recover these amounts from Manala. The SCA was of the view that the loss which had occurred in this regard was undoubtedly due to gross negligence on the part of both the respondent and Manala. As a businessman and attorney who was chairman of one of South Africa's largest legal firms as well as chairman of one of the largest property loan stock companies (Redefine) listed on the JSE, the respondent's failure to comply with the provisions of the Companies Act[28] was also considered to be 'inexcusable'.[29]

55. Lastly, the SCA was of the view that in enriching themselves the behaviour of the respondent and Manala constituted wilful misconduct, as it was 'entirely intentional' and committed with clear knowledge of the obligations they owed Grancy, and in relation to the performance of their duties as directors at the very least it constituted gross negligence akin to recklessness, and a breach of trust which was 'entirely inexcusable and ongoing'.[30] Consequently, in the SCA's view the declaration of delinquency had been entirely justified.[31]

56. As will be apparent from what is set out below, the respondent's corporate shenanigans extended far beyond what is set out in the judgment of the SCA. Amongst other things, during 2010 and 2011 he made various attempts to have the wrongful and irregular payments of the directors', promotional and 'surety' fees condoned and ratified at various general meetings of the company.

57. Before turning to discuss the complaints that ultimately led to this application being brought it may be mentioned that although Manala and the respondent resigned as directors of SMI in February and September 2011 respectively, from which time SMI was left rudderless, they refused to agree to an eminently sensible request by Grancy for the appointment of 2 independent directors in their place. This necessitated a further application having to be brought by

[28] S 226 of Act 61 of 1973.
[29] At para 136].
[30] At para [139].
[31] *Id*.

Grancy, which predictably was opposed. Although it lost the application a *quo,* on appeal the SCA[32] granted the Order sought in May 2013.

The complaints and the disciplinary enquiry: a long and winding road

58. As previously pointed out in the introductory paragraphs above, Mawjii first lodged a complaint against the respondent with the applicant in September 2009. It was in the form of an unattested affidavit. The respondent provided a response thereto in November 2009, and Mawjii provided an amplified and properly attested affidavit in February 2010 to which the respondent provided a formal response on 31 March 2010, which was followed up by further submissions on 12 April 2010, in which he contended *inter alia* that he had rendered a proper accounting in respect of the Spearhead investment.

59. On 19 April 2010 Mawjii's attorneys forwarded the applicant a copy of the judgment of Binns-Ward J which had been handed down a few days earlier, in which he found that the Spearhead accounting had been inadequate. They followed this up on 22 June 2010 with a copy of the judgment which had been handed down by Dlodlo J, in which he had come to a similar conclusion in regard to the Scharrig investment.

60. On 28 June 2010 the applicant's council resolved that the complaints should be referred to a disciplinary enquiry committee ('DEC') for a formal enquiry to be held. However, on 22 November 2010 it resolved to postpone the enquiry pending the outcome of the civil action which had been launched in January 2010.

61. Mawjii was dissatisfied with this decision and took it on review. On 21 September 2012 this Court[33] set aside the postponement and directed the applicant to proceed with the disciplinary enquiry without delay. Pursuant to this a summons and charge-sheet were prepared and served upon the respondent and the

[32] *Grancy Property Ltd v Manala & Ors* 2015 (3) SA 313 (SCA).
[33] Per Olivier AJ in case no. 1786611 (reported *sub nom Grancy Property Ltd & Ano v Law Society of the Cape of Good Hope & Ors* [2012] ZAWCHC 174.

enquiry was set down for hearing on 19 August 2013. However, it could not proceed on that date as Mawjii had in the meantime brought a further review of certain interlocutory decisions which had been taken by the DEC. These were to not allow legal representation for the complainants and to direct that Mawjii would not be permitted to testify from London by way of video link instead of *vivo voce,* and that a transcript of the proceedings of the enquiry would not be furnished to the complainants.

62. In the meantime, in March 2011 Mawjii supplemented his original complaint by way of a further affidavit. For reasons which are not apparent from the papers it appears that the applicant only called upon the respondent to respond thereto two years later, in March 2013. The respondent duly furnished his response some two months after this. After a further exchange of correspondence between the parties, on 14 April 2014 the applicant's council resolved that the supplementary complaints should also go to a formal enquiry.

63. On 5 November 2014 the complainants succeeded in having all of the interlocutory decisions made against them by the DEC, set aside. A fresh summons which incorporated a supplementary charge-sheet was served upon the respondent and the enquiry was rescheduled for hearing between 15 and 25 September 2015.

64. After Mawjii had given evidence for 3 days (from 15 to 17 September 2015) the video link malfunctioned and the matter was accordingly postponed for further evidence to be given *vivo voce* in Cape Town on 26 July 2016. However, in the light of the findings and judgments of Traverso DJP in February 2016 and of the SCA on 24 March 2016, in May 2016 applicant's council resolved to abandon the disciplinary proceedings and accordingly postponed them *sine die* pending the outcome of an application to strike the respondent from the roll. For reasons which are not apparent from the papers the instant application was only launched more than a year later, on 10 August 2017.

65. In his original complaint in 2009 Mawjii alleged that the respondent had, in breach of his fiduciary duties and the Rules of the Law Society of the Cape of Good Hope and the relevant provisions of the Attorneys Act, failed:

65.1 To properly account to his co-investors, Grancy and MG, in respect of the Spearhead and Scharrig investments;[34]

65.2 To keep the co-investors' monies which had been entrusted to him, in a trust account in their name and for their benefit;[35]

65.3 To account for the interest which was earned on co-investors' monies which had been entrusted to him;[36]

65.5 To use co-investors' monies which had been entrusted to him, only in furtherance of the investment agreements which had been entered into and solely for the business and purposes of such investments; [37]

65.6 To ensure that the balance of the monies held at any one time in the HHG trust account did not go into debit ie was not less than the total amount which stood to the credit of the co-investors;[38] and finally

65.7 To ensure that the trust bank account was used only for the investment purposes of the co-investors and not as a personal bank account.[39]

66. Mawjii supplemented his complaint in March 2011, as a result of developments in 2010. He pointed out that on 25 October 2010 respondent had given notice to the shareholders that the annual general meeting of SMI would be held on 29 November 2010 and had forwarded a copy of the draft annual financial statements ('AFS') for February 2010 which it was proposed were to be adopted at the meeting. On considering these statements it became apparent that the

[34] Contrary to Rules 14.3.1 and 14.3.7.
[35] Contrary to Rules 13.5; 14.3.1; 14.3.4; 14.3.7; 14.3.14 and s 78 of the Act.
[36] *Id*.
[37] Contrary to Rules 13.5; 13.3.3; 13.3.4; 13.13.7; 14.3.1; 14.3.4; 14.3.7 and 14.3.14.
[38] Contrary to Rules 13.5; 13.13.3.
[39] Contrary to Rules 13.5; 13.7; 13.13.3; 13.13.4; 13.13.7; 14.3.1; 14.3.4; 14.3.7, 14.3.14 and s 78 of the Act

respondent and Manala had received payment of various irregular loans and directors, 'promotion' and 'surety' fees which were referred to earlier in this judgment, which had come to light as a result of the further accounting which they had been forced to make, pursuant to the judgments of Binns-Ward and Dlodlo JJ. Mawjii pointed out that between 2006 and 2009 neither the respondent nor Manala had drawn any remuneration in respect of their directorships of SMI, because it was a special purpose vehicle whose sole purpose and business was to passively hold a shareholding in Ngatana, for the Spearhead investment. Consequently, the award in 2010 of some R5.5 mil in total to the respondent and Manala by way of these extraordinary 'fees' was seen as nothing more than a deliberate attempt on their part to misappropriate funds which would otherwise have been distributed to the shareholders by way of dividends.

67. When Mawjii's attorneys queried these payments and challenged the contents of the draft AFS in regard to these perceived irregularities, on the basis *inter alia* that a number of these payments were excessive and had been made unlawfully (in breach of the company's articles of association[40] which provided that directors fees and extraordinary remuneration could only be paid subsequent to approval thereof by the company in meeting), HHG notified him that the AGM was to be postponed as there were 'certain errors' in the draft AFS which might need to be 'revised'. When Grancy then formally called for an extraordinary general meeting to be held on 22 December 2010 [41] it received no response. Instead on 20 November 2010 the respondent repaid the 'surety' and directors' fees which he had taken.[42]

68. On 20 January 2011 the directors of SMI gave notice afresh that the AGM would be held on 14 February and submitted a set of amended financial statements from which it was apparent that they still intended obtaining approval at the AGM, by way of *ex post facto* ratification, for the irregular payments which had been

[40] Art 107.
[41] In terms of s 181 of the Companies' Act of 1973.
[42] As we understand it Manala never repaid these fees. It was averred that these were set off and deducted against his share of a dividend which was later declared.

made to them. Mawjii's attorneys objected once again to the proposed meeting and pointed to the unlawfulness of seeking to adopt, ratify and approve various items listed in the amended AFS. The directors of SMI were not dissuaded by the objection and indicated that the meeting would go ahead regardless. At the commencement thereof on 14 February 2011 the respondent sought to introduce a further amended set of financials, which save for certain minor changes nonetheless sought to obtain approval for the various payments and 'loans' which had been made irregularly to him and Manala. The meeting was then adjourned. It appears that some two years later, on 8 April 2013 Grancy was given notice that Manala had called for a general meeting to be held in order to pass a resolution approving and ratifying the directors and 'surety' fees which had been paid. Despite a further complaint that the meeting was out of order it went ahead on 30 April 2013, at which time the necessary approval and ratification of the irregular directors and 'surety' fees was rammed through by simple majority, notwithstanding Grancy's objections. Grancy alleged that although the meeting had been called by Manala it was effectively set up with the 'connivance' of the respondent, who had deliberately abstained from exercising a vote on behalf of the DGFT in order that the resolution could be passed, as Grancy was a minority shareholder.

69. Aside from its additional objections in relation to the irregular 'loans' and payment of directors and surety fees, in its supplementary complaint Grancy also raised a number of alleged irregularities which had taken place in relation to respondent's failure as a director to properly discharge certain statutory duties. In this regard it alleged, amongst other things, that the respondent and Manala had failed to appoint an audit committee for each financial year, as required[43] and had improperly appointed Bruk Munkes as the company's auditors, when they were legally disqualified [44] from serving as such, as they had performed secretarial work for the company.

[43] In terms of s 269A of the Companies Act.
[44] In terms of s 275(1)(b) of the Companies Act.

The charges before the disciplinary enquiry

70. In its initial charge-sheet dated 8 March 2013 the applicant charged the respondent with 10 counts of alleged unprofessional and dishonourable or unworthy conduct. By way of summary, the gist of these charges was that the respondent had a) caused or permitted:

70.1 The amounts of R3.5 mil, R540 250 and R10 mil which had been paid over to HHG by MG/Grancy, and which should have been credited to a trust account in the name of MG/Grancy, to be wrongfully credited to and held in a trust account in the name of SMI instead;[45]

70.2 The aforesaid amount of R10 mil to be wrongfully invested in an account in the People's Bank[46] (and to be credited to a trust investment account in HHG's books), in the name and for the benefit of SMI, without the consent of MG/Grancy, instead of in the name of MG/Grancy;[47]

70.3 The proceeds of redemption of the monies so held in the aforesaid account at People's Bank, including the interest thereon, to be credited to a trust account in HHG which was in the name of SMI, without the consent of MG/Grancy, instead of in the name of MG/Grancy; [48]

70.4 The amounts of R2 764 118 and R50 000, which had been paid into HHG's trust account by DGFT (to cover equivalent transfers to Taurin for the credit of MG/Grancy), and which represented the return, with profit, of a R1 mil investment by MG/Grancy and interest which accrued on the further amount of R10 mil (in respect of the Scharrig investment), to be wrongfully credited to and held in a trust account in HHG in the name of SMI, instead of in the name of MG/Grancy;[49]

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[45] Contrary to s 78(4) of the Attorneys Act and Rules 13.5, 14.3.1; 14.3.4; 14.3.7 and 14.3.14.
[46] In terms of s 78(4) of the Attorneys Act.
[47] *Id.*
[48] *Id.*
[49] *Id.*

70.5 An amount of R1.8 mil of the aforesaid amount of R3.5 mill earmarked for the Spearhead investment, to be paid to Ngatana, without authority from MG/Grancy (at a time when MG/Grancy had no actual or prospective liability to Ngatana and such amount was also not owing to Ngatana by SMI and was substantially in excess of MG/Grancy's proportionate share of the contemplated first tranche of funding of Ngatana by SMI), thereby wrongfully misappropriating funds of MG/Grancy;[50]

70.6 Interest of R 78,256.58 which had accrued on investment of the aforesaid amount of R10 mil to be utilised for payments of R21,073 and R57 182 to the Stellenbosch University and the DGFT respectively, without authority from MG/Grancy, thereby misappropriating its funds;[51]

70.7 The HHG trust account held in the name of SMI, to be used for 'private purposes';[52] and in addition, it was alleged that the respondent had b) failed:

70.8 To cause payment to be made to MG/Grancy in full of the interest which had accrued on investment of the aforesaid amount of R10 mil and only caused R 50,000 of such interest to be paid over, leaving the balance of R28 256.58 thereof unpaid:[53]

70.9 To furnish MG/Grancy with a proper accounting in respect of the investment by MG/Grancy in Spearhead, as demanded, and as directed by Binns-Ward J and Traverso DJP in case no. 15757/07, in breach of his common-law fiduciary duties to MG/Grancy, and contrary to the Rules;[54]

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[50] Contrary to s 78 (1) of the Attorneys Act and Rules 13.13.7, 14.3.1, 14.3.4 and 14.3.14.
[51] Contrary to s 78 (1) of the Attorneys Act and Rules 13.12, 13.13.7, 14.3.1, 14.3.4 and 14.3.14.
[52] Contrary to s 78 (1) of the Attorneys Act and Rules 13.5, 13.7, 13.13.7, 14.3.1, 14.3.4, 14.3.7 and 14.3.14.
[53] Contrary to s 78 (1) of the Attorneys Act and Rules 13.12, 14.3.1, 14.3.4, 14.3.7 and 14.3.14.
[54] Contrary to Rules 13.11, 14.3.1, 14.3.4, 14.3.7 and 14.3.14.

70.10 To furnish MG/Grancy with a proper accounting in respect of the investment by MG/Grancy in Scharrig, as demanded, and as directed by Dlodlo J, in breach of his common-law fiduciary duties to MG/Grancy, and contrary to the Rules.[55]

71. In its final supplementary charge-sheet dated 9 June 2015 [56] the applicant added an additional 15 charges. These were aimed at covering the further complaints which Mawjii had raised subsequent to developments in 2010.

72. It was averred in the supplementary charges that the respondent had made himself guilty of further unprofessional and dishonourable or unworthy conduct, in that he had a) unlawfully misappropriated the amounts of R750 000, R2.5 mil and R1 114 539 ostensibly as directors or 'administrative/surety' fees, and the further amount of R2 mil as a 'loan' for Manala, which amounts would otherwise have been available for distribution as a dividend for shareholders, and b) had wrongfully failed to appoint an audit committee for SMI for each financial year from Feb 2008 to date, had permitted Bruk Munkes to act as auditor when it was disqualified from doing so, and had allegedly caused SMI to make payment of 'excessive' remuneration to Bruk Munkes. In addition, it was further averred that c) the respondent had wrongfully[57] failed to call a general meeting of SMI subsequent to a formal request from Grancy as a shareholder and d) had failed to provide or furnish documentation or accounts contrary to his fiduciary duties; and e) had improperly caused annual general meetings of SMI to be called for 29 November 2010 and 14 February 2011, and had connived at the holding of an annual general meeting for 30 April 2013, for the purposes of the approval and ratification of directors fees or remuneration which had been paid unlawfully.

73. The respondent furnished a number of written responses in respect of the initial, as well as the supplementary charges, over a number of years. Aside from his

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[55] *Id*.

[56] By means of which it made certain cosmetic and typographical amendments to its original charge-sheet and added further charges.

[57] *Contra* s 181(1) of the Companies Act of 1973.

initial 'report' in November 2009, he furnished further detailed responses and submissions in March 2010, March 2014 and September 2015. He attached to the September 2015 submission a number of annexures, comprising a detailed tabular response to the material facts set out in the original charge-sheet (annexure DG1), a response to the original 10 charges (annexure DG2 which adopted the format of a plea to the allegations made in the charges), a tabular response to the material facts set out in the supplementary charge-sheet (annexure DG3), and finally, a response to the further charges (annexure DG4 which similarly adopted the format of a plea to the allegations made therein).

The law

74. In *General Council of the Bar of SA v Geach* [58] Ponnan JA pointed out that as members of a 'distinguished and venerable' profession lawyers occupy a very important place in our society. As officers of the Courts they play a vital role in upholding the Constitution and ensuring that our justice system is efficient and effective, and as a result 'absolute personal integrity and scrupulous honesty' are required of them.[59] In addition, the law expects the 'highest possible degree of good faith' from practitioners in their dealings with those for whom they act, and in their dealings with the Courts.[60]

75. Without these fundamental qualities neither members of the public to whom they turn for help and advice in times of need, nor the Courts before whom they appear to plead their cases, can trust and therefor rely on them, and in such circumstances the edifice on which the system is built may come tumbling down. Because of this, the Courts must be vigilant in seeking to uphold these values.

76. Although many practitioners often lose sight of this in the hurly-burly of professional practise and the pursuit of their careers and financial well-being, ultimately their single most important and only real asset-in-trade is their personal

[58] 2013 (2) SA 52 SCA at para [87].
[59] *Id,* and *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 656B.
[60] *The Law Society of the Northern Provinces v Oosthuizen* [2018] ZAGPPHC 848 at para [32].

reputation. A lawyer who is willing to sacrifice the values of integrity and honesty at the altar of personal enrichment will often find that he has lost his reputation in the process, and has thereby lost the only currency he had.

77. In terms of the Attorneys Act[61] an attorney may, at the instance of the law society of which he is a member, be struck from the roll or suspended from practice if the Court in the exercise of its discretion considers him not to be a fit and proper person to continue to practise.

78. It is trite that an application to strike an attorney is a *sui generis* proceeding[62] which is neither criminal nor civil in nature.[63] As such, the purpose thereof is not to punish the alleged transgressor. As a voluntary association which was responsible at the time for regulating the professional conduct of its members the applicant has brought the matter before the Court in the interests, and for the protection of, the public and the profession.[64] The objective of these proceedings is to maintain the integrity, dignity and respect the public must have for officers of the court.[65]

79. It is trite that the adjudication of an application such as this involves a threefold enquiry.[66] In the first place the Court must determine, on a balance of probabilities, whether the law society has established the misconduct upon which it seeks to rely. Thereafter, it must determine whether the attorney is a 'fit and proper' person to continue to practise. This requires the Court to weigh up the conduct complained of against the conduct expected and, to this extent, it involves a value judgment.[67] Finally, the Court must decide whether the misconduct warrants the ultimate sanction of being struck from the roll or whether

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[61] Note 2, s 22(1)(d),
[62] *Cirota & Ano v Law Society, Tvl* 1979 (1) SA 172 (AD) at 187H.
[63] *Hassim v Incorporated Law Society of Natal* 1977 (2) SA 757 (AD).
[64] *Incorporated Law Society Natal v Roux* 1972 (3) SA (NPD).
[65] *Law Society v Du Toit* 1938 OPD 103, at 104.
[66] *Summerley v Law Society of the Northern Provinces* 2006 (5) SA 613 (SCA) at para [2], *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA).
[67] *Jasat* n 61 at 51E-F; *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 851C-E.

an order of suspension from practice will suffice. The exercise of discretion is thus concerned with the second and third parts of the enquiry, not the first.

80. When considering a matter such as this we are required to evaluate all the material circumstances including the respondent's personal circumstances, the nature of the conduct complained of and the extent to which it reflects upon the respondent's character or shows him to be unworthy to remain in the ranks of an honourable profession, the likelihood or otherwise of a repetition of such conduct and the need to protect the public.[68]

The law applied

81. In the answering affidavit which he filed, the respondent adopted a curious and somewhat ambivalent stance. On the one hand he said that he accepted without reservation the various findings of the High Court and the SCA and acknowledged the wrongdoing he had committed as set out in the judgments of those courts, for which he 'sincerely and humbly' apologised. He said that to the extent that the High Court and the SCA had made findings that were inconsistent with the written responses he had filed, he accepted those findings. However, when it came to answering, paragraph by paragraph, to the averments contained in the founding affidavit he said, without providing any particularity (save in respect of charges 6, 7, and 11-14), that whilst he admitted that he was guilty of 'certain' of the charges which had been preferred against him, he denied that he was guilty of 'all'. He averred that the facts which were traversed in the founding affidavit and the judgments of the High Court and the SCA did not address 'many of' the charges listed in the charge-sheet, particularly those pertaining to his alleged misuse of trust funds, and these aspects had not been dealt with in the hearings which had taken place before Fourie J and Traverso DJP. He said that these aspects were supposed to have been ventilated during the disciplinary enquiry, but it was abandoned without 'all' the evidence being presented on them.

[68] *Malan & Ano v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) at par [5]; *Geach* n 58 at para [74].

82. Similarly, he said that the matters contemplated in charge 6 (the alleged failure to appoint an audit committee), charge 7 (permitting Bruk Munkes to act as auditors even though they were statutorily disqualified), charge 11 (the refusal/ failure to call a general meeting when requested to do so) and charge 12 (calling a general meeting for an improper purpose), as well as charges 13 and 14 (the alleged failure to provide sufficient responses to requests for documentation and an accounting) were not addressed in any 'meaningful manner' (sic) in the proceedings before Fourie J and had not been the subject of any judicial pronouncement. However, whilst it is indeed so that the matters contemplated in the charges referred to (save for those pertaining to charges 13 and 14, on which certain findings against him were in fact made) were not addressed in the proceedings before Fourie J, which were largely concerned with events which occurred before 2010, this does not mean that they can be ignored, or that they have not been established by the applicant in these proceedings on a balance of probabilities. In support of the charges pertaining to these matters, and the remaining charges, the applicant attached to its founding affidavit a voluminous bundle of supporting documents which are not in dispute, including copies of various judgments, correspondence between the parties, annual financial statements, notices or letters in respect of the calling of annual general meetings for SMI, Mawjii's detailed complaints and the respondent's very detailed responses thereto, going back over many years. And if one examines the respondent's own responses it is abundantly clear that he unequivocally admitted to having done what was alleged in respect of charges 6, 7, 11 (and even 12, insofar as it related to the approval and ratification of fees which had been wrongfully paid to him and Manala at his instance, without being authorised by the company in general meeting, as was required by SMI's articles of association).

83. In certain instances, the respondent's attempt at trying to suggest that any matters which were not dealt with by the SCA should be ignored or treated as if they were genuinely in dispute, is disingenuous, if not misleading. In this regard

his averment[69] that neither the High Court nor the SCA made any finding that 'inadequacies' in respect of the accounts which had been furnished warranted a 'conclusion' of wilful non-disclosure on his part, is incorrect. As was pointed out in paragraph 47 above, the SCA was of the view that the respondent adopted every possible stratagem to avoid discharging his fiduciary obligation to account properly to Grancy for its investment in SMI. It also found that demands for access to company records were 'rebuffed'[70] and various attempts by Grancy to obtain information from the respondent were rejected on the grounds that it was not entitled to it.[71] What else was this, other than a deliberate and sustained effort at non-disclosure? This much is also clear if one reads the judgments of Binns-Ward J, Dlodlo J, Fourie J and Traverso DJP. The very fact that Grancy was compelled time and again to make application for an Order extracting a better and improved accounting, illustrates a deliberate unwillingness to properly disclose what was required.

84. In like vein, the averment that the judgments of Fourie J and the SCA did not address the misuse of trust funds, is startling and also incorrect, unless one adopts a narrow and formalistic interpretation of what constitutes trust monies. In this regard although it is so that this is not a case where the respondent stole monies which were being held in a trust account in a typical attorney and client relationship, I set out in some detail above how the SCA found that monies which had been 'entrusted' to the respondent and in respect of which he stood in a fiduciary position were abused in numerous respects: by crediting them to SMI instead of to Grancy or MG, by using them for the respondent's own personal investments in Ngatana and Spearhead or those of his wife and the family trust, by misappropriating them for speculative investments for the family trust (Scarlet Ibis Investments (Pty) Ltd) or for personal expenses (his daughter's university fees), or for the purpose of unauthorised and unjustified 'loans' and (directors and surety) fees for himself and Manala. To achieve these purposes, a trust

[69] In para 91 of the answering affidavit.
[70] *Gihwala v Grancy* n 10 at para [26].
[71] *Id* at para [27].

account of HHG at which the respondent was Chairman was used improperly and the respondent simply regarded it as an oversight and refused to fully take responsibility, and merely offered an 'apology'.

85. When one examines the respondent's answering affidavit it is very apparent that he does not engage or deal with any of the charges (save for those I have referred to in paragraph 81), in any substantive way, and in fact in his own various responses he admits almost all of them, save for a few exceptions. As I read the contents of his various responses and his answering affidavit, he either admits or does not dispute the charges referred to in paragraphs 70.1-70.4 and 70.6 above, as well as the supplementary charges which I summarised in paragraph 72(a)-(e), save for the allegation that he caused or allowed Bruk Munkes to be remunerated excessively. Save in certain limited respects he does not seek to provide any explanation or justification for his involvement in any of the charges, and where he does so he does not take responsibility for what happened and seeks to blame others. In many instances his attempts at justifying what happened are disingenuous to say the least, and show that he still fails to own up and to take responsibility for his actions.

86. So, he says that any misconduct he is guilty of is an exception to his otherwise unblemished career, and took place in the context of an 'angry and acrimonious' break-down of a relationship between friends. Whilst it may be so that there was a fall-out between him and Mawjii in 2005, this can hardly serve as an excuse for the egregious abuse of his position in relation to their business dealings, his wholesale breach of the investment agreement they had, and his gross misconduct thereafter, over a period of almost 10 years, if one includes the period between 2005 when Mawjii and Narotam gave notice of termination of their investments, and the judgment of Traverso DJP in 2016. And from the correspondence to hand the break-down in the relationship came about because of his high-handed attitude that he could do as he liked with Grancy's money, and if there was anger and acrimony it seems to have been on his side, and not on the side of Mawjii and Narotam. In my view the respondent's comments are

reflective of a continued failure to accept responsibility for his actions, and an attempt to blame others for a bloody-minded course of action he chose to adopt, for many years.

87. Similarly, he blames his staff at HHG for incorrectly crediting the R10 mil in funds which were received from Grancy and which were earmarked for the Scharrig investment, to an account in the name of SMI, and for doing the same when the funds and the interest earned thereon were repatriated to HHG, from the People's Bank. He said he held these funds initially as a co-investor and they fell under his control to do with 'as he saw fit' in relation to the Scharrig investment. It was thus fortuitous that he decided that the funds should be kept in trust (because he wanted to keep his co-investors' monies separate), when they did not need to be. He claimed that he only realized the 'error' that had been made by the accounting dept of HHG in relation to the trust account in which the funds were held, when the funds and interest were repatriated, and as far as he was concerned there was no need to remit the interest which Grancy claimed because it had not been earned in its name, but in the name of SMI. He was of the view that, in any event, if the funds needed to be kept in trust then this should have been in the name of the DGFT, because the Scharrig investment was going to be effected via the trust and Grancy had given permission for the funds to be transferred from the HHG trust account to DGFT. And as far as his appropriation of the interest which had been earned on the funds was concerned he justified his actions on the basis that Mawjii and Narotam had agreed that he could take 25% of any return which was made on investment, as 'compensation' for the loan which he had agreed to extend in respect of Manala's portion of the Spearhead investment.

88. As Mawjii pointed out in his response to these explanations, the R10 mil was transferred into HHG's trust account pending a possible investment in Scharrig. At the time the respondent held himself out as a responsible attorney and Chairman of a major law firm. He instructed his co-investors to pay over into HHG's trust account on the assurance that their monies were safe and

'ringfenced', and without any indication that by doing so ownership thereof would be lost, or would vest in any other party. The funds were only to be disbursed if the opportunity to take up the share options actually materialized. Pending the conclusion of a transaction in this regard it was understood that they would be held and kept in trust, for the benefit of Grancy, and not for anyone else. And as far as respondent's claim that he was entitled to 25% of the interest is concerned, Mawjii pointed out that the arrangement was only applicable to the Spearhead investment, because it was only in relation to this investment that there had been a loan to Manala. In any event the interest earned was not a return proper (ie a profit which was earned on an investment which took place) because no investment occurred. It was interest which would have accrued to Grancy anyway, had it kept its money in any bank account, awaiting the green light for an investment. As such, it was not intended to be subject to any deduction at the capricious whim of the respondent.

89. The respondent's attempts at justifying what happened in relation to the Scharrig funds, and the interest earned thereon, do not wash, and I agree with the submission which was made by applicant's counsel that his actions, at least insofar as the interest is concerned, amount to nothing short of a further blatant misappropriation. He took the entire interest amount (R78 256) and appropriated it immediately for the benefit of himself and his family: R21 073 went towards settling his daughter's university fees and the balance of R57 182 went to his family trust. To borrow the description used by the SCA, his conduct was inexcusable. He did not think of discussing or asking permission for what he planned to do with the interest which had been earned, and which was clearly not his, with either Mawjii or Narotam, who had been asking him to return the capital they had advanced (and which he had only held for little over two months), together with the interest. He simply took the entire amount as if he was entitled to it and then when confronted, instead of repaying it in full, claimed that it could not be paid over because it was subject to tax. To add insult to injury, when he finally did decide to return it he still kept R28 256 for himself, which represents

36% (and not 25%) of what was earned, and which gives the lie to his 25% profit-share justification.

90. The only real dispute of fact which emerges from a reading of the affidavits is in relation to the additional complaints which were set out by the applicant[72] which did not form part of the subject matter either of the original and supplementary charges, or of the findings and judgment of the SCA, in the appeal from the judgment of Fourie J. These complaints pertain to the alleged acquisition of additional Scharrig option shares by the respondent personally, via a short-term loan which was allegedly granted by the Medicover Medical Scheme (an entity of which he was co-curator whilst it was in curatorship from 2001 to 2006), to an entity known as 'Rosedene'. The applicant alleged that at the time when the respondent acquired these shares by means of a loan from Medicover he would have had a conflict of interest, and he therefore abused his position as curator to obtain an unfair advantage and to unfairly enrich himself, or his family trust, at Grancy's expense, and without disclosing these facts to it. The respondent denies these allegations. He says that he is unaware of any loan being provided by Medicover to Rosedene, and he denies that he received or acquired any additional Scharrig shares and claims that this is clearly apparent from a further accounting which he has rendered in pending action proceedings which have been instituted against him by Grancy. He avers that the relevant share registers and financial statements, as well as his tax returns, will reflect that he did not acquire the alleged shareholding. In the circumstances, there appears to be a genuine dispute of fact in relation to this complaint which cannot be resolved on the papers, and in the circumstances we have left it out of consideration.

91. Save for this, in my view the applicant has clearly established that the respondent has made himself guilty of numerous acts of serious misconduct, committed over a period of many years, including acts which amount to misappropriations, abuse of funds or monies which belonged, or which had accrued, to co-investors (and which were entrusted to him or which fell under his

[72] At paras 57-70 of the founding affidavit.

control) in order to enrich himself and his co-director Manala at their expense, a persistent and deliberate refusal to account to co-investors, and various acts of dishonesty. breach of integrity and of his fiduciary duties, as well as of the professional Rules of the applicant society of which he is a member, as reflected in the various findings of the SCA and the charges which I have referred to.

92. By way of summary, these acts were as follows:

92.1 He unfairly and improperly made use of information and opportunities which came his way (by virtue of his position as director/chairman of SMI, Ngatana, Spearhead, Redefine and Interactive Capital amongst others) in order to gain personal advantage and to enrich himself at the expense of Grancy and MG, co-investors to whom he owed a fiduciary duty;

92.2 He persistently and unjustifiably refused, for a period of 4 years between 2005 and 2009, to acknowledge that Grancy had a right to a one third shareholding in SMI, despite the agreement which he concluded in this regard in February 2005 and his clear acceptance and understanding thereof at the time;

92.3 He persistently and improperly refused (for some 10 years from date of the initial refusal to date of compliance with the Orders of Traverso DJP and of the SCA),[73] to render a proper accounting in the Spearhead and Scharrig investments to Grancy and MG, and to allow them access to the books of account, the records of SMI and the underlying transactions pertaining to these investments;

92.4 He set about significantly increasing Ngatana's indebtedness and thereby exposed Grancy to a significantly greater risk, by acquiring

[73] This period does not have regard for the fact the second phase of the debatement must still take place later this year.

millions of additional Spearhead units for Ngatana without the knowledge or consent of Grancy, as co-investor;

92.5 He failed to consult Grancy in relation to a decision that Ngatana should accede to an offer by Redefine to acquire linked units in Spearhead, and failed to consult it in regard to subsequent decisions to acquire millions of additional Redefine units and thereafter to dispose of them, thereby excluding Grancy as co-investor from significant profits which were made from these transactions, which it would ordinarily have shared in;

92.6 He misappropriated a dividend of R5.27 mil which he caused Ngatana to pay to SMI, by paying the amount out as a dividend in equal shares to Manala and the DGFT and excluding Grancy from its share thereof;

92.7 He improperly allowed R3.5 mil (which was advanced by Grancy for the purposes of the Spearhead investment and which should have been held as such in trust for it in HHG's trust account), to be credited to a loan account for Manala, and also improperly caused this account to be credited at various stages with a further R2 mil 'loan' and exorbitant and unjustified director's fees in amounts of R2.75 mil and R750 000, and 'promotion' and so-called 'surety' fees in amounts of R225 000 and R1 114 539 respectively, allowing Manala to thereby draw out approximately R9 mil to which he was not entitled, from this account, over a number of years;

92.8 He improperly paid himself exorbitant and unjustified (director's, 'promotional' and 'surety') fees in an amount of approximately R4.8 mil;

92.9 He misappropriated an amount of R6 637 673 (which Ngatana repaid to SMI as return on the capital loan it had received from SMI

together with the profit which was made), by utilising it without Grancy's consent to repay the loan portion of his and Manala's contribution towards the investment, without doing the same in respect of Grancy, to whom an amount of R2 057 678 should have been refunded in respect of its portion of the investment, and misappropriated R2 mil of this money by investing it without Grancy's knowledge or consent in a speculative property investment in Scarlet Ibis Investments (Pty) Ltd, in which his wife and the DGFT had an interest, which investment failed;

92.10 He misappropriated interest which had been earned on funds belonging to Grancy, for personal benefit, in an amount of R78 256 (by utilising R21 073 for his daughter's university fees and the balance of R57 182 for his family trust);

92.11 He improperly caused personal legal fees (in respect of legal services which had been rendered to him and the DGFT in relation to ongoing legal proceedings between the parties), to be paid by SMI, without the knowledge and consent of Grancy, thereby misappropriating monies which would otherwise have been available for distribution as dividends to shareholders, including Grancy;

92.12 He improperly failed to call a general meeting of SMI subsequent to a formal request from Grancy as a shareholder, and improperly caused annual general meetings of SMI to be called for the purposes of approving and ratifying loans, directors, 'surety' and 'promotional' fees or remuneration which had been paid unlawfully;

92.13 He failed to ensure that SMI kept proper accounting records, and produced inaccurate and incomplete annual financial statements which he represented as fairly reflecting the company's financial position, failed to appoint an audit committee for SMI, and

appointed a firm of auditors who were disqualified from serving in that capacity;

92.14 He breached the professional Rules of the law society of which he was a member, as well as provisions of the Attorneys Act,[74] in relation to the investment and holding in trust, of monies which were paid over to him.

93. In his answering affidavit the respondent claims that his acts of misconduct pertain 'exclusively' to the break-down in the personal and business relationship which he had with Mawjii, and are not a reflection of his behaviour or character in general. He points out that in his dealings he did not act as Mawjii's attorney, or as attorney for the entities which he represented.

94. Firstly, whilst it is so that the misconduct did not occur in the context of an attorney-client relationship, the fact that the respondent was a prominent, senior practitioner of a major law firm played a very important role in this matter. Mawjii said that the respondent held out that by virtue of his position as a senior member of a profession which had a strong ethical code and as Chairman of one of the largest and most well-known law firms in the country, he could be trusted, and he consequently believed it would be safe to do business with him as it would be 'unthinkable' that he would engage in any unprofessional or wrongful conduct. As is apparent from one of the very first emails which the respondent sent to Mawjii in February 2005,[75] when he set out the terms of their agreement and assured Mawjii that he would be drafting the necessary written contracts which would incorporate such terms, the respondent signed off his email in his capacity as Chairman of HHG, and not in his personal capacity.

95. As far as he was concerned therefore the position which he occupied as an attorney was of importance to his dealings with Mawjii and Narotam. In addition, the investments in which he participated together with Mawjii and Grancy were

[74] Note 2.
[75] *Vide* para [15].

effected by utilizing his firm's trust account facilities, and its legal capacity and resources. As such, it was common cause that any monies paid over to his firm became subject to the professional Rules of the applicant society and the relevant provisions of the Attorneys Act. It may be mentioned that his firm also acted on his behalf in the various legal proceedings which were instituted against him, subsequent to the termination of his relationship with Mawjii. In the circumstances the respondent quite correctly conceded that he was not exempt from the disciplinary jurisdiction of the applicant simply because his misconduct took place in the context of a business rather than a professional relationship. The respondent also conceded that inasmuch as his actions may reflect upon his professional reputation and the question of his continued fitness to be an enrolled attorney they are not immune from scrutiny by this Court either, especially as he acknowledges that the High Court and SCA have made findings that reflect adversely on both his integrity as well as his honesty. In fact, he accepts[76] ultimately that his conduct warrants a finding by this Court that he is guilty of unprofessional, dishonourable and unworthy conduct, for which he should be sanctioned. The only real issue that he has with the proceedings is in regard to the 'sanction' which is sought. In this regard he submits that striking him from the roll of practitioners would be a disproportionately severe 'penalty' in the 'exceptional' circumstances of his case, and an order of indefinite suspension from practice would be the appropriate 'sanction' to impose.

96. In support of the averment that there are 'exceptional' circumstances present which warrant a 'sanction' of suspension instead of a striking off the respondent says that he has already been 'severely sanctioned' for the conduct which has given rise to this application. He points out that as a result of the terms of the Order which was handed down by the SCA he was required to pay the sum of R12.87 mil odd, which represents the capital and interest which was awarded, which he paid in full on 12 April 2016. In addition, he was also held liable (jointly and severally with Manala and the DGFT), for Grancy's costs of suit, which

[76] At para [119] of his answering affidavit.

untaxed, he says are currently sitting at approximately R21 mil. And, because he was declared a delinquent director he has had to resign various directorships, and will only be eligible to apply for a suspension of the delinquency, after a period of 3 years from the date of the declaration thereof. In the result, he says he has paid a heavy price, professionally, reputationally and financially. Finally, he points out that he retired from practice in 2011 as a result of ill-health, and is currently aged 65 and has no intention of practising again. He submits that in the circumstances the imposition of a striking off would serve no purpose as such is intended to protect the public, who would be at no risk, due to him having retired.

97. In my view, the respondent's submissions in this regard are misplaced. In the first place, it has been repeatedly emphasised that proceedings such as these are not about imposing a sanction or punishment on an offender.[77] As was said in *Van Der Berg* [78] the enquiry before a Court which is called to exercise its disciplinary powers over a practitioner is not about what constitutes an 'appropriate punishment for a past transgression but rather what is required for the protection of the public in the future'.

98. In any event, the Order which was made by the SCA (which confirmed its findings that the respondent and his family trust had entered into an investment agreement with Grancy and MG which he had breached in material respects and that as a result he was liable to Grancy for damages in various amounts), which came to approximately R5.7 mil in the aggregate, plus interest, does not qualify as a sanction. Neither does the Order holding him liable for costs. These Orders were made in consequence of the respondent's breach of agreement, and the monetary consequences thereof were merely directed at making good the financial harm which had been suffered by Grancy and MG, as a result of the aforesaid breach. Similarly, the Order that was made declaring the respondent to be a delinquent director was not directed at sanctioning him, but at protecting the corporate world from him.

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[77] *Incorporated Law Society Natal v Roux* n 64 at 151A; *Geach* n 58 at para [67].
[78] *Van Der Berg v GCB of SA* [2007] 2 All SA 499 (SCA) at para [50].

99. In the second place, given that a material portion of the misconduct of which he made himself guilty was sustained and persistent misconduct which occurred over a number of years (despite many fruitless attempts to call him to order by means of repeated litigation and ample opportunity for him to come to his senses), we are not dealing with a single, isolated fall from grace, or a so-called once off 'moral lapse', but rather with an apparent serious flaw in character and a fundamental lack of integrity. In my view, the fact that the respondent adopted the attitude that Grancy was not to be registered as a shareholder in SMI shortly after, and contrary to, the conclusion of an agreement with Mawjii and Narotam to this effect, and that he persisted with this unconscionably for a period of 4 years well-knowing it not to be true (given that he had clearly confirmed in his own email of 21 February 2005 that Grancy was to be a one third shareholder), is a materially aggravating feature and reflects very badly on his honesty. Furthermore, the SCA found[79] that the respondent was also grossly dishonest when he deliberately and knowingly informed the bookkeepers who were responsible for SMI's accounts and financial statements, that the R3.5 mil which had been paid over by Grancy was a loan to Manala and as such could be credited to his loan account (instead of crediting it to SMI as a loan to it from Grancy, as was actually the case). In effect, by doing so he set the stage for Manala to later misappropriate money which belonged to Grancy. And, the respondent's egregious abuse of the business relationship he had with Mawjii and Narotam, his wholesale and flagrant breach of their investment agreement and deliberate refusal to recognize Grancy's shareholding, and multiple misappropriations and abuse of monies entrusted to him by Mawjii, Narotam and Grancy all attest to a complete lack of integrity.

100. As was previously pointed out[80] honesty and integrity are fundamental qualities for every practitioner. Where a senior attorney who is involved in a professional or business relationship with a third party, falsely adopts and thereafter repeatedly and deliberately asserts a position which he knows is untrue (and

[79] Note 10, at para [135].
[80] Per the SCA in *Geach* n 58 at para [87].

contrary to the very terms of an agreement he has with the third party), over a number of years, both privately in his dealings with the third party as well as publicly in litigation which ensues between them, and egregiously abuses their business relationship as indicated in the preceding paragraph, he makes himself guilty of gross professional misconduct, as he shows he lacks these qualities.

101. In *Malan* the SCA held[81] that if a Court finds dishonesty to have been present in any misconduct by a practitioner, the circumstances must be exceptional before the Court will impose a suspension, instead of striking off. This dictum was subsequently held[82] not to mean that there is an inviolate rule in this regard, which must be applied mercilessly and without regard for the other circumstances which must factored in to the weighing up process, for the Court is supposed to be exercising a discretion. What it means is simply that when the practitioner concerned has been shown to have been dishonest a Court will need to be satisfied that the circumstances before it are such that the inference that the dishonesty is likely to recur, which would ordinarily follow upon such a finding, need not be drawn, and in that sense the misconduct before it constitutes an exception to what would ordinarily be expected.[83]

102. In my view, rather than leaning towards the drawing of an inference that a recurrence of dishonesty and a lack of integrity on the part of the respondent in the future is unlikely or improbable, the facts of this matter show that it is most likely that it will recur, because it appears to be an ingrained and inherent part of the respondent's character. Despite his assertion that he does not intend to return to practice, nothing would prevent the respondent from doing so should circumstances allow. As I have pointed out previously, and at the risk of repeating myself *ad nauseam*, right from the outset the respondent dishonestly adopted the attitude that Grancy was not entitled to be registered as a shareholder in SMI, and then deliberately continued to adopt this stance, both privately as between himself and Mawjii and Narotam, as well as publicly in the

[81] Note 68, at para [10].
[82] In *Geach* n 58 at para [69].
[83] *Id*.

resultant litigation which took place, and he only recanted when he was forced to do so 4 years later in March 2009, on the eve of the hearing of the matter in which such relief was sought. By doing what he did the respondent demonstrated that he was quite prepared to be untruthful and dishonest not only towards a co-investor, but also towards the Court, and consequently he exhibited a lack of integrity in this respect as well. And when called upon over a number of years to provide explanations for his misconduct, in his various responses he averred that he had consistently maintained the 'highest' standards of honesty and integrity,[84] had 'faithfully, accurately and timeously' accounted for all monies he had been entrusted with[85] and in his dealings with Grancy and Mawjii had never done anything 'which could or might bring the attorneys' profession into disrepute'.[86]

103. By maintaining consistently over many years that he had adhered to the requisite standards of probity and had never acted inappropriately or improperly towards Grancy and Mawjii, he similarly demonstrated a singular lack of honesty and insight. It was only in these proceedings that he finally admitted, albeit partially, to having wronged his co-investors and to having acted improperly. The impression which one is left with is that he had to make these admissions, given the wide-ranging findings which were made against him by the SCA. In my view, had such findings not been made there is little chance that the respondent would ever have owned up to his wrongdoing. That in itself also demonstrates that he lacks the integrity and moral fibre which is required of a senior practitioner, occupying the position which he did. Until the decision of the SCA he was quite content to carry on regardless of his ethical duties and responsibility as an attorney, and to make Grancy and Mawjii jump through each and every hoop in their quest for justice. Furthermore, the respondent still did not show any contrition by providing a full explanation for his actions, and taking into account that he did not proffer a version in the action proceedings (which he was entitled to do), we are still at a loss as to why he did what he did. Acceptance of the

[84] Paras [3] and [58] of his initial response dated 9 November 2009.
[85] Para [12.5] of his response dated 31 March 2010.
[86] *Id* at para [12.6].

damning findings made by the Courts can hardly, in this case, be regarded as a sign of genuine remorse.

104. As far as directing that he be suspended 'indefinitely' rather than being struck off, we were not able to find a single reported or unreported decision in which an Order was made in such terms, nor were counsel able to refer us to one. In *A v Law Society of the Cape of Good Hope*[87] the Appellate Division held[88] *obiter* that any Order of suspension must 'implicitly' ie by its very nature be conditional, and as the wording of the statutory provision in question[89] imposes no restriction on the form any condition of suspension may take, it will thus be permissible to make an Order of suspension which is conditional upon the cause of unfitness being removed, and which in that sense may be indefinite, in effect. In that matter the practitioner concerned had harassed his ex-wife's former advocate[90] because he was suffering from a personality disorder. Because, according to the opinion of a psychiatrist, it was a treatable condition and the prospects were good that he would recover, and because it was further the opinion of the psychiatrist that in the event that the respondent were to be removed from the roll of attorneys on a permanent basis it might retard his rehabilitation and cause him further depression and 'retardation' (sic), on appeal an Order striking him was substituted for an Order suspending him from practice 'until such time' as he satisfied the Court that he was a fit and proper person to resume practice.[91] In this matter there is no suggestion that the respondent's actions over the course of the many years and the many proceedings which have been traversed, were in any way brought about by any medical or psychological ailment or disorder. Nor was it suggested that the respondent's misconduct was occasioned by

[87] Note 67.
[88] Per Kumleben JA at 852E-F.
[89] Which, as in this matter was s 22(1) of the Attorneys Act 53 of 1979.
[90] Mrs Traverso, who later became the Deputy Judge-President of this Division.
[91] In *Law Society Northern Provinces v Oosthuizen* n 60 an attorney who was found guilty of a number of irregularities in regard to the keeping of trust accounts, as a result of a post-traumatic stress disorder he developed after being subjected to an armed robbery, which caused him to neglect his practice and to cut corners with his book-keeping and his trust accounts,, was suspended from practice for a period of 1 year, as the Court had before it a report from a psychologist who was of the view that he was unlikely to repeat his misconduct and with continued psycho-therapy and medication would make a full recovery.

financial need. As such, this is not a matter where the practitioner can say that there are reasonable prospects that he may recover from his deficits, and that there is every chance that he may be rehabilitated. We point out that in this matter the respondent's misconduct was sustained over a number of years, after he had already been in practice as a senior practitioner for more than 20 years, and he was not a young and immature practitioner who unfortunately fell off the path he was supposed to tread, in the early stage of his professional life.

105. Ordinarily, an Order suspending a practitioner will be appropriate where the circumstances show that the misconduct concerned was relatively minor or it occurred because of a single 'moral lapse' and the practitioner is unlikely to repeat it in the future. In essence, such an Order is a corrective measure which is appropriate in the case of a practitioner who, although fallible, has a reasonable prospect of being rehabilitated. It is not appropriate for the seeming incorrigibles. As such, it has usually been imposed in the case of practitioners who have slipped and fallen because they have strayed into temptation, but who are essentially capable of redemption, after a certain period, as they have the basic qualities needed to be upstanding lawyers. Thus, for example, it has been imposed in cases where practitioners have made themselves guilty of irregularities in the keeping of their books of account[92] and where a young attorney in her first year of practice who was struggling to make ends meet and was in a desperate financial predicament, misappropriated monies which were held in trust in order to pay her practice and living expenses.[93] The SCA was of the view that her misconduct had been brought about by a 'moral lapse' and not by a defect of character, and it consequently upheld an Order which had been granted suspending her from practice for a year.

106. In my view, for the reasons I have already set out above, an Order suspending the respondent from practice, even for an indefinite period, would be wholly inappropriate. Not only is there no suggestion that he intends one day to resume

[92] *Transvaal Incorporated Law Society v K* 1950 (4) SA 449 (TPD); *Summerle*y n 66; *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA); *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA).
[93] *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA).

practice (the respondent says that he retired due to a condition known as *myathenia gravis*, a progressive, chronic autoimmune disorder which affects his neuromuscular functioning), and such an Order would thus make little sense from a corrective or rehabilitative point of view, but the protracted misconduct which he committed is of a very serious nature and shows that the respondent has a fundamental lack of honesty and integrity which he has exhibited for a considerable period of time, and which would in the ordinary course have rendered him wholly unfit to continue to practice, had he not retired.

107. In addition, in my view the most important factor militating against the imposition of such an Order is that it would send out the completely wrong message to the profession, and members of the public. The Court is supposed to be the defender of the profession and the values it espouses and the proceedings before us are aimed at maintaining the integrity, dignity and respect the public must have for officers of the Court.[94] An Order of suspension would make a mockery of these objectives and degrade what is often referred to as a noble profession, which cannot continue to describe itself as such if it tolerates members who lack honesty and integrity. The Order which the Court is to make should consequently serve as a warning and a deterrent to other members of the profession, who may be minded to forsake the fundamental values of honesty and integrity which they are required to uphold, and to engage in similar conduct to that in which the respondent engaged, in the blind pursuit of profit and self-enrichment. We live in times and in a society where many persons who are required to observe these fundamental values have succumbed. It is up to the Court to remind practitioners that the privileged position they occupy comes with ethical responsibilities, and in order to protect and sustain the profession we cannot countenance those who fundamentally lack these qualities.

[94] *Law Society v Du Toit* n 65 at 104.

Conclusion

108. The respondent rightly accepts that whatever the Order of the Court, he is liable for the costs of these proceedings, and that these should be on the scale of attorney and client. This is in accordance with the well-established principle in this regard.[95] But, in addition to such costs the applicant also seeks an Order directing the respondent to pay the costs of the disciplinary enquiry, which was abandoned. The respondent disputes liability for those costs. He says that not only did the disciplinary enquiry not proceed to find him guilty on any of the charges which he was facing, but in terms of the Attorneys Act he could only have been ordered to pay such costs by the tribunal in the event that he was found guilty, and this Court is only empowered to make an Order in respect of the proceedings before it, and is not at liberty to make an Order for the costs of proceedings in another matter.

109. S 72(1) of the Attorneys Act provides that where an attorney is found guilty of unprofessional, dishonourable or unworthy conduct before a disciplinary enquiry of a law society, it may impose a limited range of sanctions on him, which include a fine[96] or a reprimand, and may in such event also recover the costs which were incurred in connection with the enquiry. (As the relevant Rule read at the time, such costs would include the costs pertaining to the obtaining of a record of the proceedings, as well as the reasonable costs of employing a *pro forma* prosecutor, and costs in relation to the attendance of members of the enquiry.) In terms of the Act a society does not have the power to suspend an attorney from practice, or to remove him from the roll. Such powers are reserved for the Court.

110. In my view, the provisions of s 72 should not serve as a bar to this Court making an Order in respect of the costs of the disciplinary proceedings. In this regard I note that s 72(5) provides that the provisions of s 72 shall not affect the power of a society to apply for the suspension from practice or the striking from the roll, of any practitioner against whom an enquiry is being, or has been, conducted. In

[95] *Botha* n 92 at para [20].
[96] In terms of s 72(1)(a)(i), which fine may be suspended (s 72(2)(b)).

the circumstances the Act clearly envisages situations where a society may decide that the evidence before a partially completed enquiry is of such a conclusive or overwhelming nature in respect of acts of serious misconduct, that it would not only be a waste of time to proceed with it to completion but in fact the interests of justice demand that application should be made immediately to a Court for an Order striking or suspending the practitioner concerned, as the misconduct does not merely warrant the imposition of a minor sanction such as a fine or a reprimand. It could hardly have been intended by the legislature that in such instances, where a society will inevitably have to proceed to Court for an Order striking or suspending a practitioner, it will have to forsake the costs it has incurred in a partially completed disciplinary enquiry. But of course, each matter will have to be decided on its own facts and particular circumstances.

111. On the respondent's construction of s 72 the only way a law society could ever recover the costs of a disciplinary enquiry would be for it to proceed with it to completion, even if it was thereafter obliged in any event to make application to a Court for an Order suspending or striking the practitioner from the roll. Such a construction would not be sensible, or in the interests of justice, and would in fact severely prejudice the practitioner, who would not only have to face having to go through a disciplinary enquiry and thereafter an application for his removal or suspension based on the same grounds, simply so that the costs of both proceedings would be recoverable from him, but would thereby unfairly be exposed to double costs, or costs which could have been avoided. Of course, this does not mean that a regulatory authority can simply charge a practitioner before a disciplinary enquiry without properly investigating the circumstances concerned and without establishing the nature of the misconduct which he has committed beforehand, and it also does not mean that it can abuse the provisions of the Act or the disciplinary process it envisages, by launching disciplinary enquiries instead of applications to strike or suspend, where these are clearly warranted. In my view, given the evidence which was before the DEC at the time including the responses provided by the respondent, in which he essentially admitted to most of the complaints and charges, he would inevitably

have been found guilty of the majority of the charges. In the result, the fact that the proceedings in the disciplinary enquiry did not proceed to completion therefore should not serve to prevent this Court from making an Order in regard to the costs thereof, and in fairness he should be ordered to pay those costs.

112. As far as the lengthy delay is concerned it is apparent, from the circumstances of this matter, that the complaints which were lodged by Mawjii in 2009 and 2011 concerned fairly complex transactions which involved intricate commercial schemes of investment, which required some investigation and consideration beyond what would normally be the case. What complicated matters is that the respondent adopted an obfuscatory approach to Mawjii/Grancy's queries and requests for information and a proper accounting, and consequently the parties became embroiled in a number of legal skirmishes, which were conducted at every level of the courts, and which took some time to be resolved. To add to the delay the DEC itself also made a number of unfortunate, interlocutory decisions which were wrong, and which needed to be set aside on review. However, it seems that it was only when the judgments of the SCA and Traverso DJP were handed down that the full extent of the respondent's misconduct was made plain for all to see, at which point instead of continuing with the disciplinary enquiry and thereafter with a striking off application, the applicant quite properly discontinued proceedings before the DEC and proceeded to launch this application. Although there was an unexplained delay in getting the papers out, there is no indication that this was accompanied by any additional or unnecessary costs, nor any suggestion that it prejudiced the respondent in any way.

The Order

113. In the result, we make the following Order:

113.1 The respondent's name is struck off the roll of attorneys of this Court;

113.2 The respondent shall surrender and deliver to the Registrar of this Court his certificate of enrolment as an attorney within 10 days from date hereof, failing which the Sheriff of the district in which such certificate of enrolment may be found is authorised and directed to take possession thereof and to deliver same to the Registrar;

113.3 The respondent shall be liable for the costs of the application (which costs shall include the costs of counsel), on the scale as between attorney and client, as taxed or agreed;

113.4 The respondent shall be liable for the costs incurred by the applicant in connection with, as well as the costs of, the disciplinary enquiry which was conducted by it (in respect of complaints lodged by Karim Mawjii/Grancy Property Ltd and/or Montague Goldsmith AG against the applicant), which costs shall be calculated in accordance with the non-litigious tariff of the applicant, as taxed or agreed, and which shall include the following:

113.4.1 The costs of recording, transcribing and preparing transcripts and copies of the record of the enquiry;

113.4.2 The costs incurred in the employment of a *pro forma* prosecutor and the reasonable allowances payable to members of the disciplinary enquiry, arising out of the absence of such members from their offices during the hearing of the enquiry.

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ML SHER

Judge of the High Court

I concur**.**

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NP BOQWANA

Judge of the High Court

Attendances:

Applicant's counsel: Adv J Rogers

Applicant's attorneys: Abrahams Kiewitz Inc.

Respondent's counsel: Adv L Rose-Innes SC and Adv G Quixley

Respondent's attorneys: Adriaans Attorneys