IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 5603/19P

In the matter between:

LEGAL PRACTICE COUNCIL (KWAZULU-NATAL PROVINCIAL OFFICE)	Applicant
and	
PRANIL RAJKOOMAR	First Respondent
STANDARD BANK OF SOUTH AFRICA	Second Respondent

ORDER

The following order is granted:

1. The matter is referred for the hearing of oral evidence in terms of Uniform Rule 6(5)*(g)* at a time and date to be arranged with the Registrar on the following issues:

(a) Whether there was any dishonesty or unworthy conduct on the part of the first respondent in the administration of Ms Sheriffa Bacus's property.

(b) Whether there was sufficient monies in the first respondent's trust account of Ms Sheriffa Bacus for the payment of R194 399.47 on 29 July 2016 and, if so, why the first respondent did not make payment towards the administration of the property earlier.

(c) Whether the first respondent's books of account were properly managed and maintained and specifically whether the first respondent maintained a

proper fee and transfer journal.

(d) What monies were held in the first respondent's trust account between the period January 2013 to 29 July 2016.

(e) Whether the first respondent utilized trust monies to pay other creditors.

(f) Whether the first respondent withdrew monies from his trust account from the period 4 May 2015 to 17 September 2017 on no less than six occasions in the sum of R53 975.00. If so, what the purpose was of these withdrawals and whether these monies were credited to his trust account.

(g) Whether there was a deficit of R979 573.71 for the period ending 29 February 2016 in the first respondent's trust account.

(h) Whether there was a debit balance in the first respondent's trust account as at 30 November 2016 in the sum of R13 256.01.

(i) Whether the contents of the inspection report dated 1 December 2016 is factually correct.

2. The various deponents to the affidavits filed may be called as witnesses as well as any other witness(es) that the parties may wish to call, provided that notice be given to the other party fourteen (14) days before the date appointed for the hearing of oral evidence.

3. Either party may subpoena any person to give evidence at the hearing whether such person has consented to furnish a statement or not.

4. Within 21 days of the granting of this order, each of the parties shall make discovery under oath, of all documents relating to the issues referred to under paragraph 1 hereof, which are or have at any time been in the possession or under the control of such party. Such discovery shall be made in accordance with Uniform rule 35 and the provisions of that rule with regard to the inspection and production of documents discovered shall be operative.

5. Costs are reserved for determination by the Court hearing the oral evidence.

JUDGMENT

Gounden AJ (with E Bezuidenhout J concurring)

Introduction

[1] The applicant, who is described as the Legal Practice Council, seeks to strike the name of the first respondent, Mr Praneel Rajcoomar, from the roll of legal practitioners together with ancillary relief.

[2] The proceedings before the court are of a disciplinary nature and are *sui generis*. The court is obliged to embark upon a three stage enquiry which has been summarised as follows:

‘First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. Second, the court must consider whether the person concerned “in the discretion of the court” is not a fit and proper person to continue to practise. This involves a weighing-up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. Third, the court must inquire whether in all the circumstances the attorney is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice.’[1]

[3] The courts have repeatedly emphasized that impeccable ethical standards are required of an attorney who practises law. He is to conduct himself with the utmost integrity and with scrupulous honesty. The Supreme Court of Appeal has commented that the heavy responsibility which officers of the court are required to shoulder in ‘upholding the Constitution’ is ‘without parallel’.[2]

[4] In a nutshell, this application involves the conduct of the first respondent who is alleged to have failed to carry out his mandate and abandoned his duties to his client. Upon an investigation by the applicant it was uncovered that the first respondent had failed to administrate and manage his practice finanaces in an appropriate manner.

[5] In opposition, the first respondent has raised various points in limine. At

[1] *Botha v Law Society, Northern Provinces* [2009] ZASCA 13; 2009 (1) SA 227 (SCA); [2009] 3 All SA 295 (SCA) para 2, and *Malan and another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); [2009] 1 All SA 133 (SCA) para 4.

[2] *General Council of the Bar of South Africa v Geach and others* [2012] ZASCA 175; 2013 (2) SA 52 (SCA); [2013] 1 All SA 393 (SCA) para 87.

the hearing of this application it was agreed between the parties that the court would deal with the points in limine before engaging with the merits of the application, as the effect of the first respondent being successful on any of the points in limine may be dispositive of the matter.

[6] The in limine challenges are as follows:

(a) The applicant's locus standi to institute the application;

(b) An alleged defect in the notice of motion;

(c) The deponent to the founding affidavit lacks the personal knowledge and the requisite authority to bring the application;

(d) The applicant instituted the application in terms of the Attorneys Act 53 of 1979 ('the Attorneys Act'), whereas the application should be in terms of the provisions of the Legal Practice Act 28 of 2014 ('the LPA') as it was instituted after 1 November 2018. The provisions of the LPA prescribe a disciplinary procedure before the institution of an application and this process has not been followed by the applicant. Arising from this point the first respondent also submits that there is no prima facie case or cause of action;

(e) An estoppel challenge.

[7] Prior to engaging with the points in limine it is necessary to set out a background of the factual history of this matter.

The factual background

[8] In June 2016 the applicant received a complaint against the first respondent, who is an attorney of 25 years, from Ms Fawzia Essop Bacus, an attorney, who at the time was employed by the Verulam Justice Centre. The first respondent was known to Ms Fawzia Bacus as they had worked with each other over the years.

[9] In 2009 Ms Fawzia Bacus instructed the first respondent to attend to the administration of an immovable property that belonged to her mother, Ms Sheriffa Bacus, which involved the collection of rental and other property related matters.

[10] In terms of the first respondent's mandate he would attend to the rental collections in respect of the property, which would be received into his trust account and utilised to pay the bond instalment for the property, the rates and other utilities on a monthly basis. He would provide a monthly statement of account reflecting all monies collected and disbursements made in respect of the property.

[11] Ms Fawzia Bacus relocated to the Western Cape and her sister, who lived in Durban, continued to deal with the first respondent. It was at this stage that the sister raised a query with the first respondent's office as she was not receiving the monthly statements of accounts. The first respondent's office was being evasive, which led to the sister complaining to Ms Fawzia Bacus about the lack of response received. Ms Fawzia Bacus attempted unsuccessfully to contact the first respondent by making numerous telephone calls and leaving several messages.

[12] Sometime in 2015 Ms Fawzia Bacus became aware that Nedbank, the bond holder of the property instituted foreclosure proceedings against the property as the bond instalment had not been paid. Ms Fawzia Bacus attempted to arrange an urgent meeting with the first respondent, but was unsuccessful in all her attempts.

[13] As a result of the many failed attempts to contact the first respondent Ms Fawzia Bacus terminated the first respondent's mandate. She contacted Nedbank and made arrangements to settle the indebtedness to rescue the property from a sale in execution. Thereafter, Ms Fawzia Bacus instructed attorneys TC Mehta and Company to administer the property, and laid a complaint with the applicant relating to the conduct of the first respondent.

[14] The applicant appointed two senior attorneys Mr Praveen Sham ('Mr Sham') and Ms Manette Strauss ('Ms Struass') as members of the inspection committee. Upon the first inspection, the inspection committee reported inter alia that the first respondent had compiled a report and a reconciliation and paid the sum of R194 399.47 to Ms Sheriffa Bacus. He was unable to provide any

explanation why the bond instalments for the property were not paid despite there being a credit balance. He admitted that he failed to supervise the person in his office who was responsible for handling the matter. He was unable to produce any financial records as these records were with his accountant. The records he did have were in an office, which office was locked. His accountant had the only key to the office. The inspection was adjourned for the production of the records. Thereafter the first respondent, in writing, objected to the continuation of the inspection and challenged the legal standing of the inspection committee. He also alleged that his accountant was hijacked and not available.

[15] A subpoena was subsequently issued for an interview with the first respondent. At this stage, the first respondent engaged the services of an attorney who raised various objections to the interview. After various aborted attempts to conduct the interview the first respondent eventually attended the inspection and produced his accounting records. It is alleged that the first respondent admitted that there was a shortfall of approximately R1.9 million in his trust account, which was remedied through an agreement with a client who allowed him to utilise the monies on certain terms. The first respondent's attorney confirmed that there was a general deficiency in his trust account and that his books of accounting where not properly written up. A further inspection was undertaken where further irregularities were uncovered.

[16] The inspection committee commented as follows in their report dated 1 December 2016:

'This is one of the sorriest looking set of books that we have come across. Rajcoomar acknowledged that his knowledge of bookkeeping was limited and in our view his bookkeepers knowledge of legal accounting is even more limited'.

[17] As a result of the investigation the KwaZulu-Natal Law Society resolved to bring proceedings to remove the first respondent from the roll of attorneys. In April 2017 an application was instituted, but was withdrawn due to technical deficiencies in the application. In May 2019 the applicant's council approved the recommendation of its committee that the resolution taken by the KwaZulu-

Natal Law Society, to institute proceedings for the removal of the first respondent’s name from the roll of legal of practitioners, is confirmed.

[18] Thereafter the applicant instituted the present application as it formed the view that the first respondent had little or no understanding of basic accounting principles after a lengthy period of practice; there was no clear distinction between the first respondent’s trust and business account; the first respondent acknowledged an indebtedness to Ms Sheriffa Bacus without providing any clarity on the details; there was a reasonable suspicion that he was rolling trust funds; as a senior attorney he showed disregard to the instruction of Ms Fawzia Bacus and a reckless abandonment of the matter. This led to unnecessary stress and trauma for the Bacus family. All these issues were indicative of misappropriation of trust monies and unprofessional conduct.

[19] The first respondent’s answer to the Bacus complaint is that his records reveal that there was insufficient income to meet the monthly expenses on the property and that he paid the expenses from his business account, because of his long standing relationship with Ms Fawzia Bacus. He furnished a full reconciliation of account to attorneys TC Mehta and Company, which they accepted. His difficulty in communicating with Ms Fawzia Bacus was that his office was burgled and it took him time to set up new infrastructure and that he did attempt on various occasions to call Ms Fawzia Bacus to no avail.

[20] The first respondent also raised and challenged the unfairness of the inspections that were held as the two inspectors that conducted the inspection participated in the deliberations where the decision was taken to remove his name from the roll. The first respondent denied any misappropriation of trust funds as he was provided with a fidelity fund certificate and was granted a certificate of good standing. He also denied the admission relating to the R1.9 million shortfall in his trust account that was remedied through an agreement with his client.

[21] It is against this background that the in limine challenges must be seen in their context and in this regard it is apposite to refer to the remarks made by the

Supreme Court of Appeal in *Law Society, Northern Provinces v Mogami*:

'Very serious, however, is the respondents' dishonest conduct of the proceedings. Instead of dealing with the issues they launched an unbridled attack on the appellant. It has become a common occurrence for persons accused of a wrongdoing, instead of confronting the allegation, to accuse the accuser and seek to break down the institution involved. This judgment must serve as a warning to legal practitioners that courts cannot countenance this strategy. In itself it is unprofessional.'[3]

[22] I now turn to deal with the points in limine as raised by the first respondent.

The applicant's locus standi to institute this application

[23] The applicant is cited as a body corporate with full legal capacity established in terms of s 4 of the LPA, which exercises jurisdiction over all legal practitioners as contemplated in terms of the LPA.

[24] In the founding affidavit, the applicant attached the extract of minutes of a meeting of its council which resolved by not less than nine councillors that an application is to be made for removal of the name of the first respondent from the roll of legal practitioners. The applicant has also referred to itself in the heading of the application as the 'Legal Practice Council (KwaZulu-Natal Provincial Office).'

[25] In the replying affidavit, the applicant attached the minutes of the meeting held by its council, described as the 'Legal Practice Council of South Africa', in Midrand on 18 May 2019, which confirmed the authority of the applicant to institute proceedings against the first respondent and attached a recommendation by its council for the removal of the first respondent's name from the roll of practitioners. The applicant explained that the first resolution was attached to the founding affidavit in error.

[26] In terms of s 4 of the LPA:

'The South African Legal Practice Council is hereby established as a body corporate

[3] *Law Society, Northern Provinces v Mogami and others* [2009] ZASCA 107; 2010 (1) SA 186 (SCA); [2010] 1 All SA 315 (SCA).

with full legal capacity, and exercises jurisdiction over all legal practitioners and candidate legal practitioners as contemplated in this Act'.

[27] The LPA makes the legal practice council primarily responsible for the protection and regulation of the legal profession.[4] The applicant is the custodian of all legal practitioners, it has a direct and substantial interest in the matter, and in the subject and object of the proceedings in question, and consequently the outcome of the litigation as it is legislatively responsible for the administration of all candidate and legal practitioners as contemplated in the LPA.[5]

[28] In the circumstances I am of the view that the applicant has the requisite legal standing to bring this application.

An alleged defect in the notice of motion

[29] In the notice of motion the applicant states 'kindly take notice further that the affidavit of *Pearl Dawn Arnold Mfusi* and other affidavits referred to therein will be used in support thereof'. The founding affidavit attached to the notice of motion was deposed to by Ms Hlaleleni Kathleen Matolo-Dlepu ('Ms Matolo-Dlepu'). There is no affidavit in the name of Ms Pearl Dawn Arnold Mfusi attached to the notice of motion. The applicant has admitted that this was an error on its part and corrected it by providing an amended page.

[30] The first respondent submits that this error is fatally defective *ab origine* to the application.

[31] An affidavit deposed to by Ms Matolo-Dlepu, the chairperson of the applicant, has indeed been annexed to the founding affidavit. This point, in my view, is badly raised and seeks to elevate form over substance.

[32] Accordingly I find no merit in this point.

The personal knowledge and authority of the deponent to the affidavit in

[4] *Johannesburg Society of Advocates v Nthai and others* [2020] ZASCA 171, 2021 (2) SA 343 (SCA), [2021] 2 All SA 37 (SCA) para 24.
[5] *Abrahamse and others v Cape Town City Council* 1953 (3) SA 855 (C).

support of the application

[33] The first respondent challenges the personal knowledge and the authority of the deponent to the affidavit in support of the application on the basis that she has no personal knowledge of matters raised in her affidavit, and that she has impermissibly attempted to rectify her failures in reply.

[34] The affidavit in support of the application is deposed to by Ms Matolo-Dlepu, who is the chairperson of the applicant, and who states that the facts contained in the affidavit, 'where otherwise stated, or the context indicates the contrary, are within her personal knowledge and belief and are true and correct' and that the matter in its entirety was discussed comprehensively at the applicant's council meeting, as such she acquired the knowledge to depose to the affidavit.

[35] First-hand knowledge of every fact cannot and should not be required of an official who deposes to the affidavit of large corporations.[6] Ms Matolo-Dlepu has satisfied the requirement of her personal knowledge by virtue of her position held in the applicant and discussions that ensued at the applicant's council meeting, which is sufficient to depose to an affidavit.

[36] The applicant has attached the minutes of a meeting of its council together with an extract of an approval confirming that the initial resolution taken to institute proceedings against the first respondent to remove his name from the roll of legal practitioners is confirmed. In my view, this satisfied the internal authorisation of the applicant to commence the application against the first respondent.

[37] It is trite that the deponent to an affidavit does not have to be authorised to depose to an affidavit, she (in this case) is merely a witness. It is the attorney of the litigant who by signing the notice of motion and issuing the papers signifies that he or she is authorised to initiate the application on behalf of the litigant.[7]

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[6] *Rees and another v Investec Bank Ltd* [2014] ZASCA 38; 2014 (4) SA 220 (SCA) para 15.

[38] I am of the view that there is no merit in the challenge of personal knowledge and authority.

Whether the applicant has complied with the provisions of the LPA

[39] Both counsels appearing on behalf of the applicant and the first respondent respectively, concentrated most of their efforts on this point. The LPA brought about a new era of governance within the legal profession in terms of which the Attorneys Act 53 of 1957 ('the Attorneys Act') was repealed. The four law societies, which were established in terms of s 56 of the Attorneys Act, were dissolved and replaced by nine provincial councils established in terms of s 23 of the LPA, which provincial councils in turn fall under the council, the body tasked with exercising jurisdiction over all legal practitioners.

[40] The objects of the applicant includes enhancing access to justice, promoting and protecting the public interest, regulating all legal and candidate legal practitioners, preserving and upholding the independence of the legal profession, enhancing and maintaining the integrity and status of the legal profession and upholding and advancing the rule of law, administration of justice, and the Constitution of the Republic of South Africa.[8] In order to achieve these objects the applicant is empowered to do all things necessary for the proper and effective performance of its functions or the exercise of its powers, which include inter alia instituting and defending legal proceedings.

[41] In 2016 Ms Fawzia Bacus made the complaint against the first respondent. At that stage the Attorneys Act was the legislation that governed the conduct of attorneys. The investigation process that commenced against the first respondent was under that legislation. In 2017 an application was instituted by the then KwaZulu-Natal Law Society for the removal of the name of the first respondent from the roll of attorneys. In June 2018 the KwaZulu-Natal Law Society withdrew the application.

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[7] *ANC Umvoti Council Caucus and others v Umvoti Municipality* [2009] ZAKZPHC 47; 2010 (3) SA 31 (KZP) para 27 at 43A-I.

[8] See s 5 of the Legal Practice Act 28 of 2014.

[42] The LPA came into operation on 1 November 2018. This application was launched in August 2019. The first respondent asserts that the investigation was finalised in December 2016, and when this application was instituted there were no legal proceedings against him and accordingly the correct legislative regime that applies to the first respondent is the LPA and not the Attorneys Act as suggested by the applicant.

[43] By reference to the applicability of the LPA the first respondent's challenge is centred upon the disciplinary proceedings foreshadowed in terms of s 39 of the LPA which provides that a disciplinary hearing must be convened and in terms of s 40 it is the disciplinary committee that advises the applicant's council to apply for inter alia the removal of the name of a legal practitioner from the roll. Section 41 of the LPA provides legal practitioners with the right to lodge an appeal against a decision by the disciplinary committee. It is the first respondent's challenge that this process was not followed by the applicant.

[44] It is common cause that disciplinary proceedings were not held in terms of s 39 of the LPA for the first respondent, but was conducted in terms of the rules of the KwaZulu-Natal Law Society. The reason that this process was adopted is that the compliant was brought before the implementation of the LPA.

[45] In order to assess the merits of this challenge two questions arise: (a) what is the effect of the withdrawal of the first application? And (b) the interpretation of the transitional arrangements in terms of s 116(2) of the LPA. The controversy raised relates to the change in the legislative regime and the impact that it has on the present application which is based on the LPA.

[46] Section 116 of the LPA, which is titled 'Pending Proceedings', clarifies the position regarding pending proceedings prior to the enactment of the LPA, and 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 or 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.'

[47] In *Murray NO v FirstRand Bank Ltd*,[9] the Supreme Court of Appeal emphasized that when it comes to the interpretation of statues, the starting point should always be the specific language of the statue or section. This should be used together with the context or background within which the statute, or section, has been created, as well as the purpose or objective of the statute or section. If the language of the specific statute, or section, reflects an inability to support the specific meaning that is being argued, the later should not be accepted.

[48] Section 116(1) is directed at the consequences of an enquiry in terms of any law repealed by the LPA for unprofessional or dishonourable or unworthy conduct of a legal practitioner that has not been finalised by 1 November 2018, and it provides the applicant's council with a discretion as to the further conduct of the enquiry.

[49] Section 116(2) is directed at the consequences of any proceedings for the suspension or the removal of a legal practitioner from the roll in terms of any legislation that has been repealed by the LPA, and which was not concluded by 1 November 2018. The proceedings must be continued and finalised in terms of the repealed law.

[9] *Murray NO and another v FirstRand Bank Ltd* [2015] ZASCA 39; 2015 (3) SA 438 (SCA) para 30; see also *Natal Joint Municipal Pension Fund v Endumeni Municpality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) para 18.

[50] The primary distinction between s 116(1) and (2) is the use of the words 'enquiry'[10] and 'proceedings'.[11] Each of these words contemplate a different processes being adopted regarding the unprofessional, untoward or dishonourable conduct of a legal practitioner.

[51] In my view, the words '*enquiry*' in s 116(1) connotes an internal process being followed, and the words '*any proceedings*' in s 116(2) suggests an application that has been instituted before a court, but had not been finalised by the 1 November 2018 when the LPA came into effect.

[52] In *South African Legal Practice Council v Bobotyana*[12] Kroon AJ said:

'9. This application, having been launched after 1 November 2018, must be adjudicated in terms of the LPA although the conduct of Bobotyana must be adjudged in accordance with the law as it stood at the time that it took place, namely before the repeal of the Attorneys Act and when the rules of the Law Society were still applicable.

. . .

110 In the view of the Court the submission that section 116(2) finds application is not correct. Whilst it may be so that the internal investigation of the Law Society and indeed the interdict proceedings were instituted before 1 November 2018, the current proceedings, which are not in any way dependent on earlier enquiries / proceedings, are fresh proceedings and they were instituted after 1 November 2018 and it is accordingly an application properly brought in terms of the LPA.' (footnotes omitted)

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[10] *In Smith NO and others v Master of the High Court, Free State Division, Bloemfontein and another* [2023] ZASCA 21 para 2, the Supreme Court of Appeal said the following:
'When a company is placed in liquidation, the Act authorises the court or the Master ─ at their own volition or on application by a liquidator, a creditor, a member or a party with an interest in the matter ─ *to conduct a private enquiry to obtain information about the affairs, conduct of business and trade dealings* of the company in terms of s 417 of the Act.' (emphasis added).
See also RD Claassen & M Claassen *Claassen's Dictionary of Legal Words and Phrases* (Service Issue 25 – July 2022) at 'enquiry' where it is stated: 'An "enquiry" in terms of s 29 of Act 25 of 1945 is not a judicial proceedings and is not a proceeding in the administration of justice'.

[11] *Alliance Commercial Office v Benjamin* 1949 (4) SA 92 (T) the court said that the words 'any proceedings' in the Rule of Court 49 (Transvaal) includes an appeal. In *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO* 2002 (1) SA 841 (E) at 845F-G, it was held: 'It is my view, with respect, that the learned Judge a quo placed an unduly restrictive interpretation on the words "any proceedings". There can, in my view, be no doubt at all that an application for security in terms of s 13 of the Companies Act [61 of 1973] or Rule 47 of the Uniform Rules of this Court can be described as court proceedings. The fact that a claim for security is a separate and ancillary issue between the parties, collateral to and not directly affecting the main dispute between the litigants, does not place it in a category other than court proceedings.'

[12] *South African Legal Practice Council v Bobotyana* [2020] ZAECGHC 114; [2020] 4 All SA 827 (ECG).

[53] The investigation into the Bacus complaint commenced soon after the complaint was made in June 2016, and the investigation was finalised in December 2016. At that time the provisions of the Attorneys Act and the relevant rules of the KwaZulu-Natal Law Society were applicable, as that was the law which was of application when the complaint was made. As such the compliant must be adjudicated in accordance with the law as it stood at that time. Therefore, I am in agreement with the sentiment expressed by Kroon AJ. The enquiry envisaged in s 116(1) was finalised at that stage and in terms of the prevailing legislation at the time.

[54] The withdrawal of the first application is akin to an order for absolution from the instance, and does not preclude the institution of a new application.[13]

[55] In *Pudi v Tshwane University of Technology*[14] it was held as follows:

'[18] A withdrawal of a matter at Court is a unilateral act done by the applicant as *dominus litis*. Once done, there is no live matter between the parties pending at Court. However, since the matter was not decided on the merits of the application or claim, the applicant may approach the Court to decide the matter on the merits. The issue is whether the applicant may reinstate proceedings and proceed on the original papers that were withdrawn or re-institute the proceedings and proceed on a fresh referral to the Court.

[19] Almost a century ago, the Court in *Kaplan v Dunell Ebden and Co*, laid the principle that a withdrawal of a matter at Court is akin to an order for absolution of instance. The Court stated that on withdrawal of the case by the applicant "the case disappears from the Roll as though absolution from the instance had been given." Thus, the effect of a withdrawal of a matter has the same consequences as an order of absolution from the instance.

[20] The principle is that the position of a matter where the defendant was granted an absolution from the instance does not mean that the applicant is barred from bringing his/her claim, it just meant that the applicant could bring an application *de novo* on the merits without the defendant raising a plea of *res judicata* or *lis finita*.' (footnotes omitted)

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[13] *Pudi v Tshwane University of Technology* [2022] ZALCJHB 160.

[14] *Pudi v Tshwane University of Technology* [2022] ZALCJHB 160. See also *Kaplan v Dunell Ebden and Co* 1924 EDL 91 at 93, and *Irish & Co (now Irish & Menell Rosenberg Inc) v Kritzas* 1992 (2) SA 623 (W) at 633B-D.

[56] In *Shibogde v Minister of Safety and Security*,[15] it was observed that as long as the merits or issues between the parties have not been resolved, there is nothing that bars the applicant from starting the process afresh.

[57] Accordingly, in my view, there exists a live controversy in this application which must be adjudicated upon in terms of the LPA.

[58] The first respondent's submission that he has been deprived of a disciplinary enquiry in terms of the provisions of LPA is artificial in light of my finding that the Attorneys Act and rules of the KwaZulu-Natal Law Society applied, at the time of the complaint as that was the law which applied at the time.

[59] In terms of s 44 of the LPA:

'(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, candidate legal practitioner or a juristic entity

(2) Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or 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 juristic entity or in connection with any decision of a disciplinary body, the Ombud or the Council in connection with such complaint or charge.'

[60] My view is fortified by the provisions of s 44(1) of the LPA, which clothes this court with extensive powers that extend beyond the provisions of the LPA to adjudicate upon, and make orders in respect of matters concerning the conduct of legal practitioners. This is consonant with the *sui generis* procedure to be adopted by this court when dealing with unprofessional conduct of legal practitioners.[16]

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[15] *Shibogde v Minister of Safety and Security and others* [2012] ZALCJHB 64 para 26. See also *Bukula v Clientele Legal* [2011] ZAFSHC 43 para 13, and *Pudi v Tshwane University of Technology* [2022] ZALCJHB 160 paras 21 – 25.

[16] *Mavudzi and another v Majola and others* [2022] ZAGPJHC 575; 2022 (6) SA 420 (GJ) para 33, and *Eastern Cape Provincial Council of the South African Legal Practice Council v Mfundisi* [2022] ZAECMKHC 87; [2023] 1 All SA 90 (ECG) paras 43 – 44.

[61] Properly construed, this point is a form over substance argument against the context of the facts of this case, because it is common cause that an investigation was held and finalised in terms of the Attorneys Act and the rules of the KwaZulu-Natal Law Society, which culminated in the applicant adopting a resolution to institute proceedings against the first respondent. In my view, to hold a further disciplinary hearing would only serve to repeat the process and delay the finalisation of the matter which has been ongoing since 2016. This much was conceded by the first respondent's counsel. The Supreme Court of Appeal recently reiterated that substance must prevail over form.[17]

[62] The applicant has placed the facts before this court and it is now the duty of this court to exercise its discretion regarding the conduct of the first respondent, which it is entitled to do mero motu without the reliance on the applicant's co-operation or, indeed, against the applicant's wish.[18]

Estoppel: the issuance of a fidelity fund certificate and a certificate of good standing

[63] The applicant issued a fidelity fund certificate and certificate of good standing to the first respondent after the Bacus compliant was received by it and a resolution was passed for the removal of his name from the roll of attorneys.

[64] The first respondent submits that the conduct of the applicant in issuing the certificates is an acceptance that the first respondent is a fit and proper person and as such it is estopped from alleging otherwise.

[65] In terms of rule 1.20 of South African Legal Practice Rules the definition of good standing in relation to a legal practitioner includes that there are no proceedings pending or contemplated to remove the name of the legal practitioner from the roll of legal practitioners to suspend him or her from practice.

[17] *Auditor-General of South Africa v MEC for Economic Opportunities, Western Cape and another* [2021] ZASCA 133; 2022 (5) SA 44 (SCA) para 22.
[18] *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T).

[66] The applicant submitted that the issuance of the certificates is administered by a separate department and that the certificate of good standing was issued in error. It does not however detract from the proceedings that are pending against the first respondent.

[67] The test for representation by conduct is whether the representor should reasonably have expected that the representee might be misled by the conduct and the representee acted reasonably in construing the representation in the sense which the representee did.[19] The first respondent knew of the complaint against him and knew of the process that was being adopted by the KwaZulu-Natal Law Society (as the predecessor to the applicant) against him for the removal of his name from the roll of attorneys. In my view, it cannot be said the issuance of the certificates created a positive impression that his removal from the roll of attorneys had fallen away.

[68] Unprofessional, untoward and unlawful conduct has been levelled against the first respondent. Estoppel may not be used to make legal what would otherwise be illegal.[20]

[69] The conduct of the applicant also deserves comment because the issuance of the certificates to the first respondent when there are pending proceedings against him demonstrates a failure of its administrative duties, which should not be countenanced as acceptable practice.

[70] In the circumstances, I find that there is no merit in this challenge.

Referral to oral evidence

[71] Upon reading the papers and during argument, it became apparent that it might be appropriate to refer the matter for the hearing of oral evidence on certain issues. It was also conceded by the parties at the hearing that the issues

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[19] *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter* [2004] ZASCA 59; 2004 (6) SA 491 (SCA); [2004] 4 All SA 589 (SCA).

[20] *Eastern Cape Provincial Government and others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA).

between the parties should be determined at a hearing of oral evidence. In *Van den Berg v General Council of the Bar of SA*[21] the Supreme Court of Appeal said:

'Proceedings to discipline a practitioner are generally commenced on notice of motion but the ordinary approach as outlined in *Plascon-Evans* is not appropriate to applications of that kind. The applicant's role in bringing such proceedings is not that of an ordinary adversarial litigant but is rather to bring evidence of a practitioner's misconduct to the attention of the court, in the interests of the court, the profession and the public at large, to enable a court to exercise its disciplinary powers. It will not always be possible for a court to properly fulfil its disciplinary function if it confines its enquiry to admitted facts as it would ordinarily do in motion proceedings and it will often find it necessary to properly establish the facts. . . .' (footnotes omitted)

[72] In my view the first respondent has adopted an obfuscatory approach to this matter instead of a transparent approach, this much is evident from the technical approach to the complaint since its inception, the in limine challenges, and the prolix content in the supplementary affidavit. Whilst a party is fully entitled to raise valid points of law a party cannot simply raise a plethora of unsustainable legal points to cloud and protract issues. The first respondent does not deal extensively and conclusively with the Bacus compliant and has adopted the view that since payment has been made to Ms Sheriffa Bacus, and the new attorney raised no further complaint, that puts an end to the matter. This stance is unfortunate as the first respondent has a duty to co-operate and to be completely transparent by furnishing the court with all the necessary information, so that the full facts are placed before the court to enable it to make a correct and just decision.[22]

[73] Insofar as the other issues uncovered by the investigation committee are concerned, the first respondent in my view did not properly engage with the second inspection report, neither did he provide a proper explanation of the absence of fees or matters relating to the transfer journal; the taking of fees without a completion of a mandate or accounting to client; the keeping of a

[21] *Van den Berg v General Council of the Bar of SA* [2007] ZASCA 16; [2007] 2 All SA 499 (SCA) para 2.
[22] *Hewetson v Law Society of the Free State* [2020] ZASCA 49; 2020 (5) SA 86 (SCA); [2020] 3 All SA 15 (SCA) para 67.

conglomerate trust account; keeping one conveyancing account; a general deficiency in the trust account and his books of accounting not being in order; personal withdrawals of funds and loans taken from clients to rectify shortfalls.

[74] In my view, all these issues and questions require an oral hearing to establish the true facts.

[75] The parties were invited at the hearing to produce a list of issues which should be referred to the hearing of oral evidence in terms of Uniform rule 6(5)*(g)*. Both parties submitted lists of issues, which are simplified below.

[76] The issues are as follows:

(a) Whether there was any dishonesty or unworthy conduct on the part of the first respondent in the administration of Ms Sheriffa Bacus's property.

(b) Whether there was sufficient monies in the first respondent's trust account of Ms Sheriffa Bacus for the payment of R194 399.47 on 29 July 2016 and, if so, why the first respondent did not make payment towards the administration of the property.

(c) Whether the first respondent's books of account were properly managed and maintained, specifically whether the first respondent maintained a proper fee and transfer journal.

(d) What monies were held in the first respondent's trust account between the period January 2013 to 29 July 2016.

(e) Whether the first respondent utilized trust monies to pay other creditors.

(f) Whether the first respondent withdrew monies from his trust account from the period 4 May 2015 to 17 September 2017 on no less than six occasions in the sum of R53 975.00? If so, what was the purpose of these withdrawals and whether these monies were credited to his trust account.

(g) Whether there was a deficit of R979 573.71 for the period ending 29 February 2016 in the first respondent's trust account.

(h) Whether there was a debit balance in the first respondent's trust account as at 30 November 2016 in the sum of R13 256.01.

(i) Whether the contents of the inspection report dated 1 December 2016 is factually correct.

Costs

[77] The conduct of the first respondent in defending himself with the various unsustainable legal points, the presentation of his case by his legal representatives with a prolix and cumbersome supplementary affidavit and voluminous heads of argument (totalling almost 71 pages) is unsatisfactory, and demonstrates an attempt by the first respondent to cloud the substance of the application. These are factors that in my view, the court hearing the referral to oral evidence might want to consider in the final determination of the question of costs. At this stage it is however appropriate and in line with the usual practice to reserve costs for determination by the court hearing the oral evidence.

Order

[78] In the circumstances I make the following order:

1. The matter is referred for the hearing of oral evidence in terms of uniform rule 6(5)*(g)* at a time and date to be arranged with the Registrar on the following issues:

(a) Whether there was any dishonesty or unworthy conduct on the part of the first respondent in the administration of Ms Sheriffa Bacus's property.

(b) Whether there was sufficient monies in the first respondent's trust account of Ms Sheriffa Bacus for the payment of R194 399.47 on 29 July 2016 and, if so, why the first respondent did not make payment towards the administration of the property earlier.

(c) Whether the first respondent's books of account were properly managed and maintained, specifically whether the first respondent maintained a proper fee and transfer journal.

(d) What monies were held in the first respondent's trust account between the period January 2013 to 29 July 2016.

(e) Whether the first respondent utilized trust monies to pay other creditors.

(f) Whether the first respondent withdrew monies from his trust account from the period 4 May 2015 to 17 September 2017 on no less than six occasions in the sum of R53 975.00. If so, what was the purpose of these withdrawals and whether these monies were credited to his trust account.

(g) Whether there was a deficit of R979 573.71 for the period ending 29

February 2016 in the first respondent’s trust account.

(h) Whether there was a debit balance in the first respondent’s trust account as at 30 November 2016 in the sum of R13 256.01.

(i) Whether the contents of the inspection report dated 1 December 2016 is factually correct.

2. The various deponents to the affidavits filed may be called as witnesses as well as any other witness(es) that the parties may wish to call, provided that notice be given to the other party fourteen (14) days before the date appointed for the hearing of oral evidence.

3. Either party may subpoena any person to give evidence at the hearing whether such person has consented to furnish a statement or not.

4. Within 21 days or the granting of this order, each of the parties shall make discovery under oath, of all documents relating to the issues referred to under paragraph 1 hereof, which are or have at any time been in the possession or under the control of such party. Such discovery shall be made in accordance with Uniform rule 35 and the provisions of that rule with regard to the inspection and production of documents discovered shall be operative.

5. Costs are reserved for determination by the Court hearing the oral evidence.

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GOUNDEN AJ

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BEZUIDENHOUT J

Appearances

Attorney for the applicant	:	Mr S Chetty
Instructed by	:	Siva Chetty and Company
Counsel for the first respondent	:	Mr DJ Botha
Instructed by	:	Udesh Ramesar
Date of hearing	:	13 March 2023
Date of judgment	:	9 June 2023