IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

....
DATE SIGNATURE

CASE NO: 31130/2019

In the matter between:

JENNIFER EMILY HUTCHINSON WILD Applicant

and

LEGAL PRACTICE COUNCIL First Respondent

EASTERN CAPE SOCIETY OF ADVOCATES Second Respondent

BISHO SOCIETY OF ADVOCATES Third Respondent

GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA Fourth Respondent

JUDGMENT

D S FOURIE, J:

[1] The applicant applies for an order to review and set aside a decision of the first respondent in relation to an *"advisory"* note issued on 18 April 2019 to all advocates regarding disciplinary proceedings involving advocates. The applicant

also applies, in the alternative, that if no decision exists to be reviewed, an order compelling the Council to withdraw the advisory note should be granted. Given the issues and parties involved, it was decided by the Deputy Judge President to issue a directive in terms whereof a Full Court has been constituted to sit as a court of first instance to hear and determine the legal issues in this matter. The application is opposed by the first, second and fourth respondents.

THE PARTIES

[2] The applicant is a practising advocate who was admitted in 1977. She has practised continuously as an advocate for 42 years, initially as a member of the KZN Society of Advocates and, according to her, for the last nine years as a member of the third respondent. There appears to be a dispute regarding the applicant's membership of the third respondent.

[3] The first respondent is the Legal Practice Council. It was established in terms of section 4 of the Legal Practice Act, No 28 of 2014 ("the LPA") as a body corporate with full legal capacity. It exercises jurisdiction over all legal practitioners. The LPA came into effect on 1 November 2018. I shall refer to the first respondent as the Council.

[4] The second respondent is a voluntary association of advocates. According to its answering affidavit it is a legal *persona* governed by its constitution and is also a constituent member of the fourth respondent. I shall refer to the second respondent as the Eastern Cape Bar.

[5] The third respondent is also a voluntary association of advocates. According to the founding affidavit (the third respondent did not file an answering affidavit) it is also a voluntary association, capable of *"owning property and being sued"*. This respondent is also a constituent member of the fourth respondent. I shall refer to the third respondent as the Bisho Bar.

[6] The fourth respondent is another voluntary association of advocates established in 1946. According to the answering affidavit it is a legal *persona* empowered to act as a plaintiff or an applicant or be cited as a defendant or respondent in terms of its constitution. This respondent has twelve constituent members, all societies of advocates, and represents the interests of approximately 3 150 practising advocates. I shall refer to this respondent, the General Council of the Bar, as the "GCB".

BACKGROUND

[7] On 26 September 2017 the Eastern Cape Bar brought an application in the Eastern Cape Division of the High Court, Grahamstown for an order that the applicant's name be struck from the Roll of Advocates. According to the striking off application (which is part of the record of proceedings) complaints regarding alleged misconduct on the part of the applicant were directed, first, to the Society of Advocates, KwaZulu-Natal and, second, to the Bisho Bar.

[8] By the time the complaints were received by the Society of Advocates, KwaZulu-Natal, the applicant was no longer a member of that society and had commenced practice as a member of the Bisho Bar. However, it is alleged in that application that the applicant continues to practise as an advocate within the

area of jurisdiction of the Eastern Cape Division of the High Court, Grahamstown. The Eastern Cape Bar in the present application has its offices also in Grahamstown.

[9] According to the striking off application the alleged misconduct on the part of the applicant appears from three judgments in two divisions, namely two judgments in this Division handed down on 19 April 2012 and 20 June 2016 respectively and a judgment of the KwaZulu-Natal Division handed down on 1 September 2016.

[10] Relying on these judgments it is alleged in the founding affidavit of the striking off application that the applicant *"behaved dishonestly, thereby breaching her duty to the Court and also disregarded her professional ethics as an officer of the Court"*. Reference to these allegations has also been made in the first respondent's answering affidavit in the present application. In her replying affidavit the applicant alleges that these allegations *"do not fairly or accurately reflect the facts and are an illustration of the type of prejudice which I suffer"*. The allegations regarding dishonesty, breaching a duty to the Court and the disregard of professional ethics are all denied.

[11] On 10 January 2018 the applicant brought an application in the Eastern Cape High Court, Grahamstown, in which she sought a review of the decision taken by the Eastern Cape Bar to institute the striking off proceedings against her and for certain ancillary relief. That application is still pending.

[12] On 1 November 2018 the LPA came into effect. On 18 April 2019 the Council issued an *"Advisory to all advocates regarding disciplinary proceedings*

involving advocates: Section 116 of the Legal Practice Act". It appears that the *"advisory"* note seeks to define the rights and duties of the GCB and its constituent bars to investigate and deal with unprofessional conduct of advocates.

[13] The advisory note, in summary, gave notice:

(a) that unprofessional *conduct enquiries* in respect of members of bars pending on 31 October 2018 should be completed by the applicable bars, at their own cost;

(b) that *applications for striking or suspension* of members of bars instituted before 1 November 2018, should be completed by the applicable bars, at their own cost;

(c) to *"accredit"* bars in terms of section 6(2)(c) and (d) of the LPC for this purpose and to delegate its powers to them;

(d) that all *complaints* received by the Bars or the Council from 1 November 2018 onwards will be dealt with by the relevant Provincial Council;

(e) that *applications for striking or suspension* of members of bars which were instituted from 1 November 2018 onwards must be transferred to the relevant Provincial Council.

[14] In May 2019 the applicant launched the present application. In the amended notice of motion she applies for an order setting aside the transitional

arrangements by the Council (as set out in the advisory note, reflected in par 13(a) to (c) above) and the Council's failure to withdraw the advisory note.

THE MAIN ISSUES

[15] Counsel for the applicant submitted that the crisp issues for determination are whether the Council did or could take the decisions recorded in the advisory note, and if it could not, what remedy should follow. Counsel for the Council argued that the applicant's attack, at its core, is upon the *locus standi* of the Eastern Cape Bar in the striking off application.

[16] Counsel for the Eastern Cape Bar and the GCB contended that, in essence, the main issues can be summarised as follows:

(a) whether the decision of the Council was lawful;

(b) the interpretation of sections 116(1) and (2) of the LPA;

(c) whether the Eastern Cape Bar is in terms of the LPA empowered to proceed with a striking off application against the applicant, notwithstanding the commencement of the LPA;

(d) whether the GCB and its constituent bars retained their powers to investigate unprofessional conduct of its members and to bring applications before the Courts for the suspension of advocates or the removal of their names from the roll, notwithstanding the advent of the LPA.

THE APPLICANT'S CASE

[17] The applicant contends that the decision that was taken by the Council regarding the advisory note is contrary to the express provisions of the LPA, or alternatively, constitutes unlawful administrative action and should be reviewed and set aside. The effect of section 116(2) of the LPA, so it was contended, is that pending striking off applications must be continued by the Council and not by any of the Bars or the GCB. If no decision exists to be reviewed, then the Council should be compelled to withdraw the advisory note.

[18] It is also alleged that the applicant has been severely prejudiced as she has not been afforded an opportunity to be heard. She is forced to be involved in expensive litigation and the application for the striking of her name from the Roll of Advocates has been launched without a proper enquiry having been conducted.

[19] In her supplementary founding affidavit it is further contended that the arrangements contemplated in the advisory note are not authorised by the legislation, nor by the resolutions of the Council. These arrangements were taken without being duly empowered to do so, or irrelevant considerations were taken into account. Therefore, so it is submitted, the decision taken by the Council contravenes also *"all of the other provisions of section 6(2) of PAJA"*.

THE CASE FOR THE RESPONDENTS

[20] The Council, Eastern Cape Bar and the GCB are in agreement that, flowing from section 116(2) of the LPA, the Eastern Cape Bar is entitled to

continue with the striking proceedings against the applicant. Difference is to be found on how this is to be achieved. The Council's view being that it is through accreditation of and delegation to the relevant Bar, while the Eastern Cape Bar and the GCB hold the view that they are not only entitled to continue to bring applications to strike the names of advocates from the roll, but also that section 116(2) authorises them to do so, without accreditation and delegation by the Council.

[21] The Council on the one hand and the Eastern Cape Bar as well as the GCB on the other hand also disagree over the exclusive disciplinary jurisdiction asserted by the Council and reflected in the advisory note. It was further contended that the Bars as well as the GCB, upon a proper interpretation of the LPA, retained their right to bring applications before the High Court regarding complaints of a disciplinary nature involving advocates, both before and after the coming into operation of the LPA. This submission is disputed by the applicant and the Council.

THE STATUTORY FRAMEWORK

[22] On 1 November 2018 the LPA came into effect. In terms of section 2 thereof the Act is applicable to all legal practitioners. Section 118(a) provides that subject to the provisions of this Act, a reference in any other law to an advocate must be construed as a reference to a legal practitioner in this Act.

[23] Section 3 sets out the purpose of the Act. It is, *inter alia*, to create a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an accountable, efficient

and independent legal profession. It is also to protect and promote the public interest (s 3(c) and (d)).

[24] In terms of section 4 the Council is a body corporate with full legal capacity and it exercises jurisdiction over all legal practitioners (and candidate legal practitioners) as contemplated in this Act.

[25] Section 44 sets out the powers of the High Court. It provides as follows:

> *"(1) The provisions of this Act do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, a candidate legal practitioner or a juristic entity.*
>
> *(2) Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or a juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or a juristic entity or in connection with any decision of a disciplinary body, the Ombud or the Council in connection with such complaint or charge."*

[26] Section 116 makes provision for pending proceedings. It reads as follows:

> *"(1) Any enquiry in terms of any law repealed by this Act into the alleged unprofessional or dishonourable or unworthy conduct of a legal practitioner which has not been concluded at the date referred to in section 120(4), must be referred to the Council which must treat the matter as it deems appropriate.*
>
> *(2) Any proceedings in respect of the suspension of any person from practice as an advocate, attorney,*

> *conveyancer or notary in respect of the removal of the name of any person from the roll of advocates, attorneys, conveyancers or notaries which have been instituted in terms of any law repealed by this Act, and which have not been concluded at the date referred to in section 120(4), must be continued and concluded as if that law had not been repealed and for that purpose a reference in the provisions relating to such suspension or removal, to the General Council of the Bar of South Africa, any bar council, any society of advocates, any society or the State Attorney must be construed as a reference to the Council."*

[27] Section 119 refers to the repeal and amendment of laws. In terms thereof the Admission of Advocates Act No 74 of 1964 has been repealed in its entirety.

[28] Taking into account the reference in section 116(1) and (2) to *"any law repealed by this Act"*, more particularly with regard to advocates, it is necessary to also refer to the relevant section in the Admission of Advocates Act (now repealed). Section 7(1) of that Act provided, *inter alia*, that, subject to the provisions of any other law, a Court of any division may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the Roll of Advocates if the Court is satisfied that he/she is not a fit and proper person to continue to practice as an advocate. Section 7(2) provided as follows:

> *"Subject to the provisions of any other law, an application … for the suspension of any person from practice as an advocate or for the striking off of the name of any person from the roll of advocates may be made by the General Council of the Bar of South Africa or by the bar council or the society of advocates for the division which made the order for his or her admission to*

> *practise as an advocate or where such person usually practises as an advocate or is ordinarily resident …"*.

[29] Taking into account these provisions insofar as they may be relevant, as well as the submissions made by the parties, I shall now consider the main issues in this matter.

DISCUSSION

[30] The applicant seeks to review and set aside the decision of the Council as set out in the advisory note which is reflected in paragraph 13(a) to (c) above, as well as its failure to retract the said note. In the alternative thereto, she seeks a declaratory order that the first respondent did not take any of the decisions recorded in the advisory note of 18 April 2019 and for an order compelling the Council to withdraw the advisory note. I shall first consider the review application.

THE REVIEW APPLICATION

[31] The applicant founds her case primarily in section 6(2)(a)(i) of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

[32] In the answering affidavit of the Council (par 6.60) it is alleged that *"the Council's decisions do not constitute administrative action"*. In support of this view it was contended that the transitional arrangements reflected in the advisory note do not adversely affect the applicant's rights, nor do they have a direct, external legal effect.

[33] In terms of section 1 of PAJA,

> *"'administrative action' means any decision taken, or any failure to take a decision, by –*
>
> *(a) an organ of state, when*
>
> *(i) exercising a power in terms of the Constitution or a Provincial Constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
>
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,*
>
> *which adversely affects the rights of any person and which has a direct, external legal effect …".*

[34] The Act then lists certain exclusions from the definition which are not relevant here. Taking into account the elements of this definition I shall assume that a *"decision"* was taken (which shall be considered later); by an organ of state or a natural person; exercising a public power or performing a public function; in terms of legislation or in terms of an empowering provision which does not fall under any of the listed exclusions. The real issue, as I understand it, relates to the question whether the decision of the Council adversely affects the rights of the applicant and which has a direct, external legal effect.

[35] In *Grey's Marine Hout Bay and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) par 23 Nugent, JA considered the impact of these two requirements. He then concluded as follows:

> *"The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."*

[36] Counsel for the applicant argued that the decision that was taken by the Council is contrary to the express provisions of the LPA and therefore this is an unauthorised decision that was taken to issue the advisory. The decision, the advisory note and the failure to retract the note should therefore be reviewed and set aside. In support of this submission I was referred to the judgment of Davis J in *Spier Properties (Pty) Ltd and Another v Chairman, Wine and Spirit Board and Others* 1999 (3) SA 832 (C). There, an unauthorised decision of the Wine and Spirit Board to issue a notice, justified the setting aside of the decision and the notice as *"the board has failed to act and it has implicitly conceded that it improperly delegated its powers"* (at 846J).

[37] It is important to point out that in *Spier* the issue of prejudice as well as a sufficient and direct interest was pertinently raised and decided. After having concluded that the applicants in that case had been prejudiced by the decision as contained in the board's notice (at 842E), it was also found that the applicants had shown a sufficient and direct interest in the case. The following was then said in this regard:

> *"It is a trite proposition that an applicant for review must be able to show that he or she has a sufficient personal and direct interest in the case. The law requires that an interest is not a*

> *subjective one and, in determining the question of an infringement of a right, courts are not concerned with the intensity of the applicant's feelings or indignation at the alleged illegal action or the weight which an applicant places upon such a right. The determination concerns whether an objectively determined interest exists."* (at 842F)

[38] Has the applicant been able to demonstrate that the decision of the Council adversely affects her rights and that it has a direct, external legal effect? These two statutory requirements are important aspects of the definition of administrative action. Even if one takes into account the extended meaning that administrative action also includes the *"capacity to affect legal rights"* (as suggested by Nugent JA), a Court must still be satisfied that an application for review complies with these requirements.

[39] If one looks at the nature of the decision which is attacked (the transitional arrangements reflected in par 13(a) to (c) above), it soon becomes clear that in essence the purpose of the advisory note was to preserve the status *quo* with regard to disciplinary procedures (conduct enquiries as well as applications to strike off advocates) which were already pending on 31 October 2018, i.e. before the LPA came into effect. These are not new procedures which have been initiated by the impugned decision. They already existed when the impugned decision was taken and thereafter circulated. Furthermore, the decision and the advisory note have no consequences other than that existing disciplinary procedures should be continued. In short, the advisory note did not change anything with regard to the position of the applicant as it existed

immediately before the LPA came into effect. As a matter of fact, the opposite is true.

[40] It was contended by the applicant that she is severely prejudiced as the striking off application has been launched without a proper enquiry having been conducted, she was never given the opportunity to be heard and is forced in expensive litigation to defend striking off proceedings. It is not clear to which entity the applicant is referring. This Court is not called upon to decide whether or not a proper enquiry was conducted or whether the applicant should have been given the opportunity to be heard by the Eastern Cape Bar before instituting the striking off proceedings (if that is the applicant's case in that application). Furthermore, the present application is not about the procedure followed and decision taken by the Eastern Cape Bar prior to instituting the striking off application. This application is directed against a decision that was taken and the procedure followed by the Council in relation with the advisory note.

[41] If the complaint that the applicant was not afforded the opportunity to be heard, is aimed at the Council, the following considerations should be taken into account: first, having regard to the circumstances of the case, the applicant was not entitled to be heard before the advisory note was issued. Procedural fairness (*audi alteram partem*) is concerned with giving people an opportunity to participate in the decisions *that will affect them* (Hoexter, Administrative Law in South Africa, 2nd Ed., 63). Also in terms of section 3(1) of PAJA, administrative action which *"materially and adversely affects the rights or legitimate expectations of any person"* must be procedurally fair. As already indicated

above, the purpose of the advisory note was to preserve the status *quo* with regard to pending procedures, including the striking off application which was then already pending against the applicant. The impugned decision did not introduce any new matter affecting the rights of the applicant, neither is it a disciplinary procedure in itself.

[42] Second, notwithstanding the nature of the advisory note, the applicant will in any event be given the opportunity to be heard regarding the striking off application. She is entitled to file an answering affidavit and to argue her case when that application is ripe for hearing. No decision in this regard has been taken, save for a decision to launch the application. Put differently, neither the decision to issue the advisory note, nor the failure to retract the note, adversely affects any of the applicant's rights and has no direct legal effect regarding the applicant.

[43] Finally, the expensive litigation into which the applicant now finds herself, is the result of her own conduct. She has decided to launch two review proceedings in two different Courts, i.e. against the Eastern Cape Bar in the Eastern Cape Division of the High Court (for a review) as well as in this Court against all the respondents cited in this application. In any event, she is also entitled to be heard in these two applications.

[44] I therefore conclude that for this reason alone this part of the review cannot succeed. However, this is not the end of the review application. In the event that I have misdirected myself, it will be necessary to also consider the

other grounds relied upon by the applicant and the issues in connection therewith.

THE LEGAL PRACTICE ACT

[45] The applicant proceeds to also attack the *locus standi* of the Eastern Cape Bar to continue in the striking off application. There is more to this attack than meets the eye. She relies on section 116(2) of the LPA which provides that proceedings for the suspension or striking off of an advocate which have not been concluded must be continued and concluded *"as if that law had not been repealed"*, and for that purpose any reference to a Bar or Society of Advocates *"must be construed as a reference to the Legal Practice Council"*. The applicant contends that this means the Council must replace the Eastern Cape Bar in the striking off application and for this reason also it should be found that the advisory note is unlawful or contravenes the law.

[46] The Council holds the view that, flowing from section 116(2), the Eastern Cape Bar is entitled to continue with the striking proceedings against the applicant, but that it is only through accreditation and delegation that the Eastern Cape Bar is authorised to do so.

[47] The Eastern Cape Bar and the GCB contend that their *locus standi* to bring such applications was not only retained by the provisions of the LPA, but were indeed expanded by the provisions thereof and that the LPA did not alter the common law in this regard.

[48] Taking into account the issues between the parties, it is clear that this application raises the fundamental issue of what role, if any, the Societies of Advocates may play in disciplinary matters to investigate unprofessional conduct of advocates and their standing to continue with striking or suspension applications of advocates instituted before 1 November 2018 and also thereafter.

THE COMMON LAW ISSUE

[49] Following a request of the Court at the hearing of the application the parties filed supplementary heads of argument in relation to certain issues raised by the Court. These issues, briefly stated, are whether the LPA takes away a common law right of the Bars to apply for the striking off of advocates, and, secondly, whether the LPA limits the Bars' access to Courts under section 34 of the Constitution, and, if so, whether such limitation is permitted by section 36?

[50] I was referred by Mr Groome, acting for the Council, to what was said in *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) at par 13 and 14 with regard to issues raised by the Court:

> *"13. There may also be instances where the Court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the Court to determine that dispute and that dispute alone.*
>
> *14. It is not for the Court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they*

> *may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues."*

[51] The issue whether or not the Bars are also empowered by the common law to apply for the suspension or removal of advocates has been pertinently raised in the answering affidavit of the Eastern Cape Bar and by necessary implication also the GCB. For instance, the Eastern Cape Bar states in its answering affidavit that it has been *"empowered in terms of the common law and in terms of … the Admission of Advocates Act"* to make application for the suspension or removal of an advocate from the Roll of Advocates (par 9 thereof). It is also stated that the *"repeal of the AAA (Admission of Advocates Act) does not affect the position under the common law …"* (par 30 thereof). The applicant's reply is to deny these allegations (par 8 thereof).

[52] In its answering affidavit the GCB has also explained that its *locus standi* and that of its constituent members in disciplinary proceedings, *"has been accepted by the High Court for many years, even before the advent of the Admission of Advocates Act"* (par 18 thereof) and that *"section 7(1) was consistent with the common law and did not amend it"* (par 42 thereof). In her replying affidavit the applicant takes issue with the GCB by stating that she and the first respondent disagree that the GCB and its constituent Bars *"continue to have jurisdiction to regulate the advocates' profession by virtue of the common law"* (par 12 thereof).

[53] This issue regarding the common law does not only involve the applicant, the Eastern Cape Bar and the GCB, but also the Council. In its heads

of argument the Council has made it clear that the Eastern Cape Bar is able to continue with the striking proceedings against the applicant, but *"difference is to be found on how this is achieved"*. This is, as I understand it, a reference to paragraph 6.24 of the Council's answering affidavit where it is stated that:

> *"By bestowing certain powers upon the Bar Councils/Societies of Advocates, the Council accredits them. Accredit is not a legal term and merely conveys recognition, authorisation, approval or endorsement."*

[54] Taking into account the position taken by all the parties regarding the issue of the common law, it appears to me that this question is not only interlinked with the other issues, but is also relevant between all the parties. I am therefore satisfied that the first issue raised by the Court as referred to above, emerges fully from the evidence and is necessary for the decision of the case. All the parties have been given the opportunity to file further heads of argument in this regard. This is therefore an issue that should be considered and decided by this Court.

[55] The other two issues raised by the Court (access to Courts under section 34 of the Constitution and the possible limitation thereof by section 36) have not been raised by any of the parties in their affidavits, neither in their heads of argument. As indicated above, it is not for the Court to raise new issues and although the parties have complied with the request of the Court, I think that request took the matter perhaps too far. I have read the submissions put forward by the parties in this regard, and I am satisfied that these two new issues raised by the Court, will not take the matter any further and need not be

considered. I am also satisfied that this approach will not prejudice any of the parties.

THE POSITION PRIOR TO THE ADVENT OF THE LEGAL PRACTICE ACT

[56] According to the answering affidavit of the GCB voluntary associations of advocates have existed in this country as far back as the late 17th century when the Cape Bar came into being. The Eastern Cape Bar was established in 1864. The Pretoria Society of Advocates was established in 1877. The Johannesburg Society of Advocates came into being in 1902. Other Societies of Advocates originated simultaneously with the establishment of High Courts in their areas of jurisdiction.

[57] Before the enactment of the LPA, the advocates profession was not subject to the oversight of a statutory regulator. Disciplinary proceedings against an advocate before a Court was derived from the inherent jurisdiction of the Court conferred upon it by the common law to enquire into and pronounce on an advocate's fitness to practise and, in doing so, determine its own procedure. This common law position was explained as follows in *Johannesburg Bar Council v Steyn* 1946 TPD 115 at 119:

> *"The position is that a duty is vested in this Court to enquire, or to cause enquiry to be made, into the conduct of advocates who are officers of the Court and entitled to practice before it, when facts are brought to its notice rendering an enquiry, with the possibility of consequent disciplinary action, necessary in its opinion."*

[58] As the Courts had no machinery for the purpose of itself conducting preliminary investigations to ascertain whether there was substance in any of the complaints lodged, the Court in the past requested the Attorney-General to initiate these proceedings. (*Attorney-General v Tatham* 1916 TPD 160; *Johannesburg Bar Council v Steyn, supra,* 119.) However, in *Steyn* (*supra*, 119) it was pointed out that neither in *Tatham's* nor in any other case was it definitely laid down that *"the right of enquiry and presentation"* was vested in the Attorney-General. Referring to his official duties which gave him no special knowledge regarding questions of professional etiquette and practice which affected members of the Bar, it was said (p 120):

> *"The matter is not one of any right to appear: the Court in performing its duty in relation to the proper conduct of its officers, seeks the assistance it deems most suitable for the proper discharge of its duty."*

[59] It therefore seems that the Courts not only had a duty (and right) to enquire or to cause enquiry to be made into the conduct of advocates, but as the Courts had no machinery for the purpose of itself conducting investigations, it was the prerogative of the Courts to request a party (like the Attorney-General) who would be *"pre-eminently able to afford the Court the maximum assistance"* in the preparation of the case against an advocate as a respondent (*Steyn, supra*, 119 and 120). However, as the Attorney-General was not an official of the Bar and he had no special knowledge of professional etiquette regarding members of the Bar in private practice, the Society of Advocates of the Division concerned, who was most intimately concerned with the practice of advocates, was later recognised as the proper body to initiate disciplinary proceedings and

to bring applications to suspend or strike off the names of advocates. The role of the Society of Advocates was to render the necessary assistance to the Court in performing its duty in relation to the proper conduct of its officers.

[60] The GCB as well as the Bars, by virtue of their roles and status which developed over time, received judicial recognition in judgments of the Courts (*cf.* *Algemene Balieraad van Suid-Africa v Burger en 'n Ander* 1993 (4) SA 510 (TPA) at 515D-E). In this regard the Bars and the GCB, unlike the previous Provincial Law Societies, were never established in terms of a statute, but as voluntary associations.

[61] Taking into account all the above, it seems to me that the common law right to enquire and determine procedure regarding the conduct of advocates, which might have resulted in them being suspended or removed from the Roll of Advocates, was that of the Court derived from its inherent jurisdiction. I agree with Mr Ellis SC, that it was not a right to exert discipline, vesting in an organisation, operating as an ordinary litigant. The Bars, being voluntary associations, were recognised by the Courts as having the necessary standing to bring the misconduct of members of the advocates' profession to the attention of the Court without them having been invited, in each and every case, to do so. Put differently, this appears to be a standing bestowed upon the Bars by the Courts in recognition and acceptance of their ability to assist the Court in the proper discharge of its duty to enquire into the conduct of advocates, as officers of the Court, who were entitled to practise before it.

[62] Therefore, an application to suspend or strike an advocate (or an attorney) from the roll was not the pursuit of a cause of action in the true sense. The applicant merely submitted to the Court facts which it contended constitute unprofessional conduct and then left it to the Court to determine how it should deal with the respondent in question. These were in fact *sui generis* or distinctive proceedings as opposed to ordinary civil litigation (see van Blommestein, *Professional Practice for Attorneys*, (1965), p 89 where this is explained with reference to the previous Law Societies as applicants, but the same principle also applied to the Bars as applicants, and still applies today).

[63] On 18 February 1966 the Admission of Advocates Act came into operation. According to its preamble this Act was *"to provide for the admission of persons to practise as advocates of the Supreme Court of South Africa and for matters incidental thereto".* One of the matters incidental thereto was to make provision for the suspension from practice or that the name of an advocate be struck off the Roll of Advocates (section 7).

[64] Both subsections (1) and (2) of section 7 of that Act were qualified by the words *"subject to the provisions of any other law"*. As no other *statutory law* was then in existence (as far as I know) regarding disciplinary procedures involving advocates, it appears that this qualification should, in my view, be interpreted as a reference to the common law. In any event, a reference in a statute to *"any other law"* should, generally speaking, include both the statutory law and the common law (both comprising the law of South Africa), unless a contrary intention not to include the common law, is indicated. No such contrary intention was indicated.

[65] It is a principle of construction that a statute is to be construed in conformity with the common law rather than against it, except where the statute is plainly intended to alter the common law (*Dhanabakiun v Subramanian and Another* 1943 AD 160 at 167). There is no indication that the Admission of Advocates Act intended to alter the common law regarding disciplinary proceedings for the suspension or striking off the name of advocates. As a matter of fact, it appears that section 7 of this legislation was intended not only to recognise and confirm the standing of the Bars and that of the GCB to bring the misconduct of members of the advocates' profession to the attention of the Court, but also to make this recognition subject to the then existing common law.

[66] This means that prior to 1 November 2018 (before the LPA came into effect) the various Societies of Advocates had the requisite "*sui generis standing*" to bring applications for the striking off and suspension of advocates irrespective of section 7(2) of the Admission of Advocates Act. This view has been confirmed by the Constitutional Court in *De Freitas and Another v Society of Advocates of Natal and Another* 1998 (11) BCLR 1345 (CC) at par [9] where Langa DP said:

> *"The standing of the respondent (the Society of Advocates of Natal) to bring disciplinary matters to the attention of the Court did not depend upon section 7(2). Prior to the enactment of this section, the Courts had recognised the standing of a Society of Advocates to initiate proceedings before it for the disciplining of an advocate including an advocate who was not a member of the society … As Hugo J pointed out in his judgment … the fact that the respondent is given standing by section 7(2) to bring disciplinary matters to the attention of the Court does not*

> *necessarily mean that other interested bodies may not do so as well. If the second applicant (in that case the Natal Law Society) wishes to assert such a right of standing, the time for it to do so is when the occasion for such application arises.* ***It cannot, however, object to the standing of the respondent, which has long been recognised by the Courts and does not depend upon the provisions of section 7(2)****."* (My emphasis)

THE POSITION AFTER THE ADVENT OF THE LEGAL PRACTICE ACT

[67] The LPA came into effect on 1 November 2018. On that date the Admission of Advocates Act was repealed in its entirety. The fact that section 7(2) of that Act was also repealed is of no consequence with regard to the common law standing of the different Societies of Advocates. This is so because their standing *"has long been recognised by the Courts and does not depend upon the provisions of section 7(2)."* (*De Freitas and Another v Society of Advocates of Natal and Another, supra*, par 9.) It should therefore follow that the mere repeal of section 7(2) did not take away any existing rights or the ability regarding standing. Something more is required to justify such a conclusion.

[68] Counsel for the applicant, Mr Goddard SC, pointed out that section 3(a) of the LPA expressly states that *"the purpose of this Act is to provide a legislative framework for the transformation and restructuring of the legal profession …"*.

[69] He therefore argued that a legislative framework is provided for the transformation and restructuring of the profession which allows no rational meaning other than that the codified system in the LPA is to replace the previous

legal regime *"and to change or trump common law where it differs from what is in the LPA".* According to him the LPA should be interpreted to mean that it replaced the previous legal regime with regard to the *"custodian or regulator of the profession with the statutorily appointed LPC"*. It also replaced previous disciplinary processes with the statutory process set out in the LPA.

[70] Mr Goddard SC further contended that section 116(2) not only makes provision for pending matters to be continued and concluded as if a law had not been repealed, but that the express qualification at the end thereof (*must be construed as a reference to the Council)* cannot be ignored. According to him the reference to the Council is intended to mean that it *"should replace the Bar"*. In support of this submission he relied on a *dictum* in *Johannesburg Society of Advocates and Another v SA Nthai and Others* [2020] ZASCA 171, par [24] where it was observed by Ponnan JA that *"… the LPA does indicate an intention to place pending disciplinary investigations and applications for removal under the LPC's jurisdiction …"*.

[71] Mr Groome, acting for the Council, also relied on section 3 of the LPA by pointing out that the purpose of the LPA is not only to provide a legislative framework for the transformation and restructuring of the legal profession, but also to create *"a single unified statutory body to regulate the affairs of all legal practitioners"* in pursuit of the goal of an accountable, efficient and independent legal profession.

[72] However, he was a little bit more cautious about the question whether or not the LPA has also changed the common law standing of the different

Societies of Advocates. He conceded, rightly so in my view, that the Court's inherent power is not altered by the LPA. This is borne out by the provisions of section 44(1). He also accepted that it is *"the exclusive preserve of the Court to determine to whom it will allow standing"*. However, he qualified this submission by stating that the well-established view of the Court is that, notwithstanding the Court's inherent authority, *"it is only appropriate that the custos morum (*the guardian of good morals*) bring proceedings to suspend or strike a practitioner's name from the roll".* In support of this contention he relied on the judgment in *Hurter v Hough* 1987 (1) SA 380 (C) at 386 where Tebbutt J has pointed out that the Law Society *"has been created the custos morum of the profession"* and that it *"cannot fulfil those functions and carry out those objects which the Act has cast upon it if it is to be by-passed by individual complainants bringing such applications".*

[73] The only exceptions to be allowed, as I understand Mr Groome's submissions, are with regard to section 116(1) and (2) of the LPA. He contended that flowing from section 116(2) the Eastern Cape Bar is entitled to continue with the striking proceedings against the applicant, but *"it is through accreditation and delegation to the relevant society/bar"* as referred to in the advisory note (par 13(a) to (c) above). Disciplinary procedures which were instituted from 1 November 2018 onwards, must be referred to the relevant Provincial Council.

[74] Mr Ellis SC on behalf of the other two respondents, submitted that the prevailing common law position was not altered by the Admission of Advocates Act, neither was it altered by the LPA when the former Act was repealed. He

pointed out that the LPA did not abolish the Bars as voluntary associations and the mere restructuring of the legal profession by the LPA did not change the common law as far as the inherent powers of the Courts over legal practitioners are concerned. According to him section 44(1) and (2) of the LPA confirm an intention not to do away with or to change the common law regarding disciplinary proceedings involving advocates as legal practitioners.

[75] In support of this submission he also relied on the judgment in *Johannesburg Society of Advocates and Another v Nthai and Others*, *supra*, par [26] where Ponnan JA, with reference to section 44(1) and (2), has pointed out that a *"legal practitioner or juristic person is accordingly entitled to approach the High Court for relief 'in connection with' a complaint or misconduct against a legal practitioner"* and that the Bars as juristic entities, having an interest in promoting and protecting the advocates' profession, are empowered *"to involve themselves in readmission applications and other matters concerning the professional misconduct of advocates"*. This *dictum*, so it was submitted, affirms unequivocally that the GCB and its constituent bars may involve themselves in applications to Court for the suspension or striking off of advocates.

THE INTERPRETATION OF THE LEGAL PRACTICE ACT

[76] The question to be considered is whether the LPA altered the common law regarding the standing of the Societies of Advocates to apply for the suspension or striking off of advocates and to conduct disciplinary enquiries against its members, as was done in the past? The general principles, regarding

interpretation in this regard, seem to be well-established. In *Johannesburg Municipality v Cohen's Trustees* 1909 (TS) 811 at 823 it was pointed out that:

> *"It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the common law."*

[77] This approach was endorsed in *Dhanabakium v Subramanian*, *supra,* at 167 where it was also emphasised that *"the position under the common law must be borne in mind in construing the statute".* In *Bills of Costs (Pty) Ltd v The Registrar* 1979 (3) SA 925 (A) at 942D-E it was again explained that:

> *"What one has to seek in that Act and other relevant legislation is whether they have explicitly or by necessary implication altered the common law … In my view, none of the legislation referred to effects such an alteration. On the contrary, if anything, it assumes the continuance or retention of that common law rule".*

[78] Is there any indication, explicitly or by necessary implication, that the common law regarding the issue concerned has been altered by the LPA? The mere restructuring of the legal profession by the LPA in terms of its purpose referred to in section 3; the development of norms and standards to guide the conduct of legal practitioners as envisaged in section 6; the establishment of the Council's disciplinary jurisdiction in Chapter IV; or the provisions of section 116 regarding pending disciplinary enquiries and other proceedings did not change the common law as far as the inherent powers of the Courts over legal practitioners and the standing of the Societies of Advocates are concerned. Were it the legislature's intent to bring about such a profound change, it would

have been expressly stated, or at least, one would have expected a clear indication to that effect.

[79] The opposite appears to be true. There is no indication that voluntary associations such as the Bars have been abolished. As a matter of fact they still exist today and are even parties to this application. There is also no indication that the common law powers of the Courts to regulate their own process and to recognise who may bring disciplinary proceedings before them, have been altered. One does not find a single provision in the LPA that clearly and unequivocally indicates an intention to alter the common law or to affect the existing status of any of the voluntary associations in the legal profession.

[80] On the contrary, there is a clear and explicit indication in the LPA that it assumes the continuance or retention of the common law in this regard. Section 44(1) provides that *"the provisions of this Act do not derogate in any way*" from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner. Subsection (2) makes it clear that *"nothing contained in this Act"* precludes a juristic entity (such as the Bars) from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner. And how will a Bar be able to do this if it may not also *investigate* the alleged misconduct, before putting the facts before a Court for consideration? This right to also investigate, apart from the common law, therefore seems to be included in this section by necessary implication, which is not subject to anything else contained in this Act. I therefore have to conclude that section 44 properly analysed, appear to be a ranking clause, and not merely a linking clause. It

ranks above all the other provisions in the Act. I find it impossible to reconcile section 44(1) and (2) with an intention to interfere with the common law powers of the High Court or to do away with the common law standing of the Bars, or their right to also investigate alleged misconduct of advocates. The common law in this regard seems to be acknowledged by statute, rather to alter it.

[81] The argument that, notwithstanding the Court's inherent authority, *"it is only appropriate that the custos morum bring proceedings to suspend or strike a practitioner's name from the roll"* should not be taken out of context. It assumes, unjustifiably so, that the Council should be regarded as the only and exclusive *custos morum* (the guardian of good morals) of the legal profession. There is no indication in the LPA to justify such an interpretation.

[82] This issue was addressed by the Supreme Court of Appeal, at least to a certain extent, in *Johannesburg Society of Advocates v Nthai, supra*, at par [24] where the Court said the following:

> *"The LPA makes the LPC primarily responsible for the protection and regulation of the legal profession. However, whilst the LPA confers primary jurisdiction for the discipline of legal practitioners on the LPC, this does not deprive existing bodies from having a continuing interest in the professional ethics of the profession or standing."* [My emphasis]

[83] Taking into account this *dictum*, it was submitted by Mr Ellis SC that the LPA does not detract from the position of the GCB and its constituent Bars who are still *custodes morum* (the guardians of good morals) over the profession of advocates, neither does the LPA intend to afford exclusive jurisdiction to the

Council in this regard. I agree with this submission. Primary jurisdiction does not mean exclusive jurisdiction. This was also the view of Tolmay J in *Ex parte Mokoena* [2019] ZAGPPHC 256 at par 11 where it was held that *"the Societies of Advocates also have a duty as co-custodians of the profession to ensure compliance with the LPA …"*.

[84] The judgment in *Hurter v Hough, supra*, is also distinguishable regarding this issue. In that case it was held that the Law Society would not be able to fulfil its functions and carry out the objects which the Act has cast upon it *"if it is to be by-passed by individual complainants bringing such applications."* The operative words in this *dictum* are *"individual complainants"*. The Societies of Advocates are certainly not *"individual complainants"*. On the contrary, these societies are intimately concerned with the practice of advocates and have been recognised by the Courts over many years as having the necessary standing to bring the misconduct of members of the advocates' profession to the attention of the Court. The importance of the judgment in *Hurter v Hough, supra*, is rather to indicate that the Court exercised its inherent power not to acknowledge the standing of a *private individual* to apply for a striking off order. See in this regard *Mavudzi v Majola* 2022 ZAGP JH 575 at par 41 where Sutherland DJP also concluded that it is inappropriate for "*any layperson or entity"* to apply for a striking off order.

[85] In *Ndleve v Pretoria Society of Advocates* 2016 (12) BCLR 1523 (CC) the Constitutional Court noted with deep concern that the applicant continued to practise as an advocate despite having been struck from the Roll of Advocates. It was then pointed out (in par 13) by the Court (prior to the advent of the LPA)

that there is a duty placed upon the Pretoria Society of Advocates to take appropriate steps and to stop the applicant appearing in Courts on behalf of accused and other parties as *"the Society owes that duty to the Court, and to the public"*. I am not convinced that this duty of the Bars has been abolished by the LPA and that only the Council will now have the power to perform this duty and to take the necessary steps in this regard.

[86] Again, the opposite appears to be true. In *Mavudzi and Another v Majola and Others* (*supra*, at par 38) the Court, as a full bench, referring to the Council and other professional bodies, said the following:

> *"It is the role of the LPC and other voluntary regulatory bodies such as the GCB, the several Bars, attorneys' associations and the Law Society, that is to say, professional peers,* to assess deviancy and initiate the proper steps." [My emphasis]

[87] Further on, in the same judgment (par 41) it was also pointed out that:

> *"A complaint of misconduct against a legal practitioner must be lodged with the LPC or any one of the voluntary regulatory bodies of legal practitioners and the Court shall insist on a report from one or more of them in any striking off application that comes before it to facilitate the Court reaching a conclusion on 'appropriate relief'"*. (My emphasis)

[88] From the aforegoing judgments it has to be concluded that the Council should not be regarded as the only and exclusive *custos morum* of the legal profession. It is clear that the Bars as voluntary regulatory and professional bodies are recognised by the Courts as co-custodians of the advocates

profession, although the Council may be regarded as the primary regulator of the legal profession (*Mavudzi and Another v Majola and Others, supra,* at par 34). The Council is therefore not the only professional body who is entitled to *investigate* unprofessional conduct of advocates, or to *initiate* applications to strike off their names, as was suggested by Mr Goddard SC and Mr Groome. There is no indication in the LPA that the Bars will not also be entitled to *investigate* unprofessional conduct of advocates in general or, more specifically, a contravention of the code of conduct referred to in section 36(1) of the LPA, and to bring applications for the suspension of advocates or the removal of their names. This is a matter of exercising concurrent jurisdiction where assistance and co-operation in good spirit is required.

[89] However, this does not necessary also apply to the *enforcement* of the code of conduct. In section 1 of the LPA "*code of conduct*" means a written code setting out rules and standards … "*and its enforcement through the Council and its structures*" which may contain different provisions for advocates and attorneys. This code of conduct must be developed by the Council and will apply to all legal practitioners (section 36(1)). In terms of section 39 (1) a "*disciplinary committee must"* conduct disciplinary hearings. This creates the impression that only the Council and its structures have the statutory power to *enforce* the code of conduct as envisaged in sections 38 to 40, unless there is an indication to the contrary in the LPA. I was unable to find such an indication.

[90] This clearly does not affect the common law standing of the Bars to bring applications for the suspension of advocates, or the removal of their names, or their right in terms of section 44(2) to apply for appropriate relief "*in connection*

with any complaint or charge of misconduct" against an advocate, or to *investigate* unprofessional conduct of advocates as referred to above. It will also not affect, in my view, an *enforcement* of domestic or internal rules and decisions of a Bar with regard to its members, insofar as it does not amount to an enforcement of the code of conduct as referred to in sections 38 to 40 of the Act.

[91] What about section 116(1) and (2)? It is important to bear in mind that in both these subsections reference is made to *"any law repealed by this Act"*. These words qualify or limit the applicability of section 116. In terms of section 119(1)(a) the laws specified in the Schedule have been repealed or amended. These are all statutory laws, for instance, the Admission of Advocates Act and the Attorneys Act No 53 of 1979. There is no reference to the common law or an intention to include the common law as having been "*repealed*" or altered.

[92] This means that section 116 only applies to pending enquiries and proceedings which have been instituted *in terms of a statute repealed* by the LPA. Put differently, section 116(1) and (2) do not apply to enquiries and proceedings which have been instituted in terms of the common law. This section can therefore not apply to the GCB or the Bars when performing their duties in terms of the common law. This is so as they do not owe their existence or standing from the repealed Admission of Advocates Act. It would be anomalous if section 16 is to be interpreted that they lose their standing in pending proceedings and are to be substituted by the Council, but in terms of section 44(2) nothing precludes them, as juristic entities, from applying to the High Court for appropriate relief.

[93] I agree with the submission put forward by Mr Ellis SC that section 116(1) and (2) cannot be interpreted as if the GCB and the Society of Advocates have suddenly lost their common law standing in pending matters. They should be entitled to continue and conclude pending enquiries and pending proceedings, irrespective of the advisory note. These professional bodies need not have to be replaced by the Council, neither do they owe their standing to accreditation and delegation in terms of the advisory note or otherwise. Furthermore, it remains the common law right of the Courts to decide whether or not to accept the standing of the GCB and the Society of Advocates in any matter concerning disciplinary proceedings involving advocates.

[94] For these reasons also, the application cannot succeed.

THE IMPUGNED DECISION

[95] Finally, the applicant seeks an order declaring that the first respondent "*did not take any of the decisions"* recorded in the advisory note dated 18 April 2019 (par 13(a) to (e) above), that the first respondent should be directed to give notice to all legal practitioners that it has not taken those decisions and that it should be ordered to withdraw the advisory note.

[96] The applicant contends that there is no record of any Council meeting or resolution which indicates or confirms any decision taken by the Council concerning the content of the advisory note. The Council states in its answering affidavit (par 7.3) that the contents of the advisory note were indeed resolved upon by the Council.

THE DECLARATORY RELIEF

[97] There is a two-stage approach to the consideration of an application for declaratory relief. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation and the consideration of whether or not to grant the order, constitutes the second leg of the enquiry. (*Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at par 18). In terms of section 21(1)(c) of the Superior Courts Act 10 of 2013 the High Court has the power –

> *"In its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."*

[98] The first question to be considered is whether the applicant has an interest in an existing, future or contingent right or obligation? This requires a consideration of rights or obligations, not to make findings of fact. It is clear that this dispute concerns a factual issue, i.e. whether or not a decision by the Council was taken. For this reason alone the declaratory relief sought by the applicant cannot be granted.

[99] Furthermore, it has repeatedly been held that the Courts will not deal with abstract, hypothetical or academic questions in proceedings for a declaratory order (*Ex Parte Mouton and Another* 1955 (4) SA 460 (AD) at 464; *South African Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd* 1977 (3) SA 642 (AD) at 658). Even if a declaratory order *"that the first*

respondent did not take any of the decisions" were to be granted, it will have no practical effect. It is for the Court to consider the applicant's conduct and give an appropriate order, irrespective of whether a decision was taken to issue the advisory note or not (*Du Plessis v Prokureursorde, Transvaal* 2002 (4) SA 344 (T) at 349F-G). For these reasons I have to exercise my discretion against the applicant and refuse the granting of a declaratory order.

THE INTERDICTORY RELIEF

[100] The applicant also applies for an order that the first respondent be "*directed to give notice"* to all legal practitioners that it has not taken any of the decisions recorded in the advisory note and for an order to withdraw the said note. The applicant is not entitled to this relief for mainly two reasons: first, this relief is dependent on a finding or conclusion that the Council *"has not taken any of the decisions"*. This issue has already been dealt with above where it has been decided that the applicant is not entitled to declaratory relief in this regard.

[101] Second, it appears that the applicant applies for a final interdict directing the first respondent to give notice to all legal practitioners that it has not taken any of the decisions concerned. No clear right has been demonstrated, neither an infringement of a right and resultant prejudice have been shown. The legal status of the advisory note, whether a decision was taken or not, appears to be questionable. It is, in my view (without deciding), only what it says – an advisory note.

SUMMARY OF CONCLUSIONS AND FINDINGS

[102] To sum up:

(a) The review application cannot succeed as the Council's decisions regarding the transitional arrangements reflected in the advisory note do not adversely affect the applicant's rights, nor do they have a direct, external legal effect;

(b) Prior to the advent of the LPA, the Courts had a common law right, derived from its inherent jurisdiction, to enquire into the conduct of advocates and to determine what disciplinary procedure should be followed;

(c) The Bars, being voluntary associations, were recognised by the Courts as having the necessary standing to bring the misconduct of members of the advocates' profession to the attention of the Court. This was a standing bestowed upon the Bars by the Courts in recognition and acceptance of their ability to assist the Court in the proper discharge of its duty to enquire into the conduct of advocates as officers of the Court;

(d) Section 7(2) of the Admission of Advocates Act (now repealed) recognised and confirmed the common law standing of the Bars and that of the GCB to bring misconduct of advocates to the

attention of the Court, but this standing or ability did not depend upon the provisions of section 7(2);

(e) The advent of the LPA has not altered the common law right of Courts to enquire into the conduct of advocates and to adjudicate upon matters concerning the conduct of advocates, neither has it altered the common law standing and ability of the GCB and the Bars to *investigate* unprofessional conduct of advocates and to bring applications for the suspension of advocates or the removal of their names from the roll, notwithstanding the advisory note issued on 18 April 2019;

(f) The right of the GCB and the Bars to *investigate* unprofessional conduct of advocates does not include the *enforcement* of the code of conduct referred to in section 1 of the LPA, as envisaged in sections 38 to 40. This does not affect the common law standing of the GCB and the Bars referred to above; their right to investigate unprofessional conduct of advocates; their right in terms of section 44(2) to apply for appropriate relief; or the enforcement of domestic rules and decisions of the Bar applicable to and involving its members;

(g) The Council as the *"primary regulator"*, is not the only or exclusive *custos morum* of the legal profession. The GCB and the Bars, which have been acknowledged over many years by the Courts, are entitled to be accepted as co-custodians of the

advocates profession and they and the Council should cooperate with one another in good spirit to ensure compliance with the provisions of the LPA;

(h) Section 116(1) and (2) of the LPA apply only to pending enquiries and court proceedings which have been instituted in *terms of a statute repealed* by the LPA, and not to enquiries and court proceedings which have been instituted in terms of the common law;

(i) Ultimately, it remains the common law right and prerogative of the Courts, and not that of a party involved in the proceedings, to decide whether or not to acknowledge and accept the standing of the GCB, the Bar or any other applicant, in pending or new matters, concerning disciplinary proceedings involving advocates;

(j) The applicant is not entitled to a declaratory order, neither interdictory relief, regarding the decisions of the Council as reflected in the advisory note issued on 18 April 2019.

COSTS

[103] That brings me to the final issue of costs. It was submitted by Mr Goddard SC that if the applicant is not successful, that costs should not be awarded against her as this application concerns an issue pertaining to the lawful exercise of the Council's public powers and is brought in her own interest

as well as that of the broader public. In support of this submission the applicant relies on the so-called *Biowatch*-principle. This view is opposed by the Council and the Eastern Cape Bar.

[104] I have carefully considered the applicant's request, especially if one takes into account that one should be cautious in awarding costs against litigants who seek to enforce their constitutional rights. However, I am not convinced that this matter is all about enforcing constitutional rights. The applicant also did not bring this application based on a broader standing in the public interest. The applicant was all along acting in her own interest. Taking into account only these considerations, the general principle that costs should follow the result, must be applied.

[105] However, I should also take into account the nature of the issues involved. This was not only about a review application in terms of PAJA. Some of the issues also involved the common law, the rights and duties of the Bars, the Council and the interpretation of the LPA. This all contributed to a proper ventilation of legal issues in the interest of the applicant, the profession and the administration of justice. In short, the application also has a beneficial outcome for the respondents as many issues regarding the role and status of the Bars and the statutory position of the Council, in view of the provisions of the LPA and the common law, have been decided.

[106] In the result I must endeavour, in the exercise of my discretion, to be fair to all parties. Taking into account the above considerations, I am of the view that

in principle the applicant should pay at least some of the costs as she is the unsuccessful party. I think 50% will be fair.

ORDER

In the result I make the following order:

1. The application is dismissed;

2. The applicant must pay 50% of the costs, including 50% of the costs of two counsel where so employed.

_____
D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

I agree,

_____
N BAM
JUDGE OF THE HIGH COURT
PRETORIA

I agree,

_____
M MOJAPELO
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Matter heard on: 26 January 2023

Appearances:

Counsel for the Applicant:	Adv G D Goddard SC
Instructed by:	Nettleton's Attorneys
Counsel for the First Respondent:	Mr L Groome (Attorney)
Instructed by:	RW Attorneys
Counsel for the Second and Fourth respondents:	Adv P Ellis SC and Adv A Lamey
Instructed by:	Bernhard van der Hoven Attorneys