



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

REPORTABLE

In the matter between:

Case No: 3630/2021

**THE EASTERN CAPE PROVINCIAL COUNCIL OF
THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL**

Applicant

and

JULIA MFUNDISI

Respondent

Coram: Lowe J *et Bands AJ*
Date heard: 21 July 2022
Delivered: 20 October 2022

JUDGMENT

BANDS AJ:

[1] At the cornerstone of the legal profession, is the ethical code of conduct which governs its members' moral and professional duties, not only towards each

other and towards the members' clients, but also towards the court. It is a respected and honourable profession, which demands impeccable standards of honesty, integrity, and reliability from its members. It is against this backdrop that the applicant has brought the respondent before court.

[2] The South African Legal Practice Council ("*the Council*") was established in terms of section 4 of the Legal Practice Act, 28 of 2014 ("*the LPA*"). Amongst its objects is (i) the promotion and protection of the public interest; (ii) the regulation of all legal practitioners and candidate legal practitioners; (iii) the enhancement and maintenance of the integrity and status of the legal profession; and (iv) the determination, enhancement, and maintenance of the appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners.¹

[3] In order to achieve these objects, the Council is empowered to do all things necessary for the proper and effective performance of its functions or the exercise of its powers.² Such powers include the power to institute or defend legal proceedings on behalf of the Council,³ and to delegate any of its powers and its functions to its committees or Provincial Councils⁴ established in terms of section 23 of the Act, such as the applicant herein.

¹ Section 5 of the Act, and more particularly, sub-sections (c); (d); (f); and (g).

² Section 6(1)(b)(iii) of the Act.

³ Section 6(1)(a)(v) of the Act.

⁴ Section 6(1)(a)(x) of the Act.

- [4] By reason of the respondent's conduct, which culminated in criminal proceedings against her in the Commercial Crimes Court, and which ultimately led to her conviction of fraud, the applicant seeks an order in accordance with section 31(1)(a) of the Act; read together with section 44(1) thereof, striking the respondent's name from the roll of attorneys; alternatively, an order interdicting the respondent from practising as an attorney.⁵
- [5] On 10 August 2021, the respondent was interdicted from practicing as an attorney of this court, pending the outcome of disciplinary proceedings against the respondent, as well as the outcome of these proceedings (if any).
- [6] It is apposite to mention, that the interdict proceedings served before my colleague Lowe J; sitting together with Kruger AJ, on an uncontested opposed basis. Whilst the respondent had filed a notice of intention to oppose the said proceedings, she failed to file papers in opposition to the application. On the date of hearing, neither her nor her attorney of record were present in court. Accordingly, the matter was determined on the applicant's version only. Given my colleague's former involvement in the interdict proceedings and being mindful of note 13(iv) of the Code of Judicial Conduct, the court, whilst of the view that there existed no grounds for Lowe J's recusal,⁶ enquired from the respondent's legal representative in open court, prior to the hearing of the matter, as to whether the respondent contended there to be a conflict of

⁵ And other ancillary relief.

⁶ In that the Court was satisfied that there existed no real or reasonably perceived conflict of interest; nor did there exist a reasonable suspicion of bias based upon objective facts as envisaged in article 13 of the Code of Judicial Conduct GG 35802 of 18 October 2012.

interest and whether the respondent intended seeking the recusal of Lowe J. No such conflict was contended for. Moreover, the respondent's attorney of record advised that the respondent had no intention of seeking the recusal of Lowe J. The matter accordingly proceeded with the court as constituted. I now turn to the facts of the present dispute.

[7] It is common cause that whilst the respondent, prior to the granting of the aforesaid interdict, practiced as an attorney of this court under the name and style of J Mfundisi Attorneys in Makhanda, she, at the time of the commission of the offence convicted of; was a non-practicing attorney. Nothing turns on this.⁷

[8] The chronology of the events leading to the respondent's conviction and the institution of these proceedings, are as follows.

[9] The respondent was previously employed as a litigation officer by the Road Accident Fund ("*the RAF*"), at its East London offices. In order to facilitate direct claims from members of the public who had been involved in motor vehicle accidents, the RAF created a roadshow, termed Project Siyenza, to create awareness amongst the public regarding the RAF and to provide assistance to members of the public, without the need for such persons to

⁷ It was conceded on behalf of the respondent that whilst the court, in this case, was not concerned with misconduct committed by the respondent in her professional capacity as an attorney, the court will in a proper case remove an attorney from the roll where he or she has been convicted of a crime which was not committed in his or her professional capacity.

See: *Incorporated Law Society v Transvaal v Mandela* 1954 (3) SA 102 at 107 B-H.

engage the services of an attorney. The respondent was the co-ordinator of Project Siyenza.

- [10] As a consequence of the incident arising in 2014, which I deal with in greater detail hereunder, the respondent was arraigned before the Regional Court of the Eastern Cape in the Specialised Commercial Crimes Court, Port Elizabeth (as it then was), under case number CCC1/47/2015, on a charge of fraud.
- [11] The State's case against the respondent was that on 26 July 2014, the complainant, Mr Mncedi Dyosi ("*Dyosi*"), met the respondent in Zwelitsha, when he approached the RAF directly. It was further contended that the respondent, unlawfully and falsely, with the intention to defraud Dyosi advised him that as a self-claimant, the RAF would not entertain a claim based on future loss of income (in circumstances where she knew this not to be true); and that by signing certain documentation, which the respondent provided to him, she would assist Dyosi in instituting a claim against the RAF. Unbeknown to Dyosi at the time of signature thereof, the said documentation served to terminate the RAF's mandate and in its stead, appointed B. Bangani Attorneys as his legal representative, subject to a contingency fee agreement in terms of which the attorneys would be entitled to procure 25% of any award obtained from the RAF, as fees. The respondent thereafter notified the RAF on 18 August 2014 that direct communication with Dyosi must cease, given that he was now legally represented, and B Bangani Attorneys, in turn, lodged a claim against the RAF. Dyosi, upon becoming aware of the true state of affairs, immediately terminated the services of B Bangani Attorneys. Evidence was

further led on behalf of the State that on 2 September 2014, an official of the RAF requested a meeting with the respondent, following an investigation into Dyosi's claim. The respondent advised that she had left the building, without permission, and that she was not available for the meeting as she had a family crisis. The respondent resigned on the afternoon of the same day, and never returned to her office. She subsequently began operating her firm on 14 September 2014.

[12] The respondent pleaded not guilty to the charge against her. At the end of the trial, the Commercial Crimes Court accepted the evidence on behalf of Dyosi and rejected the evidence adduced by the respondent. The respondent was found guilty, beyond reasonable doubt. The respondent did not impress the court as a witness, which found that (i) her version of events was improbable; (ii) she contradicted herself and her instructions with her advocate; (iii) she was evasive in answering pertinent questions; (iv) she did not hesitate to fabricate her evidence when "*painted into a corner*"; and (v) she contradicted herself on several aspects.

[13] The respondent was accordingly convicted as charged on 3 October 2016, whereafter she was sentenced, on 4 January 2017, to a fine of R100,000.00; alternatively, direct imprisonment for a period of three years. Provision was made for the fine to be paid in monthly instalments in the amount of R10,000.00 per month.

[14] The respondent applied to this Honourable Court for leave to appeal, which application was dismissed on 13 October 2017. She subsequently made application for leave to appeal to the Supreme Court of Appeal, which application was also dismissed. Aggrieved by the aforesaid findings, the respondent applied for leave to appeal to the Constitutional Court, which dismissed the said application on 6 June 2019.

[15] A complaint regarding the respondent's conduct, having previously been lodged with the Cape Law Society, was thereafter correctly transferred to the applicant to attend to.

[16] Following the constitution of an investigation committee in terms of section 37(1) of the Act; read together with Rule 40 thereof, the committee investigated the circumstances surrounding the respondent's conviction and prepared a written report and recommendation. The extracts from part B of the report bear repetition herein:

“6. *Respondent has exploited all avenues to challenge the guilty verdict of Fraud. She has failed each challenge.*

7. *Council has no alternative but to accept guilty verdict of fraud passed on 3 October 2016.*

8. *...*

9. *The Committee directs that Ms Mfundisi be required to respond to the charge that she was guilty of Unprofessional Conduct for contravening:*

(1) Rule 40:1 – Fail to maintain the highest standard of honesty and integrity;

(2) Read with Rule 40:14 – Bringing the profession into disrepute in that:

9.1 ...

9.2 ...

9.3 ...

9.4 ...

9.5 ...

9.6 *She delayed finalisation of proceedings against her by exploiting every possible avenue through our Courts to continue to deny liability and guilt.*

9.7 ...

9.8 *She showed no remorse to her action and the finding of guilty in respect of the fraud charges and in her letter to the Legal Practice Council dated 15th December 2022, she submitted that because she paid the aforementioned fine in full, that no sanction should be imposed. This demonstrates her lack of remorse and lack of accountability and responsibility towards the community at large."*

[17] Part C of the report, which contains the proposed appropriate sanction of the investigation committee, records *inter alia*, that the complaints and criminal charges and verdict of guilty against the respondent are of a very serious nature incorporating dishonesty and a breach of trust and accordingly recommends that proceedings against the respondent must be concluded against her "soonest". It was further recommended that an application must be made to this Honourable Court to suspend the respondent from practicing as an attorney, pending an application to have her name struck from the roll of attorneys.

[18] The disciplinary process against the respondent, as envisaged in section 38 of the Act; read together with section 39 thereof, ran parallel to the interim interdict proceedings, to which I have previously referred.

- [19] A disciplinary hearing was held on 15 July 2021, whereafter the disciplinary committee's determination came to hand on 17 August 2021. As previously stated, the interim interdict was granted on 10 August 2021. The significance of these dates becomes more apparent hereunder.
- [20] The disciplinary committee ultimately advised the applicant to approach this Honourable Court to apply for an order that the respondent be suspended from practicing for a period of one year, which suspension is to be suspended for three years on condition that the respondent is not found to have committed any dishonest conduct during the period of suspension.
- [21] Apparent from the disciplinary committee's ruling is that the respondent, despite asserting her innocence throughout the criminal proceedings, elected to plead guilty to the charges of misconduct. The respondent's guilty plea was unqualified; it was accompanied by a full explanation of her personal circumstances at the time of the infraction; and the respondent expressed remorse. It is apparent, *ex facie* the finding, that the respondent's conduct in this regard weighed heavily in the committee's determination of the appropriate sanction, being that of a suspension (suspended) as opposed to one that was more onerous. Whilst such about turn would, in certain circumstances, indicate an acceptance by the respondent of the findings against her in the criminal proceedings⁸ and the reformation of the applicant,

⁸ In the Commercial Crimes Court, which were duly upheld by this Honourable Court; the Supreme Court of Appeal; and the Constitutional Court.

it is regrettable that the respondent's conduct, subsequent to the disciplinary proceedings, evidences the contrary.

[22] Following the granting of the interim interdict on 10 August 2021, the respondent launched urgent proceedings in this court on 16 August 2021, in which she sought that the interim interdict be stayed and rescinded. I interpose to highlight that the application was launched one day prior to the date on which the committee's ruling was made available to the parties.

[23] The urgent application was set down for hearing on 24 August 2021 and again on 7 September 2021. On the first occasion, the matter was struck from the roll with the issue of costs reserved, by reason of the late filing of papers. On the second occasion, the matter was removed from the roll with the issue of costs reserved following a *prima facie* view having been expressed by Brooks J, before whom the application served. Subsequently, the respondent has made no further attempt to pursue the application.

[24] Startlingly, the entire basis of the respondent's application was that "*the outcome of the disciplinary proceedings was a suspended fine namely R20 000.00 suspended for three years*" and that the applicant had failed to inform the court of this fact on 10 August 2021 when seeking interdictory relief.

[25] It is common cause, on the papers before this court, that not only had the ruling from the disciplinary committee not yet come to hand at the time that the respondent launched her urgent application, but the outcome of such

proceedings, as contended for by the respondent, bears no resemblance to the actual outcome received from the disciplinary committee on 17 August 2021. In the absence of any cogent explanation from the respondent for her conduct, it must be inferred that the respondent attempted to mislead the court in the urgent application, for self-serving purposes.

- [26] What is more, the respondent in an effort to persuade this court that she is a fit and proper person to remain on the roll of attorneys, once again asserts her innocence, notwithstanding the stance adopted by her in the disciplinary proceedings. To this end, the respondent goes as far as to state that:

“4.6 I must state categorically that there is nothing unlawful, untoward or irregular in all what I did. My conduct is not even closure (sic) to committing fraud or any other offence for that matter.”

- [27] The stance adopted by the respondent is not only dishonest but is reprehensible in the extreme.

- [28] The version placed before this court by the respondent, albeit in less detail than in the criminal proceedings, is the very same version that was rejected by the Commercial Crimes Court. It is not open to this court to revisit the factual findings of the Commercial Crimes Court, which findings are final and binding. In the context of the present proceedings, it was the content of the

judgment which the respondent was required to answer,⁹ which she elected not to do.

[29] In addition to attacking the merits of the present application on the basis that she is a fit and proper person, the respondent has raised three technical points *in limine*, in opposition to the relief sought. I intend dealing with the points *in limine* first.

Section 40(3)(a)(i) of the Act and the procedure envisaged therein

[30] The respondent, relying on section 40(3)(a)(i) of the Act, contends that the “*punishment*” imposed by the disciplinary committee is not susceptible to being brought to court in the manner pursued by the applicant and accordingly the application ought to fail on this ground alone.

[31] Put differently, the respondent’s complaint appears to lie in the relief sought by the applicant, contending same to be incompetent by virtue of section 40(3)(a)(i) of the Act.

[32] Section 40(3)(a)(i) of the Act caters for situations in which the disciplinary committee finds a legal practitioner to be guilty of misconduct and imposes a sentence that the legal practitioner is to pay compensation, with or without interest to the complainant. In such circumstances, the order is subject to

⁹ *Legal Practice Council v Beverley Ann Carruthers*, unreported judgment of this Honourable Court, delivered on 16 September 2021, by Roberson J (Pakati J concurring), under case number 1473/2021.

confirmation by an order of any court having jurisdiction, on application by the applicant.

[33] In the present instance, the sanction imposed by the disciplinary committee falls within the ambit of section 40(3)(a)(iv) of the Act and is properly before court.

[34] Accordingly, the respondent's reliance on section 40(3)(a)(i) of the Act is misguided and can accordingly be dismissed out of hand.

The interpretation of Section 40(8) of the Act

[35] The respondent, placing reliance on section 40(8) of the Act, contends that the applicant is bound by the sanction of the disciplinary committee and accordingly, the applicant is "*estopped from applying for a sanction different to that proposed*" by the said committee.

[36] Given the present lack of legal authority in respect of section 40(8) of the Act, the applicant requests that this court deal with the interpretation of the section to provide clarity.

[37] It is necessary to begin by considering the court's role in applications of this nature, as well as that of the applicant, as has been repeatedly articulated by the courts prior to the commencement of the Act. I thereafter turn to consider, the impact, if any, that the Act has had on the above position, and more

particularly, whether the applicant's function has been circumscribed by section 40(8).

- [38] Proceedings such as the present are not ordinary civil proceedings but are *sui generis* in nature. In this regard, Kroon J at paragraph [4.1] of *General Council of the Bar of South Africa v Matthys*,¹⁰ stated as follows:

"The proceedings are not ordinary civil proceedings, but are sui generis in nature: they are proceedings, of a disciplinary nature, of the Court itself, not those of the parties; the Court exercises its inherent right to control and discipline the practitioners who practise within its jurisdiction; the applicant, in bringing the application, acts pursuant to its duty as custos morum of the profession; in the interests of the Court, the public at large and the profession, its role is to bring evidence of a practitioner's misconduct before the Court, for the latter to exercise its disciplinary powers; the proceedings are not subject to all the strict rules of the ordinary adversarial process."

- [39] The applicant, in bringing such matters before court, does so in fulfilment of a public duty by bringing the conduct of a legal practitioner to the attention of the court to allow the court to exercise its supervisory functions over its officers. In *Van den Berg v General Council of the Bar of SA*¹¹ Nugent JA, writing for the Supreme Court of Appeal, noted as follows at paragraph [2]:

"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."

¹⁰ 2002 (5) SA 1 (E) at paragraph 4(1).

¹¹ [2007] 2 All SA 499 (SCA) at paragraph 2.

[40] Accordingly, the exercise of the court's supervisory powers over the conduct of legal practitioners is not only to discipline errant practitioners, but also to promote and protect the public interest.¹²

[41] Corbett J, in *Law Society, Transvaal v Behrman* emphasised that:¹³

"Clearly the Law Society has an interest to ensure that persons who are admitted, or re-admitted, and enrolled as attorneys and who by practising become members of the Law Society are fit and proper persons to be so admitted or re-admitted. The interest comprehends not only the relationship which is created between a member and Society but also the duties and responsibilities which the Law Society assumes in regard to members to the Court and to the general public."

[42] Insofar as the appropriate sanction is concerned, and whilst I deal with this aspect in greater detail later in the context of the respondent cited herein, it suffices at this juncture to emphasise that it is the court which remains the final arbiter, in the exercise of its discretion, as to whether a practitioner ought to be removed from the roll of attorneys or whether an order suspending the practitioner would be appropriate in the circumstances.

[43] In terms of section 44(1) of the Act:

"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."

¹² *Law Society of the Cape of Good Hope v Budricks* [2002] 4 All SA 441 (SCA) at paragraph 7.

See also: *Johannesburg Society of Advocates & Another v Nthathi & Others* 2021 (2) SA 434 (SCA).

¹³ 1981(4) SA 538 (AD) at 551 E-F.

[44] Accordingly, and by virtue of the express provisions of section 44(1) of the Act, the court's role, and the powers that it has in adjudicating applications such as the present, remains unchanged notwithstanding the commencement of the Act.

[45] Section 40 of the Act, in broad terms, deals with the procedural aspects which follow disciplinary proceedings pertaining to legal practitioners, candidate legal practitioners and juristic entities. It includes the duties and powers of the disciplinary committee, including those pertaining to sanction, following a finding of misconduct, and the concomitant rights of such practitioner or legal entity, as the case may be, insofar as mitigation of sentence is concerned.

[46] For present purposes, the provisions of section 40(3)(a)(iv) of the Act are of relevance:

“(3) If found guilty of misconduct, the disciplinary committee concerned may call witnesses to give evidence in aggravation of sentence and may-

(a) in the case of a legal practitioner:

(i) ...

(ii) ...

(iii) ...

(iv) advise the Council to apply to the High Court for-

(aa) an order striking his or her name from the Roll;

(bb) an order suspending him or her from practice;

(cc) an interdict prohibiting him or her from dealing with trust monies; or

(dd) any other appropriate relief.”

[47] In the present instance, it is common cause that the disciplinary committee advised the Council to approach this court for relief in accordance with section 40(3)(a)(iv)(bb) of the Act.

[48] Section 40(8) of the Act, reads as follows:

“The Council must give effect to the advice and decision of a disciplinary committee.”

[49] The language used in section 40(8) is uncomplicated. The question which remains to be answered however, is whether section 40(8) precludes the Council, or the relevant Provincial Council as the case may be, from seeking relief outside of the sanction deemed appropriate by the disciplinary committee. The answer to this question must, of necessity, be no.

[50] Our courts have over time, developed harmony, in the proper approach to the interpretation of documents. As succinctly set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.¹⁴

“[18] ... The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one

¹⁴ 2012 (4) SA 593 (SCA).

that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.

...

[19] All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in Jaga v Dönges NO and another, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:

'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'

...

[23] ... If interpretation is, as all agree it is, an exercise in ascertaining the meaning of the words used in the statute and is objective in form, it is unrelated to whatever intention those responsible for the words may have had at the time they selected them. Their purpose is something different from their intention, as is their contemplation of the problem to which the words were addressed.

[25] ... [W]hen the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity."

[51] The Supreme Court of Appeal, in *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others*,¹⁵ cautioned against

¹⁵ (470/2020) [2021] ZASCA 99 (09 July 2021) at paragraph [49].

utilising the principals enunciated in *Endumeni Municipality* as an open-ended permission to pursue undisciplined and self-serving interpretations. Unterhalter AJA went on further to state at paragraph [50] that:

“Endumeni simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.”

[52] At paragraph [51] Unterhalter AJA, commented, in the context of contracts, that:

“Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.”

[53] The same can be said regarding the drafters of legislation and statutory interpretation.

[54] The disciplinary committee is a disciplinary body,¹⁶ established by the Council in terms of section 37 of the Act and is tasked with the conduct of disciplinary

¹⁶ Section 1 of the Act.

hearings subject to the provisions of section 39 of the Act and the rules determined by the Council.

[55] It is the Council that is the statutory, regulatory authority, and which acts as the *custos morum* of the profession and accordingly it is the Council that has the power to institute legal proceedings to *inter alia*, achieve its objects set out in section 5 of the Act, which as previously stated, includes the promotion and protection of the public interest; the regulation of all legal practitioners; and the enhancement and maintenance of the integrity and status of the legal profession.

[56] If regard is had to the wording of section 40(8), due consideration being had to the factors enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* and *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others*, it is clear that the purpose of the said section is to ensure that the Council acts upon all infractions, as determined by the disciplinary committee.

[57] Nowhere in the sub-section under consideration, or in the broader context of section 40, does the legislation make the content of the ruling, and the sanction deemed to be appropriate by the disciplinary committee final and binding on the Council.

[58] In the event that section 40(8) was to be given the meaning ascribed to it by the respondent, same would lead to absurd results as cautioned against by the Supreme Court of Appeal.

[59] By way of illustration, if on a consideration of the facts of a particular matter, there is no doubt that a suspension from practice is entirely incompatible with the finding that a particular person was not a fit and proper person to continue practising, but the disciplinary committee incorrectly ruled that the sanction ought to be one of suspension, which in itself was suspended, it would result in the anomalous situation that the Council, or the Provincial Council as the case may be, would be bound to seek an order in line with the committee's ruling in relation to a person who is explicitly unfit to continue practising as an attorney.

[60] Moreover, circumscribing the relief that the Council can seek, in proceedings such as the present, would serve to have no practical effect, in that it is the court which ultimately determines the appropriate sanction in each case.

[61] Having determined the interpretation of section 40(8) as aforesaid, the respondent's second point *in limine* must fail.

Notice in terms of Uniform Rule 7

[62] The respondent, haphazardly, raises her third point *in limine* by (i) disputing that the deponent to the applicant's founding papers is the chairperson of the

applicant and that she has the requisite authority to depose to the founding papers and institute the proceedings; and (ii) by contending that the applicant, in this regard, has failed to respond to the respondent's notice in terms of Uniform Rule 7.

[63] The respondent's use of the procedure envisaged in Uniform Rule 7 is misplaced. The authority contemplated by Uniform Rule 7 is the authority given by a client to his or her attorney to authorise the attorney to institute or defend proceedings on his or her behalf. It does not contemplate a general authority by one person to another to represent him or her in legal proceedings. In the latter instance, if the attorney is authorised so to act on behalf of such party, there is no need for any other person, whether he or she is a witness or someone who becomes involved, to be additionally authorised.¹⁷

[64] The applicant in any event, *ex abundante cautela*, filed an affidavit in reply dealing with the deponent's designation and her authority to launch the application and depose to all necessary affidavits, which is permissible in the circumstances.¹⁸

[65] Accordingly, there is no merit in the objection raised to the deponent's authority.

¹⁷ Erasmus, Superior Court Practice, Juta. B1-59 [Service 41, 2013] and the authorities cited therein at fn's 4 and 5.

¹⁸ *Moosa and Cassim NNO v Community Development Board* 1990 (3) SA 175 (A) at 180H – 181C.

[66] Belatedly, the respondent in her heads of argument, contends that it is the Council that has the requisite *locus standi* to institute the present proceedings and not the Provincial Council. Without dealing with the irregular manner in which the point *in limine* was raised, it suffices to point out that the Council, as repeatedly stated herein, is empowered by the Act to delegate any of its powers to a Provincial Council¹⁹ and accordingly I need not deal with this aspect any further.

[67] Having disposed of the respondent's points *in limine*, I now turn to deal with the main enquiry before this court, being the enquiry into whether or not the respondent is a fit and proper person to practice as an attorney of this court.

Merits of the enquiry before the court

[68] The enquiry before court contemplates a three-stage enquiry and can be summarised as follows:²⁰

“The test to determine whether a person is fit and proper is well established and needs no further elaboration. The first enquiry is to determine whether the offending conduct has been proven on a balance of probabilities. Once this is shown, the second enquiry is to determine whether the person is fit and proper taking into account the proven misconduct. The final enquiry is to determine whether the person concerned should be suspended from practice for a fixed period or should be struck off the roll. The last two enquiries are matters for the discretion of the court, which involve a value judgment.

¹⁹ Section 6(1)(a)(x) of the Act; read with section 21(1)(d) of the Act.

²⁰ *Hewetson v The Law Society of the Free State* [2020] ZASCA 49 (5 May 2020) at paragraph [4].

See also: *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) at paragraph [2]; *Malan and Another v Law Society of the Northern Provinces* 2009 (1) SA 216 (SCA) at paragraph [4].

[69] The aforesaid requirements are dealt with *ad seriatim* below.

Has the alleged offending conduct been established on a preponderance of probabilities?

[70] The respondent stands convicted of fraud, a crime with an element of dishonesty. Such conviction is final and binding and cannot be revisited. The respondent's conduct leading up to her conviction, and thereafter, has been set out in detail.

[71] Where an attorney is convicted of an offence, which is of a seriously sufficient nature, such conviction serves as *prima facie proof* that he or she is unfit to be on the roll of attorneys.²¹

[72] The respondent, as highlighted by the investigation committee, delayed the finalisation of the criminal proceedings through every possible avenue for the purposes of delaying the inevitable. Her delay tactics continued by the launch of the urgent rescission proceedings in relation to the interim interdict granted on 10 August 2021. The assertions made by the respondent in the rescission proceedings evidences her continued lack of integrity and dishonesty and a clear lack of reformation since the commission of the fraudulent incident in 2014.

²¹ *Kwazulu-Natal Law Society v Veronica Singh* (1526/2010) [2011] ZAKZPHC 12 (25 March 2011).

[73] Despite the finding of the Commercial Crimes Court, and notwithstanding the respondent's plea of guilty before the disciplinary committee, she has, in the present proceedings, once again continued to protest her innocence, and unscrupulously denies, without any basis, that her conduct was unlawful. The respondent shows no remorse for her actions and demonstrates no appreciation for her wrongful conduct.

[74] It is expected of a respondent in proceedings of this nature, to make a full disclosure to enable the court to assess his or her motives and conduct. The respondent's conduct herein falls far short of the degree of disclosure and openness required of an attorney.²²

[75] There can accordingly be no doubt that alleged offending conduct has been established on a preponderance of probabilities.

Is the respondent a fit and proper person taking into account the proven misconduct

[76] In answering this question, the conduct of the respondent must be weighed against that which is expected from an attorney of this court.

[77] The Supreme Court of Appeal has repeatedly emphasised that the attorneys' profession is an honourable one which demands complete honesty, reliability and integrity from its members.²³

²² *Botha and other v Law Society, Northern Provinces* 2009 (3) SA 329 (SCA) at paragraph [18].
South African Legal Practice Council v Bobotyana [2020] 4 All SA 827 (ECG) at paragraph [76].

[78] In *General Council of the Bar of South Africa v Geach & Others*,²⁴ Ponnann JA commented as follows:

“After all they are the beneficiaries of a rich heritage and the mantle of responsibility that they bear as the protectors of our hard won freedoms is without parallel. As officers of our courts lawyers play a vital role in upholding the Constitution and ensuring that our system of justice is both efficient and effective. It therefore stands to reason that absolute personal integrity and scrupulous honesty are demanded of each of them. It follows that generally a practitioner who is found to be dishonest should in the absence of exceptional circumstances expect to have his name struck from the roll.”

[79] The respondent’s conduct displays a complete lack of integrity and dishonesty and is contemptuous of the applicant, being the regulatory authority of the profession, and of this court. The respondent is unrepentant. I am accordingly satisfied that the respondent is not a fit and proper person to practise as an attorney.

Should the respondent be suspended from practice for a fixed period (such suspension to be suspended) or should she be struck off the roll

[80] In *Jasat v Natal Law Society*²⁵ the court stated that:

“Whether a court will adopt the one course or the other will depend upon such factors as the nature of the conduct complained of, the extent to which it reflects upon the person’s character or shows him to be unworthy to remain in the ranks of an honourable profession... the

²³ *Law Society of the Cape of Good Hope v Randell* [2015] 4 All SA 173 (ECG).

Vassan v Law Society of the Cape of Good Hope 1998 (4) SA 532 (SCA) at 538 G-I.

General Council of the Bar of South Africa v Geach & Others 2013 (2) SA 52 (SCA).

²⁴ *Supra* at paragraph [87].

²⁵ 2000 (3) 44 (SCA) at 51 H-I.

likelihood or otherwise of a repetition of such conduct and the need to protect the public. Ultimately it is a question of degree."

[81] I have dealt with the respondent's conduct at length.

[82] Logic dictates that once a court finds that a person is not a fit and proper person to practice an attorney, it must follow that his or her name be struck from the roll of attorneys. An order suspending the respondent from practice, wholly suspended, is wholly incompatible with the above finding.

[83] In this regard, the Supreme Court of Appeal in *Law Society of the Cape of Good Hope v Budricks* (supra) stated as follows at paragraph [7]:

"...The suspension of his suspension from practice is entirely incompatible with the finding that he was not a fit and proper person to continue practising and resulted in the anomalous situation that a person who had explicitly been pronounced unfit to do so, was allowed to continue his practice. (Logically, a striking off order or an order of suspension from practice should only be suspended if the court finds that the attorney concerned is a fit and proper person to continue to practice but still wishes to penalize him..."

[84] In light of the aforesaid, there exists no other appropriate order other than to strike the respondent's name from the roll.

[85] In the result, I make the following order:

1. The respondent's name be and is hereby struck from the roll of attorneys.

2. The applicant is directed to cancel the enrolment of the respondent as an attorney as envisaged in Section 31(1)(a) of the Legal Practice Act 28 of 2014 (*"The LPA"*).
3. The respondent shall surrender and deliver to the Registrar of this Court her certificate of enrolment as an attorney.
4. Should the respondent fail to comply with the provisions of the preceding paragraph of this order within 2 (two) weeks from date hereof, the Sheriff of the District, in which such certificate of enrolment is, is empowered and directed to take possession of and deliver the same to the Registrar of this Court.
5. The respondent shall deliver her books of account, records, files and documents containing particulars and information relevant to:
 - 5.1 any moneys received, held or paid by the respondent from or on account of any person;
 - 5.2 any moneys invested by the respondent in terms of sections 78(1), 78(2) and/or section 78(2A) of Act No. 53 of 1979 and sections 86(2), 86(3) and section 86(4) of the LPA;
 - 5.3 any interest or moneys so invested, which was paid over or credited to the respondent;

5.4 any estate of a deceased person, or any insolvent estate, or any estate placed under curatorship of which the respondent is the executor, trustee or curator or which the respondent is administering on behalf of the executor, trustee or curator of such estate; and

5.5 the respondent's practice as an attorney;

to the curator appointed hereunder, provided that as far as such books of account, records, files and documents are concerned, the respondent shall be entitled to have access to them, but always subject to the supervision of such curator or a nominee of such curator and provided that such curator shall be and is authorised and directed to release such books of account, records, files and documents upon production to him/her of the certificate referred to in paragraph 3 above.

6. Should the respondent fail to comply with the provisions of the preceding paragraph of this order within 1 (one) week after service thereof upon her or after a return by the person entrusted with the service thereof that he/she has been unable to effect service thereof on the respondent, as the case may be, the Sheriff for the District in which such books of account, records, files and documents are, is empowered to take possession of and deliver them to such curator.

7. The curator is entitled and is directed to:

- 7.1 hand over to the persons entitled thereto all such records, files and documents;
 - 7.2 hand over all such records, files and documents over which the respondent exercised a *lien* to the persons entitled thereto as soon as he/her has satisfied himself/herself that the fees and disbursements in connection therewith, if any, have been paid or secured, or in the event of any dispute as to the provisions of security, in his/her discretion.
8. A written undertaking by a person to whom the records, files and documents referred to in paragraph 5 above are handed, to pay such amount as may be due to the respondent, either on taxation or by agreement, shall be deemed to be satisfactory security for the purposes of the preceding paragraph hereof provided that such written undertaking incorporates a *domicilium citandi et executandi* of such person.
9. Such curator is authorised and directed to require that any such file, the contents of which he/she may consider to be relevant to a claim, or possible or anticipated claim, against him/her and/or the respondent and/or the respondent's clients and/or the Legal Practitioners Fidelity Fund ("*The Fund*") in respect of money and/or other property entrusted to the respondent, be re-delivered to such curator.

10. The respondent is interdicted and prohibited from operating on her trust account(s).
11. The Director, failing whom, the Acting Director, failing whom, the Deputy Director, failing whom, the Acting Deputy Director, failing whom, the Assistant Director, failing whom, the Acting Assistant Director for the time being of the applicant, is appointed as curator to administer and control the trust account of the respondent comprising the separate banking accounts opened and kept by the respondent at a bank in terms of Section 86(2) of the LPA and/or any separate saving or interest-bearing accounts as contemplated by Section 86(3) and/or 86(4) of the LPA, in which money from such trust banking accounts have been invested by virtue of the provisions of the said subsection/s or in which moneys in any manner have been deposited or credited (the said account(s) being herein after referred to as "*trust account(s)*"), with the following powers and duties:
 - 11.1 subject to the approval of the Legal Practitioners' Fidelity Fund Board ("*the Board*"), to sign and endorse cheques and/or withdrawal forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which the respondent was acting at the date of this order;

- 11.2 subject to the approval and control of the Board, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against the respondent in respect of money held, received and/or invested by the respondent in terms of sections 78(1), 78(2) and/or section 78(2A) of Act No. 53 of 1979 and sections 86(2), 86(3) and 86(4) of the LPA ("*trust moneys*"), to take legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions in which the respondent may have been concerned and which may have been wrongfully and unlawfully paid from the trust account(s) and to receive such moneys and to pay the same to the credit of the trust account(s);
- 11.3 to ascertain from the respondent's books of account the names of all persons on whose account the respondent appears to hold or to have received trust moneys ("*trust creditors*") and to call upon the respondent to furnish him/her, within 30 (thirty) days of the date of this Order or such further period as he/she may agree to in writing, with the names, addresses of, and amounts due to all trust creditors;
- 11.4 to call upon such trust creditors to furnish such proof, information and affidavits as he/she may require to enable him/her, acting in consultation with, and subject to the requirements of the Board,

to determine whether any such trust creditor has a claim in respect of money in the trust account(s) and, if so, the amount of such claim;

11.5 to admit or reject, in whole or in part, subject to the approval of the Board, the claims of any such trust creditor, without prejudice to such trust creditor's rights of access to the civil courts;

11.6 having determined the amounts which he/she considers are lawfully due to trust creditors, to pay such claims in full, but subject always to the approval of the Board;

11.7 in the event of there being any surplus in the trust account(s) after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce, as the case may be, firstly, any claim of the Fund in terms of Section 86(5)(a) of the LPA in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of the respondent, the costs, fees and expenses as envisaged in this Order, or such portion thereof as has not already been separately paid by the respondent to the applicant, and, if there is any balance left after payment in full of such claims, costs, fees and expenses, to pay such balance, subject to the approval of the Board, to the respondent, if she is solvent, or, if the respondent is insolvent, to the trustee(s) of the respondent's insolvent estate;

11.8 in the event of there being insufficient moneys in the trust banking account(s) opened by the respondent as referred to above from which to pay the claims of trust creditors in full and after taking reasonable steps to ascertain the identities of such creditors and the amounts due to them to distribute *pro rata* among creditors whose claims have been proved or admitted, the amount(s) reflected by the credit balance(s) in said account(s) provided that the curator shall pay to trust creditors whose funds are held in separate accounts in terms of sections 86(2) and/or 86(3) and/or 86(4) of the LPA who satisfy him/her that they are entitled to such funds, the amounts due to such creditors;

11.8.1 subject to the approval of the Board, to close the trust account(s) and pay the credit balance(s) to the Fund and to require the credit balance(s) to be placed to the credit of a special trust suspense account in the name of the respondent in the Fund's books;

11.8.2 to refer the claims of all trust creditors to the Board to be dealt with in terms of the provisions of the LPA;

11.8.3 to authorise the Board to credit the credit balance(s) referred to in 11.8.1 above to its "Paid Claims Account" when the Fund has paid, in terms of Section 55 of the LPA, admitted claims of the trust creditors in excess of

such credit balance(s), provided that, notwithstanding the afore going, the said Board shall be entitled, in its discretion, to transfer to its "Paid Claims Account" the amount of moneys of any claim or claims as and when admitted and paid by it;

11.9 subject to the approval of the Chairman of the Board, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys and/or counsel, and/or accountants and/or other persons, where considered necessary, to assist such curator in carrying out the duties of a curator; and to render from time to time, as curator, returns to the Board showing how the trust account(s) has (have) been dealt with, until such time as the said Board notifies him/her that he/she may regard his/her duties as terminated.

12. The respondent is directed:

12.1 to pay the fees and expenses of the curator, such fees to be assessed at the rate of R850.00 per hour, including travelling time;

12.2 to pay the reasonable fees and expenses charged by any person(s) consulted and/or engaged by the curator as aforesaid;

- 12.3 to pay the costs of and incidental to this application on a scale as between an attorney and client;
- 12.4 within 1 (one) year of her having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, to satisfy the curator, by means of the submission of taxed bills of costs, or otherwise, of the amount of the fees and disbursements due (to the respondent), in respect of her former practice. And should she fail to do so, she shall not be entitled to recover such fees and disbursements from the curator without prejudice, however to such rights, if any, as she may have against the trust creditor(s) concerned for payment or recovery thereof.

I BANDS

ACTING JUDGE OF THE HIGH COURT

I agree:

M LOWE

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	K.L. Watt
Instructed by:	N.N. Dullabh & Co. 5 Bertram Street, Makhanda
For the Respondent:	T.M Jikwana
Instructed by:	Yokwana Attorneys 10 New Street, Makhanda