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

Case no: 3920/2013

In the matter between:

THE LEGAL PRACTICE COUNCIL Applicant

and

DANIEL GERRIT SMIT VAN WYK Respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 4 NOVEMBER 2021

SHER, J (BOZALEK J concurring):

1. This matter was launched as one of urgency in March 2013, some 8 years ago, by the then Law Society of the Cape of Good Hope, which at the time was the statutory body which exercised control over attorneys.[1] In its original form it comprised an application to interdict the respondent from practising as an attorney and authorising the Director of the Law Society to take control of his trust accounts as curator, pending an application to strike him from the roll of attorneys. Despite the launch of the application in circumstances of alleged urgency it was not brought before the Court until this year.
2. In October 2020 the application mutated, at the instance of the Legal Practice Council (the entity which with effect from 1 November 2018 exercises jurisdiction

[1] In terms of the Attorneys Act 53 of 1979.

and control over all legal practitioners[2]), into one in which an order suspending the respondent from practice for a period of 5 years, 3 years of which was to be suspended for 5 years on certain conditions, was sought.

3. That it has taken 8 years for the matter to come before the Court is because of a rank failure on the part of the regulatory bodies responsible for the control and governance of the profession to properly carry out their duties.

The facts

4. The respondent is a 57 year old legal practitioner who was admitted to practice as an attorney in the Orange Free State division of the High Court on 13 February 1992. He was enrolled to practice in this division the following year.

5. The founding affidavit which was filed in support of the application in 2013, some 10 years after the respondent commenced his career as an attorney, did not provide any particulars as to the course of his practice from the time of his admission. These were only briefly set out in the supplementary affidavit which was supplied at the request of the Court, in May 2021.

6. According to this account the respondent entered into partnership with J von Ludwig in March 1993. In February 1994 the firm amalgamated with Hanekom and partners, and it was incorporated the following year. By July 2001 the respondent was the last remaining director of the firm. At the time of the launch of the application in 2013 the respondent was in practice for his own account as a sole practitioner from premises in Bellville, Cape Town.

7. The respondent has notched up a dismal record of disciplinary infractions which go back some 23 years, to 1998. As at November 2012, when the founding affidavit was deposed to, he had been found guilty by the Law Society of 42 acts of professional misconduct which had been committed over a period of 14 years, for which he had cumulatively been fined a total of just short of R 400 000.

8. These offences were simply listed in chronological order in the founding affidavit, and were elaborated upon in the member and professional history reports which were attached to the supplementary affidavit which was filed in June 2021.

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[2] In terms of the Legal Practice Act 28 of 2014.

9. With a view to providing a conspectus of this history with reference to the nature of the acts of misconduct concerned rather than when they were committed, I sought to group like offences together. The picture which emerged from this exercise is as follows.

(i) Failure to respond to communications from clients and the Law Society and failure to account to them

10. The bulk of the transgressions (in terms of number and sanction imposed), concern a failure to respond to correspondence and communications from clients and the Law Society. Between 1998 and 2012 the respondent was found guilty of 29 such instances for which he was cumulatively fined a total of some R 300 000. Lest it be thought that these were simply petty non-responses, I point out that in a number of instances complaints were lodged with the Law Society by clients and colleagues that the respondent had failed to account to them, and the respondent thereafter failed to respond to communications from the Society seeking an answer in regard thereto, thereby avoiding having to account to the Society. In many of these instances the failure to respond to communications occurred after the respondent had failed to execute the mandates of his clients or to carry out their instructions. In some of these matters the respondent had failed to account to his clients in respect of monies he had received on their behalf from third parties, or in respect of monies he had received from them in lieu of fees for work he was to perform.

11. As these contraventions increased over the years so the fines which were imposed increased commensurately. For his first offence in 1998 a fine of R 500 was imposed. For subsequent offences committed between 1998 and 2002 that doubled to a fine of R 1000 per time. By 2008 the Law Society was imposing fines of R 5000 per incident and by the beginning of 2010 this had more than doubled again. In that year alone the respondent was fined just short of R 100 000 for 9 separate contraventions. In 2011 he was cumulatively fined approximately R 85 000 for 5 separate contraventions, and in 2012 he was fined a similar amount.

12. From this it is evident that the increasing fines which were imposed had no deterrent effect whatsoever. Neither did the imposition in November 2008 of a fine which was suspended on condition that the respondent was not again found guilty of a similar contravention. The respondent breached the terms of the suspension three months later.

(ii) Failure to execute his duties as an attorney

13. Between 2009 and 2012 the respondent was found guilty of a number of separate instances of failing to properly attend to clients' matters 'competently, diligently and timeously'. The first of such contraventions in September 2009 involved a failure to give the necessary attention to a divorce matter, for which he was fined R 300. A few months later, in February 2010, he was fined R 6000 for having failed to give proper attention to a damages claim since 2002.

14. A month later he was fined a similar amount for failing to enter an appearance to defend a matter. Three months after that he was fined R 9000 for failing to issue a summons on behalf of a client, and in September 2010 he was again found guilty of failing to properly carry out a client's instructions, for which he was fined R12 000, and failing to deliver client files after his mandate had been terminated, for which he was fined R 3000. A year later he was fined R 6000 for a similar offence. In January 2012 he was fined R 15 000 for failing to give effect to a client's instructions and failing to hand over the client's file.

15. Once again, the magnitude of these transgressions must be properly appreciated. As at 2011 the respondent's professional history record reflects that a total of 33 complaints were lodged against him over a period of 13 years by clients and colleagues, and as is evident from the supplementary founding affidavit dated 16 October 2020 at least a further 2 such complaints[3] were lodged against him subsequent thereto. (Although he was also found guilty of these complaints the sanction which was imposed in respect thereof has not been disclosed).

[3] The Bredenhann and Lottering complaints.

16. From the brief particulars which have been furnished in regard to some of these contraventions it appears that the respondent's failure, on numerous occasions, to act in the best interests of his clients had serious consequences for them.

17. Thus, he failed to ensure that maintenance was obtained for a woman who was in the process of getting divorced, despite taking fees from her to do so (the Camphor complaint), failed to take steps to collect monies that were outstanding (the Leon Rousseau Attorneys complaint), failed to register an antenuptial contract (the Van Greunen complaint), failed to obtain rescission of a default judgment, notwithstanding that it had been agreed to by the plaintiff, resulting in a warrant of execution being issued against the defendant (the Bredenhann complaint), failed to prosecute s 65 proceedings against a judgment debtor and to account in respect of payments made to him by the debtor (the Vermaak & Dennis Attorneys complaint), failed to issue summons on behalf of a client, presumably because he lost the original of a contract which had been provided to him for this purpose (the Cloete complaint); and failed to enter an appearance to defend an action resulting in default judgment being granted against his client, and then failed to attend to the rescission thereof (the Schmidt complaint).

(iii) <u>Offences pertaining to honesty, integrity and probity</u>

18. The respondent has also made himself guilty of a number of infractions which reflect adversely on his honesty, integrity and professional probity.

19. In 2003 he was found guilty of a misappropriation of funds, by failing to pay over staff provident fund deductions to the Legal Provident Fund, for which he was fined R 5000.

20. In June 2008 he failed to account for monies received subsequent to the termination of a mandate by a client, for which he was fined R 3000. The offence was coupled to a failure to respond to communications from the Law Society for which he was also sanctioned.

21. In September 2009 he was found guilty of failing to account faithfully, accurately and timeously to a complainant for funds he received from her, for which he was sanctioned with a fine of R 5000 after failing, once again, to respond to various communications from the Law Society.

22. Seven months later, in April 2010, he was fined R 8000 for similarly failing to properly account for monies received from a client. In August that year he was found guilty of failing to pay over interest which had accrued on monies which were held in trust, for which he was fined R 2000.

23. In May 2010 he was found guilty of failing to submit his annual audit report timeously. This followed a number of instances, from 2002 onwards, when he failed (on a biennial basis it seems, which suggests a pattern of behaviour) to qualify for the issue of a fidelity fund certificate, an essential requirement for the protection of members of the public who deal with attorneys. Practitioners commonly fail to qualify for the issue of a fidelity fund certificate when their books of account are not in good order and they have consequently not obtained the necessary audit clearance in respect of their trust accounts.

24. In April/May 2004 the respondent was interdicted from practising until he had rendered himself compliant and had obtained the necessary certificate. This appears to have been a particularly serious breach as it transpires that the interdict was only discharged two years later in 2006, when he again qualified for the issue of a fidelity fund certificate. In May 2008 he was again interdicted from practicing, for a number of months, as he was not in possession of a fidelity fund certificate. The same happened in April 2010 and February 2012.

25. In July 2007 the Law Society had to make application for an order compelling him to make his accounting records available for inspection, after he had declined to do so. An order to this effect was finally granted on 21 April 2010. Why it took some 3 years to obtain the order was not explained. No doubt the delay was at least partly occasioned by the respondent's failure to concede to the relief sought. This too is a matter which weighs heavily on the respondent's record. An attorney who has nothing to hide would hardly refuse to accede to a request to make his records available to his regulatory body, and would hardly require it to go to Court for an order compelling him to do so.

26. To aggravate matters, even after the order was served on him on 6 May 2010 the respondent refused to allow an inspection. Once again, an attorney whose records are in the condition they should be would surely have no difficulty

complying with an order of court that they be inspected. But for any attorney, even one whose records are in disarray, not to comply with an order of Court is a serious reflection of a lack of integrity and is fundamentally at odds with their hallowed position as officers of the Court.

27. As a result, the Society was compelled to make application for him to be held in contempt, although once again it does not appear to have been in any hurry to do so. It only obtained an order on 10 November 2011[4] holding him to be in contempt, and imposing a sanction of 30 days' imprisonment on him, which was suspended for 5 years on certain conditions. In addition, the respondent was ordered to pay the costs of the application on the scale as between attorney and client.

28. Aside from this order, during 2010 two orders compelling the respondent to account to his clients also had to be obtained by the Society. In one of them the respondent gave notice that he intended to oppose the relief which was sought, but he did not file any opposing papers. The Society claims that as it was unable to locate the respondent at the time, the order was never served on him or executed.

The law

29. The application was brought in terms of the provisions of s 22(1) of the Attorneys Act,[5] which provided that a person who had been admitted and enrolled as an attorney could, on application by the regulatory body concerned, be struck off the roll or suspended from practice if, in the discretion of the Court, he or she was not a fit and proper person to continue to practise as an attorney.

30. It is well-established that in applications of this nature a three-stage process is envisaged. In the first place the Court is required to determine whether the conduct complained of has been established on a balance of probabilities. If this is the case the Court must then determine, in the exercise of its discretion, whether the person concerned is not a fit and proper person to continue to

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[4] Per Davis J.

[5] Note 1.

practise. This involves a value judgment which is arrived at after weighing the offending conduct against the conduct expected of an attorney. Thereafter, the Court must similarly determine in the exercise of its discretion whether, in the light of the circumstances before it, the practitioner must be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice.[6]

31. Whether a Court will impose the one or the other sanction depends on a consideration of all the circumstances before it including 1) the nature and seriousness of the misconduct in its totality and the extent to which it reflects adversely upon the practitioner's character or shows him to be unworthy to remain in the ranks of what is considered to be an honourable profession 2) the probability of such conduct being repeated and 3) the need to protect the public. Ultimately it is said the question is one of 'degree'.[7] In deciding which course to follow the primary consideration is the protection of the public, and the imposition of a sanction on the practitioner is secondary thereto.[8]

32. Therefore, if a Court finds that, based on the facts before it the practitioner is not a fit and proper person to continue to practise it does not necessarily follow that he/she must be removed from the roll as a matter of course. The personal and professional implications of striking a practitioner from the roll are serious[9] and a Court making such an order envisages that he/she should not be permitted to practise again.

33. If the Court has sufficient and good reason to believe that a suspension will suffice and that after a period of time the practitioner will be able to rehabilitate himself, it may impose such a sanction instead of an order removing him from the roll.

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[6] *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) para 10; *Malan & Ano v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 4.

[7] *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 865B-C; *Jasat* para 10; *Malan* para 6.

[8] *Malan* n 6 para 7; *Van der Berg v General Council of the Bar of South Africa* [2007] 2 All SA 499 (SCA).

[9] *Malan* n 6 para 8.

34. Although it was said in *Summerley*[10] in 2006, in a dictum which is commonly misinterpreted and misquoted, that removal from the roll is ordinarily reserved for those who have acted dishonestly and those whose transgressions do not involve dishonesty are usually visited with a lesser sanction of suspension, it is clear, both from what was said in that matter[11] and in subsequent decisions of the Supreme Court of Appeal in *Botha* [12] and recently in *Hewetson,*[13] that this is neither an inviolate rule[14] nor a *sine qua non* and each matter must be determined on its own facts; and a practitioner may in appropriate instances be struck from the roll in circumstances where their acts of misconduct are not accompanied by any dishonesty.

35. However, where dishonesty is involved, it will require exceptional circumstances before a suspension will be imposed instead of an order removing a practitioner from the roll.[15]

36. Finally, inasmuch as the Court is required to exercise a discretion based on the specific circumstances before it, no two cases will ever be identical and decisions in other matters consequently have limited precedential value. They simply indicate how other Courts have exercised their discretion in a particular matter and do not bind or compel a Court to exercise its discretion in the same way.[16]

An assessment

(i) Ad the respondent's conduct

37. When the matter first came before us on 23 April 2021 we pointed out that the applicant was still reflected as the Cape Law Society even though it no longer existed, having been dissolved together with the other provincial statutory bodies

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[10] *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) para 21.

[11] *Id.* As stated by Brand JA 'this can obviously not be regarded as a rule of the Medes and the Persians, since every case must ultimately be decided on its own facts'.

[12] *Botha v Law Society of the Northern Provinces* 2009 (1) SA 227 (SCA) para 3.

[13] *Hewetson v Law Society of the Free State* 2020 (5) SA 86 (SCA) para 50. Thus, as Leach JA has pointed out, attorneys have been struck from the roll for failing to respond to communications from clients or their regulatory body, on the basis that this reflects a lack of integrity.

[14] *Summerley* n 10.

[15] *Hewetson* n 13 para 48.

[16] *Malan* n 6 para 10.

which formerly regulated attorneys and succeeded by the Legal Practice Council ('the LPC') in 2018. Consequently, we directed that the LPC should file a notice in terms of rule 15 of the uniform rules, formally substituting itself in the place of the Society.

38. We also directed that the LPC should file a supplementary affidavit in which it provided an explanation for why steps had not been taken against the respondent in the period between December 2013 and February 2021. In addition, we requested that it furnish an explanation as to why, contrary to the position that had been adopted in 2013 by its predecessor, it considered that an order merely suspending the respondent for an effective period of 2 years would constitute an appropriate sanction. We directed that the LPC should inform the respondent, by formally serving the order on him, that the Court was considering a more severe sanction than that sought by the LPC, which could include striking him from the roll of attorneys, and invited him to file an affidavit or affidavits in regard thereto or generally in regard to the matter as a whole, and to make such oral or written submissions as to an appropriate sanction as he deemed fit, by 10 May 2021. In terms of the order the matter was postponed for hearing on 21 May 2021.

39. The order was served on the respondent personally by the sheriff, at his residence in Pearly Beach, Gansbaai on 28 April 2021. Notwithstanding the invitation that was extended to him the respondent elected not to file any affidavits or to make any written submissions.

40. When the matter next came before us on 21 May we were informed by the LPC's attorney that the respondent had contacted her telephonically on 18 May at which time he had requested that he be furnished with a full set of the papers, which were duly emailed to him, and the respondent had also sent her an email that morning in which he informed her that he was not able to be present at Court and required a postponement of 'a month or so' in order that he could instruct counsel to represent him. Even though the respondent had not approached the Court to request a postponement we acceded to his request, and accordingly postponed the matter to 18 June 2021. We also gave the respondent a further

opportunity to file an affidavit, if any, by 14 June 2021. A copy of the order which we made was served on the respondent personally on 24 May 2021. Once again however the respondent declined the invitation which had been extended to him.

41. On 18 June 2021 the LPC was represented by counsel, who informed us that at about 09h30 that morning his attorney had received a Whatsapp message from the respondent, in which he had again requested a postponement for a month, in order that he could 'settle' the matter with the LPC. The applicant's attorney informed the respondent that the matter was before the Court for determination and could not be settled, and if he required a postponement he should approach the Court to request it, at which time the respondent thanked her and asked that he be informed of the outcome of the matter.

42. In the circumstances we directed that the matter should proceed, and when it was finally argued before us the attitude which was adopted by counsel for the LPC was that its decision to seek a suspension rather than a removal from the roll was wrong and ill-advised. It had arrived at its decision to ask for a suspension on the basis of an incorrect understanding, which it shared with its predecessor, that an order removing a practitioner from the roll was reserved solely for cases involving dishonesty, and because it was of the view that it was unable to 'prove' that the respondent had made himself guilty of theft of trust monies or of any dishonesty it had come to the opinion that his misconduct did not warrant him being removed from the roll of attorneys and a suspension would suffice.

43. As is apparent from our discussion of the case law above, the applicant and its predecessor were wrong in their understanding that striking off is a sanction which is reserved for a practitioner who has committed misconduct which is accompanied by dishonesty. They were also wrong in their re-assessment of the respondent's misconduct. They clearly forgot or had no appreciation for the fact that over the years the respondent had indeed made himself guilty of a number of transgressions which involved dishonesty or which showed a serious lack of probity and integrity, ranging from the misappropriation of provident funds, repeated failures to account to clients for monies received from them or on their

behalf, and a failure to comply with an order of Court for which he was found guilty of contempt and sentenced to a suspended term of imprisonment. On this basis alone the respondent's conduct clearly warranted an order removing him from the roll.

44. Aside from these transgressions the respondent's record of misconduct reflects that over a period of more than 10 years he repeatedly and consistently failed to measure up to that standard of ethical behaviour and conduct required of an attorney, by not adhering to the basic rules of the profession. He repeatedly and consistently failed his clients, by not carrying out the mandate or instructions he had been given, and when called to account to them frequently ignored them. When the Law Society sought explanations for his behaviour he often ignored it too. He consistently failed to get his books in order and to ensure that he qualified for the issue of a fidelity fund certificate and had to be interdicted from practising in such circumstances, on a number of occasions.

45. These were accordingly not isolated lapses or mistakes, of the kind sometimes made by a young or inexperienced practitioner. The respondent's conduct was indicative of a long-standing pattern of behaviour which reflected not only a lack of insight and respect for the profession and a disregard for the interests of those he was meant to serve, but a profound inability to take responsibility for his actions and to correct them. These are serious character defects, inconsistent with what is required of an attorney.

46. In the same way that he avoided facing up to the errors of his ways by not accounting to his clients and answering to the Law Society, he avoided answering to the Court for what he had done, notwithstanding that he was required to deal with the allegations which were made against him and was required to assist the Court in arriving at a just and fair determination of the matter, by placing the relevant facts and his explanation and personal circumstances before it.[17]

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[17] *Kleynhans* n 7 at 853G, *Law Society, Cape of Good Hope v Berrange* 2005 (5) SA 160 (C) at 167F, *Botha* n 12 para 10.

47. Because of the failure by the Law Society and by the LPC to prosecute this matter as they should have in 2013 and the years following, the respondent was not brought to book and was allowed to continue in practice as an attorney, at least until 2015, the last time when he was issued with a fidelity fund certificate. Thereafter the Law Society was allegedly unable to locate him for a period of 2 years, because he left Cape Town. In March 2018 he was traced to a residential address in Pearly Beach, Gansbaai, but no attempts were made by the Society or the LPC (which took over the matter with effect from November 2018) to investigate his circumstances, with a view to establishing what he was doing and whether he was still practising as an attorney.

48. In August 2019 tracing agents established that he was practising as an attorney in Gansbaai. At the time he was not in possession of a fidelity fund certificate and was therefore exposing members of the public who were dealing with him, to risk. Despite this, the LPC failed to do what it was supposed to. It only started taking steps to bring the matter to Court at the end of the following year, when it sought to file a supplementary founding affidavit, and later filed an amended notice of motion early in 2021.

49. As a result of the lackadaisical and haphazard fashion in which the matter was dealt with, at the time when it came before us in April 2021 it was not apparent whether, some 2 years later, the respondent was still practising as an attorney in Gansbaai or elsewhere and we were compelled to direct that the necessary enquiries be made. A perfunctory attempt in this regard was only made in June 2021, when a legal officer in the LPC's disciplinary section was informed during a telephone discussion with the respondent that he was not practising as an attorney but as a 'legal consultant'. What this entails is not clear. No attempt was made by officials of the LPC to visit the respondent in Gansbaai to check on his status.

50. In the circumstances we have approached the matter on the basis that the respondent is not currently working as an attorney. However, notwithstanding this we are of the view that to permit the respondent to continue to remain on the roll of attorneys would constitute a danger to the public, and would be irresponsible.

We are further of the view that given the magnitude and seriousness of the respondent's misconduct over a period of 21 years i.e from 1998 to 2019, a suspension would not be appropriate or sufficient and would send out the wrong message to the profession viz that an errant practitioner can avoid being held accountable by simply paying fines to his regulatory body as the years go by.

51. The respondent has shown that the chances of his re-offending are highly likely if not certain, and the lengthy period over which the offences have been committed and the repetitive nature thereof shows that, notwithstanding the imposition of many, heavy fines over the years, the respondent has not been deterred and was unable to adjust his behaviour. His chances of rehabilitation must therefore be close to non-existent. His failure to take responsibility for his actions and to own up to them also demonstrates that he has no remorse or contrition for what he has done. In our view this is consequently a matter where the only appropriate and fit sanction to impose is an order striking the respondent from the roll of attorneys.

(ii) Ad the conduct of the regulatory bodies

52. Before concluding it is necessary to say something more about the conduct of the Law Society and the LPC. We have already pointed out that after the application was filed in 2013, the Society sat on its hands for a number of years. Despite our calling on its successor to provide a full explanation for this state of affairs it skirted the issue and sought to blame the respondent, because it said it had lost contact with him in 2016 and had been unable to locate him.

53. In this regard in her supplementary founding affidavit dated 16 October 2020 Ms J Myburgh, a member of the applicant's Council, acknowledged that a significant period of time had elapsed since the application had been issued in 2013. She indicated that the decision to amend the relief which was sought to an order suspending the respondent instead of striking him from the roll, had been taken in 2014. According to her the delay in effecting the amendment was due to the fact that the Society had been unable to locate the respondent and it had only received a successful trace report as to his whereabouts at the end of 2019. But

from the contents of later affidavits which were filed it appears that this explanation is not true, in a number of material respects.

54. In the first place it is evident from the affidavit which Ms Myburgh subsequently deposed to in May 2021 that the respondent was in fact traced to an address in Pearly Beach in March 2018, but the trace report was ‘overlooked’. Ms Myburgh said that from the applicant’s attorneys’ records it was ‘unclear’ why an attempt to serve the papers was not made at the Pearly Beach address at that time.

55. In the second place, it transpires that during 2013 the Society had decided that a supplementary affidavit was necessary as further complaints regarding the respondent had been received, but the drafting of the affidavit was delayed, allegedly, as more complaints came in. It is greatly concerning that, against this background, instead of immediately enrolling the matter the Society twiddled its thumbs.

56. In September 2014 it received an opinion from its attorneys that the sanction which was sought should be amended to a suspension. How and why the opinion was provided was not explained. One must assume that the Society asked for it. This is extraordinary, considering that in its original founding affidavit it adopted the position that the respondent’s conduct was so bad that it demonstrated that he suffered from ‘character defects’ and a lack of integrity which was inconsistent with the standards of the profession, and it was not in the interests of the public and the profession that he be allowed to continue to practise as an attorney as he posed a risk to the public and the administration of justice.

57. One would have expected that given these circumstances, in the light of the additional complaints the Society would have approached the Court as a matter of urgency in 2014 for an order interdicting the respondent and removing him from the roll. Yet it still did nothing. It did not even take steps to effect an amendment and to bring the matter to Court.

58. As appears from the supplementary affidavit it was only in July 2016 that the Society was unable to serve papers on the respondent in a separate application which it had instituted against him, for his failure to be in possession of the necessary fidelity fund certificate. So, between 2013 and 2016 the Society was in

a position to bring the matter before the Court, if it wanted to. By 2016 the application was 3 years old, without yet having come before the Court. In her supplementary affidavit Ms Myburgh acknowledged that thereafter an application for substituted service could have been brought, but it was not. No explanation was provided for the failure to do so.

59. When the respondent could not be found in July 2016 the Society was clearly in no particular hurry to take steps to locate him, as it only instructed tracing agents in May the following year. And after it 'overlooked' the successful trace report of March 2018 it continued to instruct tracers to find the respondent, incurring further unnecessary expense.

60. On 26 August 2019 tracers established that the respondent was (still) living at the address in Pearly Beach. They also established that he was practising as an attorney in Gansbaai. One would have thought that given that he last held a fidelity fund certificate in 2015 this would have set alarm bells ringing, and given the risk to the public the LPC would have immediately revived the application to interdict the respondent, pending further proceedings. But once again it was seemingly nonplussed and it dilly-dallied till October the following year, when it filed a supplementary affidavit motivating why a suspension was sought instead of an order removing the respondent from the roll.

61. Lest it be thought that the attitude evinced by the Society and the LPC in their handling of this application was an isolated aberration, we note from the respondent's member history report that a number of the complaints which were lodged against him and which do not form part of the subject of this application were only finalized more than 5 years after they were lodged.

62. Even on the most benevolent interpretation of events the conduct of the regulatory bodies in this matter therefore cannot be described as anything less than woefully inadequate.

63. The former provincial law societies and now the LPC are the *custos morum* of the legal profession, and the guardians of its values and traditions. As such, in terms of their constitutions as expounded on in terms of the common law and now the Legal Practice Act, they were and are seized with the duty of upholding

the requisite professional and ethical norms and standards on which the profession is founded. In giving effect to this duty the LPC must not only regulate the profession[18] by maintaining the appropriate standards of professional practice and ethical conduct of legal practitioners,[19] but must enhance and maintain the integrity and status of the legal profession.[20]

64. Amongst the stated objectives of the Act and the LPC are to 'ensure' that the profession is held accountable and the 'public interest' is protected and promoted.[21] To this end the Act seeks to provide a legislative framework for the legal profession that embraces the values underpinning the Constitution, and which ensures that the rule of law is upheld.[22]

65. These laudable aims will remain little more than lofty ideals rather than achievable goals if the necessary will and effort to give effect to them is not present amongst the administrators of the profession. Having a code of conduct[23] which sets out the fundamental rules by which an attorney is to practise and which provides that they shall at all times maintain the highest standards of honesty and integrity[24] and shall treat the interests of their clients as paramount,[25] is all good and well, but it is worth very little unless it is enforced.

66. As is demonstrated by the facts in this matter, if those practitioners who contravene the rules and standards of the profession are not dealt with promptly and effectively by those who have the statutory power and duty to regulate the profession, then instead of ensuring accountability and upholding the integrity and status of the profession a culture of impunity is fostered and the profession is lowered in the eyes of the public, and the values and principles which are essential to its survival are debased.

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[18] Section 5(d) of the Act.
[19] *Id*, s 5(g).
[20] Section 5(f).
[21] *Vide* the preamble to and ss 3(d) and 5(c) of the Act.
[22] Section 3(a).
[23] The final Code of Conduct for Legal Practitioners was promulgated in terms of s 36(1) of the Act, on 29 March 2019.
[24] Clause 3.1 of the Code.
[25] Id, cl 3.3.

67. In terms of the Act, the LPC must employ such officials or staff as may be necessary to enable it to perform its functions 'properly' [26] and may delegate such powers and functions as may be necessary for it to discharge its duties, to its provincial councils,[27] who may in turn establish one or more committees to assist them in the performance of their functions.[28] In this regard the Act affords wide and far-ranging powers to investigating and disciplinary committees,[29] which include powers to compel the production of any book, document or articles in the possession of an attorney, and the holding of hearings. Disciplinary committees have the power to impose a range of sanctions and orders on those who are found guilty of contravening the rules of the profession, which include not only the imposition of fines and orders directing that compensation be paid, but which may also include an order[30] temporarily suspending the practitioner concerned pending the finalization of an application to Court for an order suspending him/her from practice. Given the stance adopted by the applicant this appears to have been a matter which at the very least called out for the exercise of such temporary, suspensionary power.

68. The Act clearly envisages that disciplinary proceedings are to be conducted expeditiously, as it provides that in cases where a disciplinary body is satisfied that a legal practitioner has made themselves guilty of serious misconduct it must inform the Council thereof, with a view to it instituting urgent legal proceedings in the High Court to suspend the practitioner from practice,[31] and it further provides that a finding as to whether a practitioner is guilty or not of misconduct must be rendered by a disciplinary committee within 30 days after the conclusion of a

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[26] Section 6(2)(a).
[27] Section 23(1).
[28] Section 23(6).
[29] As established in terms of ss 37(1) and 37(4).
[30] In terms of s 40(3)(a)(iii)-(iv).
[31] Section 43.

hearing,[32] and an appeal against such a finding and the sanction imposed in respect thereof must similarly be lodged within 30 days.[33]

69. Unfortunately, despite these wide powers and the clear statutory injunction that disciplinary proceedings against errant practitioners are to be instituted and held as soon as circumstances reasonably allow, instances of tardiness and torpidity on the part of the LPC have become more frequent, the circumstances of the present matter representing a particularly egregious example thereof.

70. As a result, it has unfortunately become necessary for the Court, in the exercise of its powers in matter such as these to step in to ensure that regulatory bodies which do not discharge their duties in relation to the profession are held to account, by making the appropriate orders against them when and if needs be, as we have attempted to do in this matter. We hope and trust that the LPC will take this both as a warning and an opportunity to get its house in order.

71. If the reasons for the unacceptable state of affairs whereby this matter took 8 years to come before the Court boil down to resource, capacity and financial constraints, then the applicant's Council should face and deal with them, and should properly capacitate its provincial councils and their investigating and disciplinary committees. And if needs be, the applicant should advise and consult the Minister in this regard, as the Act entitles it to do.[34] We remind the Council that in order to achieve its statutory objectives,[35] which include the regulation of the profession and the enhancement and maintenance of its integrity and status, and the protection of the public, it is statutorily enjoined to do all things necessary for the proper and effective performance of its functions and the exercise of its powers.[36]

Conclusion

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[32] Section 40(1)(a).
[33] Section 41(1)(a).
[34] Section 6(1)(b)(ii).
[35] As set out in s 5.
[36] Section 6(1)(b)(iii).

72. Although because of the lengthy passage of time this is a case of waters long having flowed under the proverbial bridge, we are nonetheless of the view that it is important that an attempt should be made to establish why the systemic failures which occurred happened, with a view to remedying any deficiencies and ensuring that effective measures are put in place to avoid future such occurrences, and to hold those who failed accountable.[37]

73. We direct that a copy of the judgment is to be furnished to the Chairperson of the LPC, for her comment and report-back as to the causes and deficiencies responsible for the matter having taken 8 years to come before the Court, and the manner in which the matter was dealt with, together with her report-back as to what steps have been taken by the LPC to hold accountable those who were responsible for what happened, and to ensure that effective measures are put in place to ensure that the LPC gives effect to its statutory obligations in terms of regulating the profession,[38] maintaining standards of professional practice and ethical conduct[39] and protecting the public,[40] by ensuring that complaints against legal practitioners are dealt with expeditiously.

74. It is an accepted practice in matters such as these to include an ancillary order directing that the practitioner be liable for the costs of the application, on the attorney-client scale. The difficulty which arises with this is that because the regulatory body knows that its costs will ultimately be borne by the unfortunate practitioner it has no incentive to act expeditiously, and it suffers no penalty if it drags matters out.

75. As the old aphorism has it ‘justice delayed is justice denied’, and apart from the interests of the public and the clients which the respondent failed, we must also have regard for his interests. Had the matter been brought before the Court in 2013-2014 when it should have been, the costs for which he would have been liable would have been considerably less. In this regard for example the initial

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[37] In terms of ss 48(6)(a)-(c).
[38] Section 5(d).
[39] Section 5(g).
[40] Section 5(c).

order which was sought at the time interdicting him from practising, pending a striking-off application, provided for the costs of the curator who was to take over and administer his trust accounts at a rate of R 500 per hour, whereas in the draft which was provided to us when the matter was heard the tariff proposed had more than doubled to R 1100 per hour. We see no reason why the respondent should be liable for the unnecessary further costs which were incurred in relation to the opinion which was given pertaining to the amendment of the notice of motion, and such amendment 6 years later, including the filing of the supplementary founding affidavit in relation thereto. The same holds good for the unnecessary costs which were incurred in having to trace the respondent. Had the regulatory bodies done what they needed to do the matter would have been before the Court and the respondent would have been dealt with in 2013-2014. In the circumstances the question which arises is whether, given the conduct of the regulatory bodies, it would be fair and just to hold the respondent liable for costs beyond 2013-2014.

76. In our view where a regulatory body has unduly delayed in bringing an errant practitioner before the Court and has run up unnecessary costs in doing so, the Court should, in the exercise of its discretion, consider deviating from the standard order, not only as a mark of its displeasure but also with a view to holding the body to account and ensuring that justice is done.

77. In the circumstances we are of the view that the fair and proper order to make in this regard is one directing that the respondent shall only be liable for the costs of the application, on the attorney-client scale, up to and including the filing of his notice of intention to oppose, on 12 April 2013. The unfortunate result of this is that the costs of the application beyond those awarded will be borne by the LPC and therefore ultimately by those of the respondent’s colleagues, who abide by the rules. Unfortunate as this may be, perhaps this will result in law-abiding members of the profession holding the office-bearers of their regulatory body to account for the due discharge of their duties.

78. Finally, although no such relief was sought in terms of the amended notice of motion which was served on the respondent, in the draft order which was

provided to us the applicant seeks a range of orders whereby the Director of its Western Cape office is appointed as curator and the respondent is directed to hand over his books of account, records and files to him/her, and is interdicted from operating any of his trust accounts. As we indicated previously, the applicant was unable to establish whether the respondent is currently practising as an attorney, and a legal officer in its employ was in fact informed by the respondent that he is not practising in that capacity but as a legal consultant. In the circumstances it would not be appropriate and would be premature to grant such orders at this stage. In the event that it becomes necessary to do so the applicant may approach us in this regard.

79. In the result we make the following Order:

79.1. the respondent's name is struck off the roll of attorneys of this Court;

79.2. the respondent shall surrender and deliver to the Registrar of this Court his certificate of enrolment as an attorney within 10 days from the date of the service of this order on him, 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 deliver same to the Registrar of this Court;

79.3. the respondent shall be liable for the costs of the application on the scale as between attorney and client, as taxed or agreed, up to and including 12 April 2013;

79.4. in the event that it is necessary for a curator to be appointed to take custody of the respondent's books of account, records and client files and/or to administer any monies received or held by the respondent for on account of any person, or to administer any monies held in trust and/or invested by the respondent in terms of ss 78(2) and/or 78(2A) of the Attorneys Act 53 of 1979 and/or ss 86(3) and 86(4) of the Legal Practice Act 28 of 2014, or to administer any estate of a deceased person or any insolvent estate or estate under curatorship, of which the respondent is an executor, trustee or curator, or which he is otherwise administering, the applicant may approach the Court on the same papers, duly supplemented, for the necessary relief in this regard.

79.5. a copy of the judgment and this order is to be furnished to the Chairperson of the LPC by the Registrar of this Court within 5 days from date hereof, for her comment and report-back to this Court (or one differently constituted if needs be) within 3 months from date of this order, as to the causes and deficiencies responsible for the matter having taken 8 years to come before the Court, and the manner in which the matter was dealt with, as well as her report as to what steps have been taken or will be taken by the LPC to hold accountable those who were responsible for what happened, and what steps have been or will be taken to ensure that effective measures are put in place to ensure that the LPC gives effect to its statutory obligations in terms of regulating the profession, maintaining standards of professional practice and ethical conduct and protecting the public, by ensuring that complaints against legal practitioners are dealt with expeditiously.

M SHER

Judge of the High Court

I agree.

pp **L BOZALEK**
Judge of the High Court

Attendances:

Applicant's counsel: Adv JH Robbertze

Applicant's attorneys: Bisset Boehmke McBlain (Cape Town)

(No appearance for the respondent).