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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 35116/2022

Date: 15 August 2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

APPLICANT

and

JONATHAN MEIR BERKOWITZ

1ST RESPONDENT

BERKOWITZ (JM) INCORPORATED ATTORNEYS

2ND RESPONDENT

JUDGMENT

BRAND AJ (WITH MBONGWE J:

Introduction

[1] On 2 May 2023, this court suspended the first respondent, Jonathan Meir Berkowitz ('Berkowitz'), from practicing as an attorney for own account, pending finalisation of an application for him to be struck from the roll of attorneys. This court

then also ordered Berkowitz to show cause on 3 August 2023 why his name should not be struck from the roll of legal practitioners.

[2] On 4 August 2023, this court suspended Berkowitz from all forms of practice as attorney. It also extended the rule nisi granted on 2 May 2023 and ordered Berkowitz to show cause on 8 February 2024 why he should not be struck from the roll. Accordingly, when this matter came before us on the extended return date of 8 February, it was in effect an application for a final order striking Berkowitz' name from the roll of legal practitioners.

[3] However, at the hearing on 8 February, a preliminary issue arose concerning the manner in which this matter reached this court that requires consideration before the merits of the main application.

The preliminary issue

[3] The applicant is the South African Legal Practice Council ('the LPC'), a body created in terms of the Legal Practice Act 28 of 2014 ('the LPA'), inter alia to 'regulate all legal practitioners and all candidate legal practitioners', 'enhance and maintain the integrity and status of the legal profession', and 'determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners'.¹

[4] The first respondent - Berkowitz - is a member of the LPC who has been practicing as attorney since February 1995, for much of that time for his own account through the second respondent, Berkowitz (JM) Incorporated ('Berkowitz Inc').

[5] The LPC brings this application in exercise of its disciplinary mandate referred to above, through the processes and structures described in sections 36 to 44 of the LPA. The structure for disciplinary proceedings concerning a member of the LPC

¹ Section 5 of the LPA.

described there is in broad outline the following:

[5.1] When the LPC receives a complaint concerning a member, it appoints a committee to investigate the complaint. The committee investigates, and when done either, where there is *prima facie* evidence of guilt, refers the matter to the LPC for a disciplinary hearing; or dismisses the complaint out of hand.

[5.2] If the matter is referred for a hearing, the LPC appoints a disciplinary committee, which conducts a hearing. Upon its conclusion, the disciplinary committee decides whether the member concerned is guilty and, if so, imposes a sanction.

[5.3] A disciplinary committee may impose a range of sanctions on a practitioner found guilty of misconduct. However, only this court may strike a practitioner from the roll. Accordingly, when a disciplinary committee concludes that a practitioner should be struck from the roll for misconduct, it can't do so itself. Instead, it recommends to the LPC that an application be brought to this court for that purpose.

[5.4] In such a case, this court decides the application for striking on the evidence placed before it by the LPC and any response from the practitioner concerned, and after a hearing.

[6] In this light, in the ordinary course of events, a disciplinary matter concerning a member of the LPC will reach this court only once a full disciplinary hearing before the LPC has been concluded. The LPA allows two deviations from this usual sequence:

[6.1] Section 43 authorises any 'disciplinary body' of the LPC, if 'satisfied that a legal practitioner has misappropriated trust monies or is guilty of other serious misconduct' to refer the matter to the LPC to approach this court urgently for the practitioner to be temporarily suspended or for other interim relief. It is settled

that an approach to court in terms of section 43 may occur before a disciplinary hearing has been held by the LPC.² In such cases, the practice is for the ensuing process before this court then to replace the LPC's disciplinary process and for any application for striking the practitioner from the roll to be decided by this court without a prior disciplinary hearing or decision of a disciplinary committee of the LPC.

[6.2] Section **44** of the LPA determines that:

(1) The provisions of this Act [the LPA] 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.

Section 44(1) makes it clear that the inherent power of this court to decide disciplinary matters concerning a legal practitioner, which derives from its position as ultimate *custos morum* of the legal profession persists in full, despite enactment of the disciplinary powers of the LPC in the LPA. It also confirms that the concomitant common law right of anyone involved with a disciplinary matter concerning a legal practitioner to approach this court for relief, likewise, remains in place. Although probably less often, section 44 has also, like section 43, been relied

² *Law Society of the Northern Provinces v Morobadi* (1151/2017) [2018] ZASCA 185 (11 December 2018) at para [25]; *South African Legal Practice Council v Masingi* (2023/077988) [2023] ZAGPPHC 1158 (13 September 2023) at para [15]; *South African Legal Practice Council v Molati and Another* [2023] ZAGPPHC 2207; 2023-038247 (9 June 2023) at paras [7]-(15); and *Langa v South African Legal Practice Council* (79330/2018) [2023] ZAGPPHC 734 (1 September 2023) at para [8].

on by the LPC to approach this court with applications for suspension and striking from the roll, where no disciplinary hearing of the LPC has as yet taken place. In those cases, this court has accepted the LPC's approach and decided the applications.³

[7] In this matter the LPC, although it had conducted a disciplinary investigation into Berkowitz' affairs, had not yet proceeded with a disciplinary hearing before a disciplinary committee. Instead, it relied on its residual common law authority to approach this court directly concerning misconduct of a legal practitioner, recognised in section 44 of the LPA, before any such disciplinary hearing had been conducted.

[8] In the only affidavit concerning this matter that Berkowitz has placed before this court (more about this below) - a founding affidavit for his application for an extension of the return date of 3 August 2023 - he questioned the LPC's decision to approach this court rather than proceed with the matter 'in-house'. The general gist of his concern was that all the allegations of misconduct levelled against him were of such a nature that they could easily be resolved *inter se*, and that there was no need to burden this court with them.⁴ In his submissions before us during the hearing of this matter (he was not represented by counsel and appeared in person) Berkowitz persisted with this line of reasoning.

[9] Accordingly, we probed counsel for the LPC on the question of what the grounds were for the LPC's decision to approach this court with an application for suspension and striking, rather than to proceed with further 'in-house' investigation and a disciplinary hearing. At the conclusion of the hearing, we reserved judgment, but directed both the LPC and Berkowitz to file supplementary heads of argument on two issues:

³ *South African Legal Practice Council v Setati* (570/2022) (2024] ZAGPPHC 207 (13 March 2024) at para [36]; *South African Legal Practice Council v Mphanama* (9875/2022) [2022] ZALMPPHC 70 (13 December 2022) at para [5].

⁴ Founding Affidavit, Application to extend rule *nisi*, Bundle p 10-3 to 10-10.

[9.1] The authority in law, other than section 43 of the LPA, in exercise of which the LPC approached this court for the relief it sought, without first having concluded a disciplinary hearing.

[9.2] Regardless of what the source of its authority to do so is, the grounds upon which the LPC in this matter decided to proceed with an application to this court before having conducted a disciplinary hearing.

[10] Both the LPC and Berkowitz duly filed such heads, on which I rely in addressing these two questions below.

[11] Concerning the first question, it is clear that the LPC, even absent reliance on section 43, which explicitly confers on it such, has further authority to proceed against a legal practitioner in this court in a misconduct matter where it has neither commenced nor concluded a formal disciplinary hearing of its own.

[12] As submitted on behalf of the LPC both at the hearing of this matter and in supplementary heads of argument, this authority derives from the LPC's common law right to do so, which in turn is sourced in this court's inherent power to hear and decide misconduct matters concerning legal practitioners, as its officers.

[13] This inherent power and concomitant right are left intact in broad and unqualified terms by section 44 of the LPA. It reads that the provisions of the LPA do not derogate 'in any way' from this court's inherent power; and that 'nothing' in the LPA precludes any natural or juristic person with an interest in a disciplinary matter concerning a legal practitioner from approaching this court for relief. The effect of this was described thus by a full bench of this Division in *Wild v Legal Practice Council and Others*:⁵

[79] ... There is ... no indication that the common law powers of the Courts to

⁵ (31130/2019) [2023] ZAGPPHC 1762; 2023 (5) SA 612 (GP) (24 April 2023) at para [79] to [80].

regulate their own process and to recognise who may bring disciplinary proceedings before them, have been altered.

One does not find a single provision in the LPA that clearly and unequivocally indicates an intention to alter the common law or to affect the existing status of any of the voluntary associations in the legal profession.

[80] On the contrary, there is a clear and explicit indication in the LPA that it assumes the continuance or retention of the common law in this regard. Section 44(1) provides that "*the provisions of this Act do not derogate in any way*" from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner. Subsection (2) makes it clear that "*nothing contained in this Act*" precludes a juristic entity ... from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner [S]ection 44 properly analysed, appear[s] to be a ranking clause, and not merely a linking clause. It ranks above all the other provisions in the Act. I find it impossible to reconcile section 44(1) and (2) with an intention to interfere with the common law powers of the High Court. The common law in this regard seems to be acknowledged by statute, rather [than] to alter it.

[14] *Wild* was of course decided in a different context than applies in this matter (the question whether the different constituent bar councils, voluntary association rather than statutory bodies like the LPC, retained their common law powers of discipline and authority to approach this court with disciplinary matters, despite the creation of the LPC through the LPA). Nonetheless, the general approach to understanding the scope and import of section 44 established there - that it insulates the common law disciplinary powers and rights of the different associations involved in the legal profession from any limitation by provisions of the LPA - must in my view also apply to the question here, concerning the LPC's power to approach this court.

[15] Within the context of this case, what were the common law powers of the LPC's

predecessor before enactment of the LPA, which are now so insulated by section 44? This question was settled by the Supreme Court of Appeal in *The Law Society of the Northern Provinces v Morobadi*, where, prior to enactment of the LPA, it held, concerning the LPC's predecessor, the Law Society, that: '[i]n general it is correct that the Council may proceed with the application for the striking off of the practitioner or for his or her suspension from practice without pursuing a formal charge before a disciplinary committee if in its opinion, having regard to the nature of the charges, a practitioner is no longer considered to be a fit and proper person.'⁶

[16] It is this authority that persists also post the enactment of the LPA: the LPC may, where it is of the (*prima facie*) view that a practitioner is no longer fit and proper, apply to this court for that practitioner to be suspended from practice or struck from the roll without having held a disciplinary hearing of its own. That is, it may in such cases bypass its own disciplinary process and place the matter before this court directly.

[17] Berkowitz' valiant reliance on the administrative law principle of exhaustion of internal remedies does not come to his aid. In short, in his heads of argument he submitted that as applies in administrative law review cases to the reviewing party, the LPC has a duty to exhaust its own internal disciplinary processes before approaching this court for a resolution of a misconduct case against a legal practitioner. The rationale for this duty is to avoid burdening this court with matters that can be disposed of internally.⁷

[18] This administrative law principle is inapposite in this context for two reasons. First, as has often been held,⁸ the LPC in disciplinary matters concerning legal practitioners is not like an ordinary litigant, seeking to vindicate its own interests in a dispute with the legal practitioner concerned, with this court simply an arbiter of that dispute; nor is its right to approach this court 'a right to exert discipline, vesting in an

⁶ (1151/2017) [2018] ZASCA 185 (11 December 2018) at para [25].

⁷ See eg *Gavric v Refugee Status Determination Officer, Cape Town and Others* (CCT217/16) [2018] ZACC 38; 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC) (28 September 2018).

⁸ *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 408-409 as cited in *Morobadi* (above) at para [4].

organisation, operating as an ordinary litigant'.⁹ Instead, the LPC 'claims nothing for itself ... It merely brings the attorney before the Court ... , informs the Court what the attorney has done and asks the Court to exercise its disciplinary powers over him ... The [LPC] protects the interests of the public in its dealings with attorneys. It does not institute any action or civil suit against the attorney. It merely submits to the Court facts which it contends constitutes unprofessional conduct and then leaves the Court to determine how it will deal with this officer.'¹⁰

[19] Second, those cases that would, in terms of *Morobadi*, qualify to be brought to this court prior to any disciplinary hearing by the LPC (ie where the charges are such that they would, if proven, render the practitioner unfit and improper and therefore liable to be struck) will in any event end up before this court, even were a disciplinary hearing to be held. As set out above, the LPC is not authorised itself to strike a practitioner from the roll. That is the preserve of this court, of which all legal practitioners are officers and to which they all, in the final instance answer. If a disciplinary committee of the LPC finds misconduct of that nature and severity, it recommends to the Council that an application to strike be brought to this court.

[20] On the second question, *Morobadi* also provides the answer. There the Supreme Court of Appeal was clear that the Council (of the LPC's predecessor, the Law Society) was entitled to approach this court prior to having conducted a disciplinary hearing, 'if in its opinion, having regard to the nature of the charges, a practitioner is no longer considered to be a fit and proper person.'¹¹

[21] The question is in other words whether the charges against Berkowitz that existed at the time the decision was taken to approach this court are such that they would justify an opinion of the LPC's then that, if proven, they would render him unfit and improper (and as such liable to be suspended from practice or struck from the roll).

⁹ *Wild* (above) at para [61].

¹⁰ *Solomon* (above) at 408-409 as cited in *Morobadi* (above) at para [4].

¹¹ (1151/2017) [2018] ZASCA 185 (11 December 2018) at para [25].

[22] To this, the answer must be yes. The main charge initially against Berkowitz was that he had for several periods practiced for own account without a Fidelity Fund certificate. To do so, it has often been held, constitutes serious misconduct that could certainly lead to a finding that the offending practitioner is not fit and proper, and often leads to practitioners being struck from the roll.¹²

[23] Accordingly, I conclude that the LPC had ample grounds upon which to conclude, within its common law authority to do so, that Berkowitz' case should be referred to court before a disciplinary hearing had been held.

Merits

[24] In matters such as these - in effect an application for striking Berkowitz from the roll of legal practitioners, alternatively his suspension from practice - the inquiry is three-fold: first, I must determine, on the facts, whether Berkowitz is guilty of the charges levelled against him; if so, second, I must determine whether that renders him unfit and improper; and if so in turn, third, I must determine what order that warrants, ie whether he should be struck from the roll or further suspended.¹³

The charges

[25] Berkowitz faces a range of charges of misconduct. Some of these concern his conduct prior to charges initially being levelled against him; others concern his conduct since he has been charged. In sum, the charges before us are that he:

[25.1] practiced for own account without a Fidelity Fund certificate for several

¹² See for recent examples in this Division, *South African Legal Practice Council v Kokoloane Cyril Pitjeng* (422/2021) [2022] ZAGPPHC 973 (6 December 2022) at para [15]; *South African Legal Practice Council v Langa and Others* (2023) ZAGPPHC 1728; 79330/2018 (31 March 2023) at paras [19] and [25]; *South African Legal Practice Council v Masingi* (2023/077988) [2023] ZAGPPHC 1158 (13 September 2023) at para [48]; and *South African Legal Practice Council v Setati* (570/2022) [2024] ZAGPPHC 207 (13 March 2024) at para [36].

¹³ *Morobadi* (above) at para (5); *Malan & another v Law Society of the Northern Provinces* (2008) ZASCA 90; 2009 (1) SA 216 (SCA) at para [4].

periods;

[25.2] failed to submit his auditor's reports for several financial years, or failed to do so timeously;

[25.3] failed to pay his LPC membership fees for several years;

[25.4] failed to cooperate with the LPC and with this court as expected of a legal practitioner during the course of the ongoing disciplinary process;

[25.5] failed to comply with orders of this court in several respects; and

[25.6] was untruthful in several instances in his communication with the LPC and, indeed, before this court.

[26] Deciding these charges is complicated by the peculiar fact that Berkowitz, despite noting opposition to this application at first refused and since then has simply failed to file an answering affidavit placing his version before this court. To date he has filed only one affidavit: a founding affidavit for his application to extend the return date of the rule *nisi* of 3 August 2024. This is the entirety of his version before this court.

[27] At the hearing of this matter counsel for the LPC, responding to Berkowitz' submission that the rule *nisi* be further extended, urged us that the hearing should proceed despite the absence of a proper answer from Berkowitz. We decided to do so, for the following reasons:

[27.1] Berkowitz had brought no formal application for further postponement or further extension of the rule *nisi*, either in advance of the hearing or from the bar (he appeared in person) and offered no formal or substantive retort to the LPC's urging that the matter should proceed.

[27.2] Berkowitz had formally noted opposition to the application already on 22 July 2022 and so had ample time - one year and almost seven months - within which to formulate and file an answer.

[27.3] The failure to file an answering affidavit is wilful. Berkowitz initially, after noting opposition, explicitly refused to file an answer, on the argument that the matter could easily be 'sorted out' between the LPC and him and didn't require an answer.

[27.4] In between noting opposition and the hearing before us on 8 February 2024, Berkowitz twice attended at hearings of this court concerning this application. Not once did he apply for a postponement to allow him to file an answering affidavit. Instead, his correspondence with the LPC before both the May and August 2023 hearings, and his application for an extension of the return date of 3 August 2023 (which was supported by an affidavit) refer only to his need for additional time to resolve his disciplinary matter with the LPC out of court.

[28] Accordingly, I proceed to address each of the charges in turn below, relying on such answer from Berkowitz as is at our disposal for his version, and further on the facts placed before us by the LPC. I do so, mindful of the fact that the ordinary approach to determination of the factual basis for deciding an application does not apply in matters such as these, which are *sui generis* and not adversarial.¹⁴

Fidelity Fund Certificates

[29] The LPC alleges that Berkowitz practiced for own account for the following periods, without a Fidelity Fund Certificate: 1 January 2012 to 3 July 2012 (three months); 1 January 2013 to 18 June 2013 (three and a half months); 1 January 2014 to

¹⁴ *Van den Berg v The General Council of the Bar of South Africa* (2007) ZASCA 16; [2007] 2 All SA 499 (SCA) at para [2].

7 February 2014 (one month); 1 January 2018 to 14 February 2018 (one and a half months); and 1 January 2019 to 25 October 2019 (almost 10 months); and from 1 January 2021 at least until 2 May 2023, when he was suspended from practice by this court (two years and four months; there is also evidence that he persisted practicing without a certificate after the 2 May 2023 hearing - more on this below).

[30] This means that on the LPC's version Berkowitz practiced without a certificate for a total of four years and one month, spread out over a period of 11 years. If proven, this would amount to a contravention of section 84(3) of the LPA, which peremptorily requires practitioners in practice for own account to have a certificate.

[31] The main answer that Berkowitz offers to this is that, for the period 1 January 2021 to 2 May 2023, his practice was essentially dormant in that he held no money in trust, so that a certificate was not required: 'I have not held money in trust on behalf of any third-party through all relevant time relating hereto'.¹⁵ He makes this allegation baldly and vaguely, without proof. And it seems a half-truth.

[32] As is more fully set out below, shortly before he filed his application to extend the rule *nisi*, during July 2023, despite then already being suspended from practicing for own account, Berkowitz filed notices and deposed to an affidavit as attorney of record for a client, one M13 Consortium ('M13'). By that time, he had been acting for M13 for a considerable time, since at least the second half of 2021. On 10 May 2022¹⁶ Berkowitz wrote a letter of demand on behalf of M13, to the defendant in the matter. In it, he demands payment of the sum of R7,543,214.35 and then states that payment may be made into his trust account (Standard Bank account number 0[...], in Berkowitz' name). In at least this one instance then, Berkowitz held out to be competent to receive money into his trust account on behalf of a client, despite that he had at that time already been without a Fidelity Fund certificate for one year and four months.

¹⁵ Founding Affidavit, Application to extend rule *nisi*, at para [21.1], Bundle p 10-7.

¹⁶ The letter is in fact dated 10 May 2021, but from the context it is clear that this is an error, and it should instead be 10 May 2022: in the body of the letter it is stated that it is in response to a letter of the defendant in the matter dated 3 May 2022; and there is reference to earlier correspondence from the plaintiff, of 29 November 2021.

[33] In any event, even were it so that his practice was effectively dormant during this time, he was still registered with the LPG as practicing for own account, and practicing through his own practice, so that he was required to have a certificate - that is, his response concerning this period does not amount to a denial. And, of course, he does not respond at all to the allegations concerning the other, earlier periods of practicing without a certificate.

[34] In this light, I must conclude on what is before me that Berkowitz indeed for all the periods alleged by the LPG practiced for own account without a Fidelity Fund certificate, in contravention of section 84(1) of the LPA.

Auditor's reports

[34] The LPG alleges that Berkowitz, in contravention of several provisions of Rule 54 of the LPC Rules, has failed to submit auditor's reports for his practice to the LPC for the financial periods ending 29 February 2020 and 28 February 2021. This failure persists to date.

[35] The LPC further alleges that Berkowitz submitted the auditor's report for the financial period ending 28 February 2019, seven months late, also in contravention of Rule 54.

[36] In sum, the charge is that Berkowitz has since 18 March 2020 (when he submitted the report for the period ending 28 February 2019), not submitted any auditor's reports as required, while the last report he did submit was itself seven months late.

[37] Berkowitz' answer to this charge is twofold. First, he alleges that his failure to submit the required reports was caused by a lack of funds to pay auditors, which in turn was caused by the Covid-19 pandemic. Second, he alleges that his failure since to

provide the required reports was caused by him being locked out of his office by his landlord due to non-payment of rental, so that he could not access the records and information required to bring his reporting up to date.

[38] These attempted explanations take the matter no further. Apart from the fact that they are offered baldly, without any proof, they amount to an implicit admission of the charges concerning auditors' reports -they are attempted justifications rather than denials. Also, they provide no answer to the charge of late submission of the 2018/19 report. And their truthfulness is in doubt. As the LPC points out, while claiming not to have had access to any of his records at the time due to being locked out of his offices, Berkowitz evidently had access to and worked extensively with the M13 file. Moreover, during June 2023, shortly before him making these statements under oath, in all the notices filed in the M13 matter Berkowitz provides his office address as the address where papers can be served.

[39] Accordingly, I conclude that Berkowitz indeed, in contravention of Rule 54, submitted his 2018/19 auditors' report seven months late and has since 18 March 2020 not submitted any auditors' reports as required.

Membership fees

[40] The LPC alleges that Berkowitz has failed to pay his LPC membership fees for 2020, 2021, and 2022, in breach of the LPC's Rules 4, 3.16, 21.1, and 21.2.

[41] Apart from his general assertions that all of the charges against him involve only 'administrative issues' that do not warrant disciplinary charges, which presumably also refer to this, Berkowitz gives no answer to this charge. Accordingly, also it must be upheld against him.

Failure to cooperate with the LPC and this court

[42] When legal practitioners are presented by the LPC with disciplinary charges and a disciplinary investigation and in particular an application to this court for suspension or striking from the roll ensues, they must not act as though involved in an adversarial process, or a dispute with the LPC concerning their personal rights and interests. Instead, because legal practitioners are always officers of this court and bear a duty at all times to assist and be open with this court and to serve the public, they must cooperate fully, openly and with diligence.¹⁷

[43] This means such practitioners must make the full facts concerning any charges against them available to the LPC and, where relevant, this court. They must avoid bare denials and evasiveness and should act in such ways as to facilitate rather than obstruct the proceedings.¹⁸ Even if this requires disclosure of information adverse to their interests, legal practitioners facing discipline must be fully honest and act in the utmost good faith.¹⁹ Allegations, evidence and complaints must be responded to meaningfully, with the intention to provide a full and proper explanation.²⁰ In sum, when responding to disciplinary charges before the LPC and before this Court, legal practitioners must display exactly those characteristics of scrupulous honesty and integrity, awareness of public duty, diligence and skill that are always required of them by virtue of the nature of their profession and their position as officers of this court.²¹

[44] Both in his engagements with the LPC concerning the charges against him and before this court, facing the application for his suspension and removal from the roll, Berkowitz falls short of these exacting requirements.

[45] This manifests in two ways: his general attitude and approach to the charges; and specific instances of failure or refusal to cooperate and resulting obstructionism and evasiveness.

¹⁷ *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 853G-H; *Law Society of the Northern Provinces v Mogami & Others* 2010 (1) SA 186 (SCA) at 195-196 par [26].

¹⁸ *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 853G-H.

¹⁹ *Hewetson v Law Society of the Free State* 2020 (5) SA 86 (SCA) at para [49].

²⁰ *Hepple v Law Society of the Northern Provinces* 2014 JDR 1078 at para [9].

²¹ *Law Society of the Northern Provinces v Sonntag* 2012 (1) SA 372 (SCA) at 380 C-1.

[46] From the outset, Berkowitz' attitude and resultant approach to responding to the charges against him has been that the charges are not serious. Instead, they represent only administrative difficulties that could easily be resolved and cleared up. Accordingly, to him there was need neither for internal disciplinary steps to be taken against him nor, more importantly, for the LPC's approach to this court.

[47] This attitude is problematic first because it is based on a mistake - an assessment that the charges against him are not serious. Of course, they are. Practicing without a Fidelity Fund certificate is a criminal offence in terms of the LPA. It has on its own repeatedly been held by this court to be grounds for a finding that a legal practitioner is not fit and proper and should be struck from the roll. Berkowitz' contrary assessment indicates a serious lack of insight into the nature and import of his duties toward the public and his clients and the risk where he fails to comply with them.

[48] This attitude is problematic second because it has caused Berkowitz to participate in the disciplinary process in the opposite manner than is required of him. Instead of cooperating fully, openly and with diligence and responding meaningfully and comprehensively to the charges as he is required, he has failed and indeed at times refused to cooperate and respond at all.

[49] The most egregious example of this (although there are also several others) is his failure to date to file an answering affidavit before this court. This is inexplicable. The most basic practical duty of a practitioner facing discipline before this court is to place all the relevant facts before court in the only form that they can be considered: in an answering affidavit. If indeed all of the charges against him can easily be 'sorted out' as he claims, the only way to persuade this court of this is to place the facts relevant to that explanation before it in an answering affidavit.

[50] In practical terms there is nothing that could have prevented Berkowitz, by his own description an experienced attorney for whom drafting affidavits must be almost second

nature, from deposing to and filing such an answering affidavit. He was served with the application on 6 July 2022 and noted his opposition on 13 July 2022. He has now failed to file an answering affidavit for a period of almost two years since becoming aware of the application. He has appeared in court three times concerning this application.

[51] His failure to answer properly is clearly deliberate. After being prompted several times by the attorneys for the LPC on the absence of an answering affidavit, Berkowitz, just before the first hearing on this matter in May 2023 communicated to the LPC that he does not believe the charges against him warrant an answer in the form of an affidavit and that he would not file an affidavit unless specifically instructed to do so. Even absent this explicit refusal, the duration of his failure to answer on its own would have justified an inference that it was deliberate. He has, in other words, chosen not to answer fully, openly, and comprehensively to the charges against him and to this court and still persists in doing so. In this way, he has breached his duty as its officer, to cooperate fully with this court.

Non-compliance with court orders

[52] The LPC alleges that Berkowitz has failed to comply with orders of this court in that he has not handed over documents and records to the court appointed curator as required and practiced as an attorney, despite being suspended from practice for own account.

[53] On 2 May 2023 this court ordered, among several other things, that Berkowitz is suspended from practicing as legal practitioner for his own account; that a curator *bonis* be appointed to manage his affairs in the interim; and that Berkowitz hand over all his accounting records and all his client files to the curator *bonis*.

[54] Since then to date, Berkowitz has failed to hand over his accounting records and client files to the curator as required by this court. He has also failed to cooperate with the curator, thus making it impossible for the curator to comply with this court's

order as far as it applies to him.

[55] Berkowitz does not deny that he has failed to hand over his records and files, so that it is established that he is in this manner in breach of the order of this court. But he does offer an explanation: that he was locked out of his practice's offices by his landlord due to non-payment of rental and so had access to neither records nor files. Accordingly, the question becomes whether he is wilfully in breach of the order, so that the breach constitutes contempt of court.

[56] I find that on a balance of probabilities, this is indeed so. To counter Berkowitz' averment that he did not have physical access to his files because he was locked out of his offices, the LPC points out that he must have had access to his files, because, despite being suspended at the time, he acted as attorney for at least one of his clients in a High Court matter (more on this below) and had access to that file. Moreover, as I point out above, in the notices that he filed on behalf of his client M13 during July 2023, directly preceding him averring under oath that he was locked out of his office, he repeatedly puts up his office address as the address for service of documents.

[57] It is also so that Berkowitz offered his excuse of being locked out of his office in August 2023, indicating at the time that his dispute with his landlord that resulted in him being locked out, was on the point of being resolved, so that he was then about to gain access to his files and records. By the time we heard this matter, six months had passed, and the client files and accounting records had still not been handed over. This raises the probability that his 'excuse' of August 2023 no longer pertains. Indeed, at the hearing of this matter before us on 8 February, a different excuse was offered: that the records for his trust bank account could not be furnished to the curator, as his account had been frozen by his bank. However, as counsel for the LPC correctly retorted, this new explanation was irrelevant, as this court's order required the handing over of accounting records and not the bank statements.

[58] Nonetheless, I need not make a finding here that Berkowitz was untruthful

when he claimed that he couldn't access his records and files because he was locked out of his office. Even were it true that he was locked out of his offices and didn't have access to his records, there are any number of ways that he could have engaged the curator *bonis* on this, so that the curator may have made arrangement through his landlord to access the offices to obtain records and files. He did not, instead doing nothing at all to cooperate with the curator, and then, in a flurry of emails and attempted telephone calls trying to make contact and negotiate with the LPC through one of its officials, in the days directly preceding the hearing before us.

[59] Accordingly, I find that, on a balance of probabilities, Berkowitz is in breach of that part of the order that he should hand over his records and files, and that his breach is wilful.

[60] The second manner in which the LPC alleges that Berkowitz is in breach of this court's order of 2 May 2023 is that during June 2023, after he was already suspended from practicing as attorney for own account, he acted as attorney of record in High Court litigation, in the M13 matter referred to above. More specifically, he signed and filed a discovery notice and an application to compel discovery, with a notice of set down and date application, and deposed to the founding affidavit of the application to compel discovery on behalf of M13, as its attorney of record, on 5 June 2023.

[61] Berkowitz responds to this allegation (here not under oath, but in correspondence with the LPC and again at the hearing before us) that he admits acting as attorney of record for M13 after he was suspended but denies that in doing so, he was practicing for own account. This is on his version because he has an interest in M13 and for that reason would not charge any fee for his appearance. He does not disclose the nature of the interest he refers to.

[62] To this the LPC responds that it had done a CIPC search on the M13 Consortium which showed that Berkowitz was not and had never been a director of M13. On this basis it disputes that he has any personal interest in M13.

[63] Although Berkowitz' claim that he has an interest in M13 is not completely convincing, the mere fact that he is not a director of M13 consortium - the only fact the LPC holds forth as indicating that his claim is false - does not prove that he has no interest in M13. His interest may be of another kind (he could be an investor or silent partner, for example). In this light, I cannot on a balance of probabilities find that Berkowitz had wilfully disobeyed that portion of the 2 May 2023 order that suspended him from practicing for own account. He seems to have genuinely believed that he was not practicing for own account and the LPC could not show on the facts that his version of the matter was false.

[64] However, here I must add the following. On 4 August 2024 this court issued a second order against Berkowitz, this time suspending him from all forms of practice as attorney. It did so having been appraised of the fact that Berkowitz had acted as attorney of record for M13 after he was suspended from practicing for own account. Nonetheless, perusal of the M13 matter shows that Berkowitz was substituted as attorney of record only five months after the 4 August order, on 12 December 2023. It seems that he remained on record for M13 for these five months, despite now having been suspended from all forms of practice. At best for Berkowitz (and this is how I shall take it for purposes of this judgment) this means that he exhibited a decidedly laissez faire attitude to compliance with the order - an attitude not appropriate for a legal practitioner. At worst (and I do not find that it is so) this delay verges on wilful non-compliance with a court order.

Dishonesty

[65] The LPC claims that Berkowitz was untruthful in three respects. The first is in his claim that he was prevented from handing over his files and accounting records as he couldn't access his office because his landlord had locked him out. The LPC points out that he had access to the M13 file, from which he was clearly working during the time that he says he was locked out. They say this shows he is dishonest in his claim of

not having access to his files. I cannot agree. There can be any number of reasons why Berkowitz had the M13 file while not having access to any of his other files. He could simply, for example, have taken it home with him to work on it from there.

[66] The second is in holding forth that he was entitled to practice as attorney, at a time that he was prohibited by order of this court from practicing as attorney for own account, which the LPC describes as 'inherently dishonest'; and it is related to the third, being his claim that he has an interest in M13. As set out above, it remains an open question whether Berkowitz was indeed practicing for own account in the M13 matter. The LPC has not disproven his claim that he has an interest in M13; it has only excluded one possible interest (that he is a director of M13). Accordingly, Berkowitz' claim that he did not practice for own account in the M13 matter remains plausible, as does his subjective belief that this was so; and so too the claim upon which both these rest, that he has an interest in M13. Accordingly, also here I cannot find that he was dishonest.

[67] However, although I do not find that Berkowitz was dishonest, in the sense of telling outright lies as alleged by the LPC, I cannot conclude that he was fully honest, in the way required of legal practitioners facing discipline. As submitted by the LPC, a legal practitioner facing discipline must from the outset declare the relevant facts fully and openly and must not allow the truth to emerge only gradually.²² Berkowitz has not been forthcoming with the facts to sustain his claims, explanations, and justifications. He has indeed 'presented as narrow a front as possible, for fear of detection or contradiction' instead of the detailed version required of him.²³ This does place a question mark over his integrity, despite my finding above that he did not commit the outright falsehoods the LPC alleges.

Fit and proper

²² *Law Society of the Northern Provinces v Sonntag* 2012 (2) SA 372 (SCA) at para [18].

²³ *South African Legal Practice Council v Bobotyana* (2020) 4 All SA 827 (ECG) at para [71].

[68] In sum, I have found that Berkowitz is indeed guilty of a) practicing for own account without a Fidelity Fund certificate, for several periods; b) submitting auditor's reports late or not at all; c) failing to pay his LPC fees for several years; d) acting improperly in several ways in response to the disciplinary proceedings against him; and e) failing to comply with an order of this court that he hand over his client files and auditing records to the curator *bonis*. Do these transgressions render him unfit and improper for legal practice?

[70] To be fit and proper, legal practitioners must exhibit the skill and knowledge required to perform their professional duty. This skill and knowledge must be applied with diligence, care, wisdom, and independence. Legal practice is also a profession and not a job. This means that legal practitioners work not in their own interest but in the public interest. They do so by employing their skill and knowledge to protect and advance the interests of their clients and not their own, but always as officers of this court. That is, they pursue the interests of their clients in such ways that serve this court and the law, and through that, the public interest. Finally, the 'capstone' virtue that ties all this together, is integrity. Above all, legal practitioners must perform their duties honestly, with the highest good faith, and must be trustworthy and dependable.

[71] In his various transgressions, Berkowitz falls short of these high standards. I focus below only on the most serious of the transgressions: practicing without a Fidelity Fund certificate; failure properly to cooperate with the LPC and this court in the disciplinary process; and non-compliance with a court order.

[72] To practice for own account without a fidelity fund certificate is manifestly a serious transgression and not simply the 'administrative issue' that Berkowitz describes it as. Section 84(1) of the LPA requires that an attorney practicing for own account have a valid Fidelity Fund certificate. The requirement is peremptory. Attorneys practicing for own account without a Fidelity Fund certificate commit a criminal offence punishable by fine or imprisonment - they break the law.²⁴ More importantly, they place their trust

²⁴ See section 93(8)(a) of the LPA.

creditors (chiefly their clients) and the public at risk. Practicing without a certificate has repeatedly been held by this court to be serious misconduct on the sole basis of which an attorney is marked as unfit and improper and may be struck from the roll.²⁵

[73] As detailed above, Berkowitz has practiced without a certificate repeatedly, for several periods totalling more than four years, over a span of 11 years. The continual and repeated disregard for his clients' and the public interest that this shows, and the disdain for the law, render him unfit and improper for legal practice.

[74] Berkowitz' attitude to the charges against him and the manner in which he has participated in the disciplinary process instituted against him are outlined above. In short it amounts to this: his attitude has been that the charges against him are not serious but only relate to 'administrative difficulties' that can be 'sorted out' easily with the LPC; accordingly, he has failed at all to cooperate in the investigations against him, going so far as to refuse and then wilfully fail to date to file an answering affidavit in which he can place his version and the full facts at his disposal, before this court. This attitude and resultant conduct show him to be lacking several of the most important characteristics required of a legal practitioner.

[75] His misdescription of the charges as simply 'administrative difficulties', with which he persists to date, evinces a serious lack of understanding of the scope and nature of his duty toward his clients and the public and the risk at which his conduct places them. His failure to cooperate with the LPC by handing over documents and records required of him and with this court by doing such a simple thing as filing an answering affidavit shows him to not be open, forthright and ultimately honest, as he is required to be with this court. Instead, he presents as cagey, withholding, and evasive. As found above, in several instances, although not directly dishonest, he is not fully

²⁵ See for recent examples in this Division, *South African Legal Practice Council v Kokoloane Cyril Pitjeng* (422/2021) (2022) ZAGPPHC 973 (6 December 2022) at para (15); *South African Legal Practice Council v Langa and Others* [2023] ZAGPPHC 1728; 79330/2018 (31 March 2023) at paras [19] and [25]; *South African Legal Practice Council v Masingi* (2023/077988) [2023] ZAGPPHC 1158 (13 September 2023) at para [48]; and *South African Legal Practice Council v Setati* (570/2022) [2024] ZAGPPHC 207 (13 March 2024) at para [36].

truthful in that he withholds or elides crucial information.

[76] Importantly, this attitude and resultant conduct is not that of a deer caught in the headlights, paralysed by apprehension. Berkowitz has had ample opportunity and much time to 'sort things out' with the LPC as he continues to say he would do; but to date he has not done so, remaining supine. He persists in his attitude that he is not charged with serious misconduct despite often having been disabused of that notion by the LPC. He initially refused and thereafter wilfully failed to file an answering affidavit. His improper approach and resultant improper conduct are deliberate. This also shows him not to be fit and proper for legal practice.

[77] Finally on this issue, I turn to Berkowitz' non-compliance with this court's order of 2 May 2023. All people must comply with orders of this court. However, because they are officers of this court, legal practitioners bear an enhanced duty to do so. They must comply fully and with alacrity and make every effort available to them to do so. They should not take refuge in technicalities or surrender to practical difficulties in their efforts to comply. This is especially so in the context of disciplinary proceedings against a practitioner before this court. In such proceedings, practitioners do not operate as if or as if on behalf of an ordinary litigant, involved in an adversarial process. They must cooperate. Wilful failure to comply with any aspect of a court order committed by a legal practitioner facing discipline before this court, is most egregious misconduct.²⁶ It is exactly what it says it is: instead of working as an officer of the court, in service of the court and the public, such a legal practitioner is in *contempt* of the court; and is as a result not fit and proper to practice.

[78] I find above that, despite his excuse that he was locked out of his office and so could not access his files and accounting records, Berkowitz' failure to hand over his files and records to the curator, as required by the 2 May court order, was wilful non-compliance and so contempt of court. I do so, not in the first place because his excuse

²⁶ *South African Legal Practice Council v Molati and Another* (2023-038247) (2023] ZAGPPHC 578 (9 June 2023) at para (46]; *Grund/er NO and Another v Zulu and Others* (08029/2021) (2023] ZAKZDHC 7 at paras (37), (52) & [54].

is not truthful (although it certainly skirts the edges of truthfulness, I could not reach the conclusion that it was false) but because he made no effort to overcome this practical difficulty so as to comply with the court order. Instead, he surrendered to it and so chose to forego compliance with the court order. This choice clearly also marks him as unfit and improper for practice.

[79] I find above that his practicing in the M13 matter subsequent to being suspended from practicing for own account by this court does not constitute contempt of court, as on the papers I could not clearly reject his explanation that he had an interest in M13 and so didn't practice for own account. Nonetheless, his conduct concerning the M13 matter deserves scrutiny concerning the question whether he is fit and proper.

[80] The proper response to the 2 May 2023 order of this court concerning the M13 matter would have been for Berkowitz to inform M13 that he had been suspended from practicing for own account, and that, although his acting for it was not strictly speaking practicing for own account, it would be improper to continue as attorney of record, and then to withdraw. Instead, he sought refuge in the slight technical distinction between practicing at all and practicing for own account, on the tenuous basis that he has an interest in M13, to justify continuing. This is not the approach to a court order expected of a legal practitioner. This failing is accentuated by the lackadaisical manner in which he responded to this court's 4 August 2023 order suspending him from all forms of practice, where he took almost five months to substitute himself as attorney of record.

[80] In sum, on all these grounds I conclude that Berkowitz is no longer fit and proper to practice as an attorney.

The order

[81] In *Malan & another v Law Society of the Northern Provinces*²⁷ the Supreme

²⁷ *Malan & another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA) at para [6].

Court of Appeal held that it 'is ... a matter for the discretion of the court' which sanction to impose upon a legal practitioner who is no longer fit and proper to practice. Exercise of this discretion 'depends 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 likelihood or otherwise of a repetition of such conduct and the need to protect the public.' 'Ultimately', the court concluded 'it is question of degree'.

[82] The purpose with which the court makes its choice on sanction is two-fold. First, the aim is to discipline and punish the errant practitioner, and second, to protect the public.²⁸ The primary aim is not to penalise, but to protect the public.²⁹

[82] What is clear, is that a practitioner who has been found unfit and improper for practice will not be allowed to continue practicing - to protect the public, such practitioners must either be struck from the roll or suspended from practice.³⁰

[83] An order for removal from the roll has serious and far-reaching consequences for the practitioner concerned, probably permanent in nature. Although the option exists for such practitioner later to apply for readmission, such applications for readmission rarely succeed. Nonetheless, this court will seldom order the suspension instead of removal of a practitioner who has been found to be unfit and improper.³¹

[84] The choice between suspension and removal is determined by the question whether the cause of the practitioner's unfitness and impropriety can be removed - whether, that is, the practitioner can be rehabilitated. The practitioner concerned must assist the court to formulate conditions that can be imposed to ensure such rehabilitation.³²

²⁸ *Summer/ey v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) at para [19].

²⁹ *Malan* (above) at para [7].

³⁰ *Incorporated Law Society, Transvaal v Visse and Others; Incorporated Law Society Transvaal v Viljoen* 1958 (4) SA 115 (T) at 131D-G.

³¹ *Malan* (above) at para [8].

³² *Malan* (above) at para [8].

[85] Where a practitioner's integrity is in question and where dishonesty is involved, courts require exceptional circumstances to exist to choose suspension instead of removal.³³

[86] Every single count of Berkowitz' misconduct is serious. They are of such a nature that it is unclear to me how their cause can be removed. Berkowitz did not practice without a Fidelity Fund certificate for four years spread over 11 years or fail to provide the LPC with his audited accounts because of some remediable gap in his knowledge, skill, or experience. He is on his own version an experienced and seasoned practitioner. He did not wilfully ignore this court's order to hand over files and records and display a generally laissez faire attitude to orders of this court because of a gap in understanding that can be corrected. It is difficult to see how his attitude of negating the seriousness of the charges against him and consequent refusal to cooperate properly in the disciplinary process can be addressed. Significantly, although continually stating that his disciplinary problems can easily be 'sorted out' with the LPC, he has not taken any steps over two years to do so; and he has not made any submissions to this court on conditions that could be imposed on any further suspension that would aid his rehabilitation.

[87] Moreover, although I have not found him to have been directly dishonest in the sense of telling outright lies, in various respects, his integrity is in question. Instead of being forthright, open and cooperative in his interactions with the LPC and this court concerning the disciplinary process, he has been cagey, evasive and uncooperative. It is unclear how this can be addressed; and Berkowitz has pleaded no exceptional circumstances to warrant suspension rather than removal, despite his integrity being in question.

[88] Accordingly, I conclude that the only appropriate order in his case is that he be removed from the roll of legal practitioners, and order as follows:

³³ *Malan* (above) at para [10].

1. That **JONATHAN MEIR BERKOWITZ** (first respondent) be struck from the roll of attorneys (legal practitioners) of this Honourable Court.
2. That the first respondent immediately surrenders and delivers to the Registrar of this Honourable Court his certificate of enrolment as an attorney of this honourable Court.
3. That in the event of the first respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate and hand it to the Registrar of this Honourable Court.
4. That paragraphs 3 to 10 of the order of 02 May 2023 and paragraph 4 of the order of 3 August 2023 shall remain in force.
5. That the first respondent be and is hereby directed to pay the costs of this application.

JFD Brand
Acting Judge of the High Court
Gauteng Division, Pretoria

M Mbongwe
Judge of the High Court
Gauteng Division, Pretoria

APPEARANCES

Counsel for the applicant: Mr R Stocker

Instructed by: Rooth & Wessels Inc

Counsel for the first respondent: In person

Instructed by: In person

Date of the Hearing: 8 February 2024

Date of Judgment: 15 August 2024