



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 15857/2023

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

And

LYNN SWARTZ

Respondent

Heard: 25 November 2024

Delivered electronically: 21 February 2025

JUDGMENT

LEKHULENI J (SHER J concurring):

Introduction

[1] This is an application in which the South African Legal Practice Council (*the LPC*) seeks an order that the respondent be struck, alternatively suspended, from the roll of legal practitioners of the Western Cape Division of the High Court of South

Africa in terms of section 40(3)(a)(iv) read with section 44(1) of the Legal Practice Act 28 of 2014 (*the LPA*). The main issue giving rise to this application (*the offending conduct*) stems from the respondent having allowed a delictual claim of Ms LD (*the complainant*) against the South African Police Services (*SAPS*) and the Minister of Police for damages to become prescribed. The respondent failed to issue summons timeously. In a dishonest attempt to conceal her error from the complainant, the respondent informed the complainant that her claim was settled and inquired from the complainant about the amount she would be prepared to accept to settle the matter.

[2] In response, the complainant informed the respondent that she would be prepared to settle the matter for an amount of R350,000. The respondent thereafter proceeded to pay this amount to the complainant out of her own pocket in instalments. The respondent was thereafter evasive with the complainant and was, for obvious reasons, not able to provide her with documentation relating to the settlement. Subsequent thereto, the complainant reported the matter to the LPC. The Investigating Committee and the Disciplinary Committee of the LPC found the respondent guilty of the offending conduct and imposed a monetary sanction i.e. a fine of R12 000 which was subsequently increased to R 45 000 and a recommendation that the respondent be suspended from practice, which in turn was to be suspended.

[3] Discontented with the sanction imposed by the two committees, the LPC approached this court for an order to strike the respondent from the roll of legal practitioners of this division, alternatively for an order suspending the respondent from practice. The LPC's case is that the respondent is not a fit and proper person to practice as a legal practitioner and that the offending conduct warrants a strike off, alternatively, a suspension from the roll of legal practitioners of this division. The respondent admitted that she had committed the offending misconduct but respectfully submitted that it does not warrant a striking off from the roll. This Court must now consider whether the respondent's dishonest misconduct is egregious enough to warrant a strike-off or whether it merits a suspension only, as prayed for by the applicant in the notice of motion.

Factual Background

[4] The respondent was admitted as an attorney of the Western Cape Division of the High Court of South Africa on 3 June 2005 and has practised as such in the Western Cape Province. On 02 April 2021, the complainant addressed an email to the LPC to lodge a complaint of unprofessional conduct against the respondent. The relevant facts which gave rise to the complaint are that on 13 May 2010, members of SAPS conducted a raid on the complainant's property in search of illegal narcotics. At the time of the SAPS raid at the complainant's property, her eleven-year-old daughter was alone at home. The complainant's daughter could not find the key to open the door, and the SAPS members removed the front gate and door to gain access to the property.

[5] According to the complainant, two to three female SAPS members undressed her daughter while the room doors were open and patted her down searching for possible narcotics. The complainant alleged that the SAPS members asked her daughter to spread her legs so that they could pat her down. The complainant and her husband arrived then, but the SAPS members denied them entry into the house. When the complainant eventually entered the house, she demanded to see a search warrant from SAPS. A piece of paper was handed to the complainant but was immediately taken back by the SAPS members before the complainant could read it. The complainant protested the way the SAPS members conducted the raid and the way her then eleven-year-old daughter was treated by members of SAPS. The complainant was thereafter placed into a police van and taken to Manenberg Police Station, where she was later released upon payment of a fine of R100.

[6] On 22 September 2010, the complainant and her daughter attended a consultation at Bardien & Higgins Attorneys, where they consulted with the respondent and Mr Higgins about instituting action proceedings against SAPS and the Minister of Police for damages in respect of the incident that occurred on 13 May 2010 at the complainant's property. On 25 September 2010, the complainant paid an amount of R10,000 in the trust account of Bardien & Higgins Attorneys, on the basis that this firm of attorneys would represent her in the contemplated action against the SAPS and the Minister of Police.

[7] The complainant further asserted that some time then passed, during which the respondent opted to practice for her own account and enquired whether she could continue with the complainant's matter against the SAPS and the Minister of Police, to which the complainant agreed. According to the applicant's records, the respondent began practising for her own account on or about 11 March 2014. The complainant further stated that all the while, the respondent offered little to no communication about the case against the SAPS and the Minister of Police, nor did the respondent provide any paperwork.

[8] On 18 September 2018, the respondent notified the complainant that she had settled the matter with SAPS and the Minister of Police for R350 000. In the following months, the complainant received the following payments from the respondent.

- 8.1 On 15 November 2018: R100 000
- 8.2 On 18 December 2018: R100 000
- 8.3 On 30 January 2019: R50 000
- 8.4 On 05 February 2019: R40 000
- 8.5 On 11 June 2019: R98 000.

[9] The complainant thus received a total sum of R388 000 from the respondent. Despite numerous requests by the complainant, since September 2010, for copies of the documents pertaining to her legal action against the SAPS and the Minister of Police, the respondent failed to finish the complainant with same. In addition, the complainant asserted that she did not sign or have sight of any written settlement agreement between the parties to the action. Subsequently, on 2 April 2021, the complainant addressed an email to the LPC to lodge a complaint of, *inter alia*, unprofessional conduct against the respondent.

[10] On 08 April 2021, the LPC addressed correspondence to the respondent to inform her of the complaint lodged against her. On 10 May 2021, the respondent addressed a letter in response to the LPC, wherein she confirmed that she was handling the complainant's case against the SAPS and the Minister of Police. In her correspondence, the respondent said that she had discovered that the complainant's

matter had prescribed in respect of issuing a summons against the SAPS and the Minister of Police. She went into complete panic. In an endeavour to correct her error and not have the complainant suffer prejudice, she inquired from the complainant what amount she (the complainant) would be prepared to accept to settle the matter. In response, the complainant informed the respondent that she would be prepared to settle the matter for R350 000. The respondent subsequently raised R350 000 and effected payment in instalments to the complainant. The respondent admitted to being evasive and not having documentation to present to the complainant, as there was nothing in her file save for a letter of demand.

[11] Subsequent thereto, on 17 May 2021 the LPC addressed a letter to the respondent wherein the respondent was advised that the complaint against her would be referred to the LPC's Investigating Committee for adjudication. On 31 August 2021, the Investigating Committee of the LPC convened to adjudicate the complainant's complaint against the respondent. Following the Investigating Committee's adjudication, in November 2021, the committee requested the respondent to provide reasons why she should not be charged with the following contraventions:

11.1 Clause 3.11 of the Code of Conduct of the LPA in that she failed to use her best efforts to carry out work in a competent and timely manner by failing to attend to the complainant's civil matter against the Minister of Police since September 2018 timeously or at all;

11.2 Clause 3.15 of the Code of Conduct of the LPA in that she brought the legal profession into disrepute by allowing the civil claim against the Minister of Police to prescribe; and

11.3 Clause 3.15 of the Code of Conduct of the LPA in that she brought the legal profession into disrepute by failing to advise the complainant that the civil claim against the Minister of Police had prescribed.

[12] On 31 January 2022, the LPC addressed correspondence to the respondent to inform her of the directives issued by the Investigating Committee and requested

her response thereto. On 21 February 2022 the respondent replied to the LPC's letter, explaining the circumstances surrounding the settlement she paid to the complainant. In the correspondence, the respondent ostensibly admitted guilt to the allegations against her.

[13] The Investigating Committee considered the respondent's correspondence. On 3 March 2022, the LPC addressed a letter to the respondent informing her that the Investigating Committee noted that the respondent intended to invoke the provisions of Rule 40.4 of the LPC Rules in that she wished to plead guilty to the contraventions of the various clauses of the Code of Conduct as specified in paragraph 11 above. The letter also directed that the respondent be requested to advise whether she would consent to a globular fine of R12,000, half suspended for two years on condition that she was not found guilty of misconduct during the period of suspension, and a contribution to the costs of the committee of R3000.

[14] The Investigating Committee was of the view that the contraventions did not warrant that the respondent's name be struck from the roll of legal practitioners, or that she be suspended from practice, or that a curator bonis be appointed to her practice. On 22 March 2022, the respondent sent an email to the LPC indicating that she accepted the proposal made by the Investigating Committee. Indeed, the respondent made payment of this fine on 3 March 2023. On 01 February 2023, the Director of the Western Cape Provincial Office of the LPC provided a memorandum to the Disciplinary Oversight Committee ("*the DOC*") of the LPC. The Memorandum recommended that the recommendations of the Investigating Committee be accepted.

[15] On 16 February 2023, the respondent's matter served before the DOC, a subcommittee of the applicant. The DOC was not satisfied with the sanction imposed by the Investigating Committee, given the serious allegations levelled against the respondent. Instead, the DOC resolved that the matter be referred, in terms of Rule 40.5.1 of the LPC Rules, to a Disciplinary Committee ("*the DC*") for further adjudication. On 1 March 2023, the DC charge sheet was sent to the respondent, wherein she was called upon to appear in person before the DC to answer to

charges of misconduct in terms of clause 21 of the Code of Conduct. It was alleged that she had contravened the following provisions of the Code:

15.1 Clause 3.11 in that she had failed to use her best efforts to carry out work in a competent and timely manner, by failing to attend to the complainant's civil matter against the Minister of Police; (count 1)

15.2 Clause 3.15 in that she brought the legal profession into disrepute by allowing the complainant's civil matter to prescribe (count 2); and

15.3 Clause 3.15 in that she brought the legal profession into disrepute by failing to advise the complainant that her civil matter had prescribed (count 3).

[16] The DC convened on 15 March 2023 to further adjudicate the complaint. The respondent appeared before the DC. At the hearing on 15 March 2023, the DC added a fourth charge against the respondent namely, a contravention of clause 3.1 read with clause 3.3 of the Code of Conduct on the basis that the respondent had failed to treat the interests of the complainant as paramount and failed to maintain the requisite ethical standards by actively lying to the complainant that she had received a settlement offer, notwithstanding that there was no settlement agreement in place. The respondent again pleaded guilty to all the charges, and the DC, after considering the matter and having regard to the respondent's explanation for her conduct, considered the imposition of the following sanctions to be appropriate:

16.1 Count 1: A fine of R 15 000

16.2 Count 2: A fine of R15 000

16.3 Count 3: A fine of R15 000

16.4 Count 4: The respondent was to be suspended from practice as an attorney for a period of three years, wholly suspended on condition that she was not found guilty of a similar offence, effective from 1 April 2023. In addition, the DC recommended that the respondent be required to provide an

undertaking that she would not take on any candidate attorneys for a period of three years effective from 1 April 2023 and should provide documentary evidence that she was registered with Prescription Alert.

[17] In the interim, the respondent paid the full amount i.e. R45 000 of the fine imposed by the DC and complied with all the other sanctions imposed upon her. The findings of the DC were sent to the DOC for finalisation and approval. To this end, on 22 March 2023, the Director of the Western Cape Office of the LPC addressed a Memorandum to the DOC in terms of section 40(3)(iv) of the LPA, in which she recorded the proceedings that occurred before the DC. The Memorandum recommended that the DC's recommendation be endorsed.

[18] However, the DOC disagreed with the DC's recommendation. It was of the view that a fraud or misrepresentation was involved and that the sanction imposed by the DC was consequently too light. The DOC believed that the respondent's conduct warranted more stringent sanctions than what the DC had recommended.

[19] At the LPC's second quarterly meeting on 8 July 2023, the LPC took note of the DOC's minute dated 5 April 2023 rejecting the DC findings and resolved that in terms of section 40(3)(a)(iv) of the LPA, the LPC should institute a High Court application to strike the respondent's name from the roll of legal practitioners with the proviso that the court be informed of the sanction imposed by the DC. Indeed, on 26 September 2024, the LPC instituted proceedings in this court and sought an order striking off the respondent from the roll of legal practitioners, alternatively that she be suspended from practice for a period of 3 years in terms of section 40(3)(a)(iv) read with section 44(1) of the LPA.

Principal Submissions by the parties

[20] In her written and oral submissions, Ms Mahomed, the applicant's counsel, submitted that a practising legal practitioner is duty-bound to properly and honestly represent her clients and to act in their best interests and that the respondent had failed to fulfil her duty in this regard. Ms Mahomed further asserted that the respondent does not dispute that she is guilty of the offending conduct or the

outcome of the Investigating Committee and the DC proceedings. In her view, the respondent's dishonest, unethical and unprofessional conduct showed a lack of integrity, judgment and insight and that she was not a fit and proper person to practice as a legal practitioner. Ms Mohamed further submitted that the offending conduct reflected adversely on the respondent's character and militated for her immediate striking from the roll of legal practitioners, alternatively for her suspension from the roll of legal practitioners for a reasonable period.

[21] Ms Mahomed opined that the respondent's conduct was demonstrably prejudicial to the complainant, members of the public and the profession itself. According to her, the respondent's conduct could not be countenanced and must be sanctioned accordingly. In light of the above, Ms Mohamed contended that the LPC has made out a suitable case for the relief sought in the notice of motion.

[22] On the other hand, Mr Jacobs SC, the respondent's counsel, submitted that the Investigating Committee, as well as the DC, did not advise the LPC that proceedings should be instituted to strike the respondent's name from the roll of legal practitioners. Mr Jacobs asserted that the memorandum of the DC which was forwarded to the DOC recommended that the recommendations of the DC be endorsed. According to Mr Jacobs, the DOC, as a representative of the LPC, was not empowered to go beyond the sanction imposed by the DC. To this end, he relied on section 40(8) of the LPA and contended that the LPC had to give effect to the advice and decision of a Disciplinary Committee.

[23] Mr Jacobs contended that section 40(3)(iv) of the LPA sets out the scope of the recommendation that a DC can provide to the Council. For completeness, the relevant section provides:

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

(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.”

[24] Mr Jacobs submitted that the LPC had a discretion to decide on a recommendation made by the DC, if it included a recommendation to pursue any of the remedial actions set out in section 40(3)(iv) of the LPA. Where the DC had not suggested that any further action be taken, the LPC was obliged to give effect to the decision of the DC, as was provided for in section 40(8) of the LPA. In the present matter, so Mr Jacobs contended, the DOC, as the delegated authority of the LPC, had not given effect to the advice and decision of the DC. For completeness section 40(8) provides as follows:

“The Council (LPC) must give effect to the advice and decision of a disciplinary committee.” (My emphasis added)

[25] It was Mr Jacobs' contention that the language of section 40(8) of the LPA is peremptory and circumscribes the LPC's position in relation to the advice and decision of a DC. In this regard, he submitted further that there was nothing in the LPA, or the Rules promulgated thereunder, that allowed the LPC not to give effect to the decision of the DC. Simply put, Mr Jacobs submitted that the LPC was bound to give effect to the decision of the DC.

[26] Regarding the offending conduct of the respondent, Mr Jacobs pointed out that the respondent admitted her wrongdoing and had not attempted to delay the disciplinary proceedings instituted against her. Furthermore, the respondent had paid all the fines which were imposed on her and did not violate any sanction imposed on her. Regarding the facts of the matter, he suggested that the case at hand reflected a moral lapse by the respondent. To this end, Mr Jacobs implored the court to order

that the respondent be suspended from practising as an attorney but that such suspension be suspended for a period as determined by the court.

Issues in dispute

[27] From the discussion above, there are two questions that this court must decide. *First*, this court is enjoined to determine whether the decision of the DC, a sub-committee of the LPC, is binding on the LPC. Expressed differently, whether the LPC cannot deviate from the recommendations made by the DC. *Secondly*, whether the offending conduct the respondent committed is so egregious as to warrant striking her from the roll of legal practitioners. Ancillary to the second question, the court must determine whether the DC's suspension of the respondent is sufficient, given the gravity of the offending conduct the respondent committed.

Applicable legal principles and discussion

[28] For the purposes of this judgment, I will discuss the issues in dispute discussed above, *ad seriatim*.

Whether the decision of the DC is binding on the LPC?

[29] As discussed above, Mr Jacobs submitted that the DC did not advise the LPC, as provided for in section 40(3)(iv) of the LPA, that proceedings to strike the respondent's name from the roll of legal practitioners be instituted. He submitted that where the DC suggested that further action be taken, the LPC had to give effect to the advice and the decision of the DC, as provided in section 40(8) of the LPA. In other words, the LPC was bound by the decision of the DC.

[30] In considering this issue, it is necessary to look at the schematic framework of the LPA as well as its Rules and the Code of Conduct. Section 40(8) of the LPA, as previously quoted, must be interpreted in conjunction with other provisions of the LPA rather than in isolation, as interpreting it without considering the broader context of the LPA may result in absurd conclusions. I will return shortly to examine the interpretation of this section in more detail. However, I must mention that the LPC

serves as the regulatory body for all legal practitioners in South Africa. The LPC is a corporate body with full legal capacity and has jurisdiction over all legal practitioners and candidate legal practitioners in the Republic of South Africa. Its mandate is to implement the provisions of the LPA to achieve the objectives specified in Section 5 of the Act.¹

[31] In the present matter, the LPC has taken the most crucial step of instituting this application, to champion the integrity and dignity of the legal profession. As I see it, this endeavour is aimed at ensuring that the public's interests are fully protected in all interactions with legal practitioners, thus fostering trust and confidence in the legal profession. As a corporate body that is enjoined to facilitate the realisation of the goals of a transformed legal profession that is accountable, efficient and independent, the LPC, in my view, is surely not bound by the decision of its subcommittees. Its subcommittees are subordinate to it. For the reasons that follow, in my view, in exercising its jurisdiction, the LPC may decline to accept and may vary or jettison any decision or advice of its subcommittees if such advice or decision, in the opinion of the LPC, would compromise the integrity and dignity of the legal profession, or would not be in the best interests of the profession and/or the public which it is meant to serve.

[32] A committee of the LPC is subservient to the LPC, which serves as the body regulating the conduct of its members, under the ultimate control and supervision of the courts. Accordingly, as a regulatory, custodian organisation it should be at liberty to approach the court to express its concerns regarding a recommendation made by its committee for either striking off or suspending a member. In my view, it is crucial for the dignity and integrity of the legal profession that the LPC has the freedom to express its concerns and have the conduct of its members tested in court in case of doubt and uncertainty. As it is only the High Court which can strike an errant practitioner from the roll, the LPC is obliged to approach it for the consideration and grant of such an order. I now turn to interpreting section 40(8) of the LPA.

¹ Section 5 sets out the objects of the Council. Amongst others, section 5 provides that the objects of the Council are to promote and protect the public interest; to regulate all legal practitioners and all candidate legal practitioners; and to enhance and maintain the integrity and status of the legal profession.

A purposive interpretation of Section 40(8) of the LPA

[33] As previously stated, section 40(8) of the LPA provides that the Council must give effect to the advice and decision of a DC. The objectives of the LPA are stipulated in section 3 of the Act. Among others, the LPA aims to provide a legislative framework for transforming and restructuring the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld. In a broader context, section 3 of the LPA requires that the Act be interpreted through the prism of the Constitution. This is consistent with the constitutional objective of section 39(2) of the Constitution, which is to ensure that the interpretation of legislation aligns with the spirit, purport and objects of the Bill of Rights. For completeness, section 39(2) of the Constitution provides as follows:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

[34] Section 39(2) introduced a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport, and objects of the Bill of Rights. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,² Wallis JA provided a comprehensive definition of interpretation and stated 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

² 2012 (4) SA 593 (SCA).

possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective.³

[35] In accordance with the guiding principles articulated above, I hold the view that only the LPC can give effect to/ implement the advice and decisions rendered by the DC. Specifically, section 40(8) of the LPA envisages that once the LPC accepts a decision of the DC, it is exclusively the responsibility of the LPC to execute and implement that decision. The DC, functioning as a subcommittee of the LPC, lacks the capacity to enforce its own decisions. The DC is subordinate to the LPC. A proper interpretation of section 40(8) of the LPA suggests that once the DC decides on a matter and the LPC subsequently endorses that decision, the LPC assumes the exclusive authority to implement it. The LPC serves as the definitive decision-making body. The decision of the DC does not hamstring the LPC. This interpretation, in my view, is underscored by section 6 of the LPA, which provides that:

“6. Powers and Functions of Council

(1)(a) In order to achieve its objects referred to in Section 5, and, having due regard to the Constitution, applicable legislation and the inputs of the Ombud and Parliament, the Council may-

...

(v) institute or defend legal proceedings on behalf of the Council;

(vi) impose monetary penalties;

...

(x) delegate any of its powers and functions to its committees or Provincial Councils, subject to any conditions it may impose, which delegation does not-

(aa) *divest the Council of the power or function so delegated; and*

(bb) *preclude the Council from varying or setting aside any decision made under a delegation.*” (My emphasis added)

³ At para 18.

[36] Section 6 makes it abundantly clear that the DC acts through a delegated power from the LPC. In delegating its power, the LPC does not divest itself of the power or function so delegated. Thus, the LPC may accept or reject the recommendation of its subcommittees. Most importantly, in terms of section 6(1)(a)(x)(bb) of the LPA, the LPC may vary or set aside any decision made under a delegation to the DC or any of its committees. Evidently therefore, the decision of a DC does not bind the LPC. It can be varied and set aside by the LPC. The argument proffered by the respondent's counsel that the decision of the DC is binding on the LPC offends the provisions of section 6.

[37] In summary, the DC is a disciplinary body established by the LPC in terms of section 37 of the LPA and is tasked with conducting disciplinary hearings subject to the provisions of sections 39 and 40 of the LPA together with the LPA Rules. The applicable sections of the LPA and the relevant clauses of the LPA rules do not make the content of a ruling by a DC, nor the sanction deemed appropriate by such DC final and binding on the LPC. Accordingly, the LPC is empowered, in terms of section 40(3)(a)(iv) of the LPA, to bring this application and have the respondent suspended from the roll of practitioners or have her name removed from the roll of legal practitioners even though such relief differs from the sanction and recommendations of the DC. Consequently, the argument that the decision of the DC is binding on the LPC falls to be rejected.

Should the respondent be struck from the roll of attorneys or suspended?

[38] The test to determine whether a person is fit and proper is well established in our law and needs no further elaboration.⁴ A determination of whether a legal practitioner must be struck from the roll of attorneys involves a three-staged inquiry.⁵ The first part of this enquiry is to determine whether the offending conduct has been proven on a balance of probabilities.⁶ Once this is shown, the second issue is to determine whether the person concerned is fit and proper to continue to practice,

⁴ *Hewetson v Law Society of the Free State* 2020 (5) SA 86 (SCA) at para 4.

⁵ *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at 51C.

⁶ *Nyembezi v Law Society, Natal* 1981 (2) SA 752 (A) at 756H 758A; *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 654D.

considering the proven misconduct.⁷ This inquiry involves the weighing up of the conduct complained of against the conduct expected of a legal practitioner and, to this extent, entails a value judgment.

[39] The third enquiry is whether, in all the circumstances, the person concerned is to be removed from the roll of attorneys or whether an order suspending him/her from practice for a specified period will suffice. Whether a court will adopt 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/her to be unworthy to remain in the ranks of an honourable profession,⁸ the likelihood or otherwise of repeating such conduct and the need to protect the public.

[40] Simply put, the court must first decide, as a matter of fact, whether the alleged offending conduct has been established. If the answer is yes, a value judgment is required to determine whether the person concerned is not fit and proper, as envisaged in the LPA. And if the answer is again in the affirmative, the court must decide in the exercise of its discretion whether, in all the circumstances of the case, the person in question is to be removed from the roll or merely suspended from practice.

[41] Every case must be determined in the light of its own facts. If a court believes that after a period of suspension, the person will be fit and proper, the appropriate order would ordinarily be one of suspension.⁹ This is because the implications of removing a legal practitioner from the roll for misconduct are serious and far-reaching. It is envisaged, *prima facie* at least, that a legal practitioner who has been struck from the roll will never be permitted to practise again because the misconduct complained of is of such a serious nature that it manifests a character defect and a lack of integrity, rendering the person unfit to practise.¹⁰

⁷ *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 637B-C.

⁸ *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T) at 108D-E.

⁹ *Malan and Another v Law Society of the Northern Provinces* 2009 (1) SA 216 (SCA) at par 8.

¹⁰ *Incorporated Law Society, Natal v Roux* 1972 (3) SA 146 (N) at 150B; See also *Cirota and Another v Law Society of the Transvaal* 1979 (1) SA 172 (A) at 194B - E.

[42] In the present matter, the offending conduct levelled against the respondent is common cause. The respondent does not dispute that she is guilty of it, nor does she contest the outcome of the Investigating Committee and the DC proceedings. It was for this reason that she paid all the fines imposed upon her by the Investigating Committee and the DC, and did not invoke her appeal rights in terms of section 41 of the LPA. What is critical in this matter is the second and third parts of the enquiry, which involve a determination of whether, in all the circumstances of the case, the respondent is fit and proper, considering the proven misconduct, and whether she should be suspended from practice for a fixed period or should be struck off the roll.

[43] In determining whether the respondent is a fit and proper person, the court must weigh up the offending conduct complained of against the conduct expected of a legal practitioner. In doing so, as I should, I must restate the well-established principle in our law that the legal profession, as codified in the LPA and the relevant Rules and Code of Conduct, is an honourable one and, as such, demands complete honesty, reliability and integrity from its members.¹¹ Legal practitioners are expected to act with integrity and honesty and to uphold the ethical standards of the profession. Legal practitioners should only be allowed to practise once they are able to convince a court that they are fit and proper persons to practise as such.¹²

[44] As I see it, the core issue in this matter is not the fact that the respondent allowed the complainant's claim to prescribe in her hands. Instead, the primary concern raised by the LPC pertains to the respondent's actions in dishonestly concealing the prescription. In summary, the complainant's claim prescribed, and the respondent misrepresented to her that the matter was settled. The respondent inquired regarding the amount the complainant would consider acceptable for settlement. In response, the complainant indicated that she would accept R350 000. Subsequently, the respondent paid the complainant R398 000 from her personal funds. Expressed differently, the respondent misrepresented to her client. It is this conduct that this court must evaluate, to determine whether it warrants her being struck off the roll or suspended.

¹¹ *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538G

¹² [2009] 1 All SA 133 (SCA)

[45] The respondent was frank and candid when she was confronted by the LPC. She did not deny the allegations against her. Importantly, the reasons that prompted her to misrepresent to her client (the complainant) were not challenged and, in my view, are a factor that weighs heavily in her favour and must be considered in the value judgment exercise. The respondent asserted in her affidavit that at the time she was handling the complainant's matter, she came to know of the personal circumstances of the complainant and the environment the complainant lived in. The complainant informed her that she (the complainant) had a soup kitchen, which the respondent decided to contribute to regularly.

[46] When the complainant visited the respondent's residence to collect donations, she was often accompanied by individuals who struck the respondent as dubious and 'unsavoury'. Although the respondent was never directly threatened, she became increasingly aware that the complainant had connections to people who could potentially harm her if she became dissatisfied with her.

[47] The respondent asserted that it was the first and only matter that she had ever negligently allowed to prescribe. After she discovered that the matter had prescribed, she went into a complete panic. She was scared to tell the complainant that her claim had prescribed. She feared that if the complainant became angry, she might harm her or her eight-year-old daughter. At the time, the respondent was also pregnant and had another minor child at home. She said that she did not know what to tell the complainant and was scared that if she told her what had happened to her claim, she might send someone to injure her family members.

[48] Rather than informing the complainant about her option to file a claim against the fidelity fund insurance, the respondent asked her if she would consider settling the matter, to which the complainant agreed. In addition, it appears that the reason why the respondent did not tell her that she had such an option was because she was embarrassed by what had happened and concerned that if it became known in the profession it would affect her reputation. The respondent then proceeded to make payments to the complainant which exceeded the amount of R350 000 which the complainant had indicated she was prepared to accept in settlement. The payments were made from the respondent's personal funds.

[49] It is crucial to note that the respondent never received any money from the complainant, and her intent was never to cause the complainant any prejudice. This is evident from her actions after the claim prescribed. If anything, from the information disclosed in the papers, it seems that the complainant may not have succeeded with a claim for breach of privacy/ unlawful search and seizure against the police had an action been lodged on her behalf, given that the search of her premises occurred in terms of a warrant which was issued, and at the very least, even if she had succeeded it is doubtful whether she may have been awarded as much as R 350 000 in damages.

[50] This is not a case where the respondent received a lump sum payment pursuant to a legal action that was instituted on behalf of a client and embezzled some of it for her benefit. Rather, the respondent made significant efforts to address her mistake, despite her flawed and misguided approach. She endured considerable financial strain by paying R398 000 to the complainant, which underscored her commitment to rectifying the situation. Significantly also, the respondent admitted that her conduct in telling the complainant that there was a settlement agreement when, in fact, there was none, was wrong.

[51] In the circumstances, although the respondent was dishonest, such dishonesty does not establish that she is a danger to the public or that she is not a fit and proper person to practice as an attorney. After she discovered that the claim prescribed, panic and anxiety became the better of her and clouded her judgment. Evidently, whilst there was a foolish, lapse or error of judgment on her part, it cannot be said that her conduct evidences that she suffers from a character defect, which renders her a danger to society or the legal profession. In the result, it cannot be said that the offending conduct is so gross and egregious that it manifests a lack of integrity, such that it renders her unfit to remain on the roll of legal practitioners.

[52] Having dealt with the first two inquiries, I now turn to deal with the third leg of the inquiry, namely whether, in all the circumstances, the respondent is to be removed from the roll of legal practitioners or whether an order suspending her from practice for a specified period would suffice. The respondent took instructions to

represent the complainant 14 years ago. The respondent has been in practice for all these years and no other complaint has been lodged against her in the past ten years.

[53] The disciplinary proceedings against the respondent were instituted more than three years ago. The respondent was still young and a junior attorney when the incident happened. She had just established her own practice. She was youthful and inexperienced. Considering her fear of the complainant, her relative youth and inexperience during this critical moment should be regarded as mitigating factors deserving of understanding and compassion.

[54] Notwithstanding, the respondent has been untruthful to the complainant. Whilst the untruthfulness of the complainant must be frowned upon, it must be stressed that not all forms of dishonesty warrant the removal of an attorney from practice. I am fortified in this regard by the admirable dictum expressed by Scott JA, as he then was, in *Jasat v Natal Law Society*,¹³ where the learned judge noted that the profession of an attorney is an honourable one and demands complete honesty, reliability and integrity from its members. However, as he went on to point out, this does not mean that any untruthfulness, however trifling, will render an attorney unfit to practice and liable to be struck off the roll. As important as the requirements of honesty, reliability, and integrity are, each case must undoubtedly be examined in the light of its own facts and circumstances.

[55] Seemingly, the LPC acknowledged that the respondent is not a danger to society as it did not institute any interdictory application to prevent her from continuing to practice. The respondent admitted her wrongdoing and did not try to delay or frustrate the disciplinary proceedings that were instituted against her. She paid the fines that were imposed upon her. In fact, it transpired that she paid the LPC more than she was fined, and it has undertaken to refund the excess. At the hearing of the application, the Court was assured by the respondent's counsel that any lingering concerns that the Court might have in respect of a possible recurrence

¹³ Note 5 para 12.

should be assuaged by the nature of the respondent's practice, which focuses on debt review, family law and criminal law, which do not involve issues of prescription.

[56] The court was further informed that the respondent is responsible for a household comprising her three children and her husband, who has been unemployed since 2011. Furthermore, she provides support for her two elderly parents, who are also without employment. The respondent shoulders all the financial responsibilities of her family and her parents, which include expenses related to housing, education, and the costs of daily living. In our view, given that the respondent paid the complainant R398 000 and the LPC a further R60 000 in fines and costs i.e. a total of R458 000, she has already paid dearly for her mistake, and it would be unjust to punish her further by suspending her from practice, thereby rendering her unable to continue to support herself and her family.

[57] Consequently, having regard for the nature of the respondent's misconduct and the circumstances in which it occurred, and the factors personal to the respondent and peculiar to her case and, the legitimate interests of the profession and the public and their justifiable expectation that the court will protect and further their interests, we are of the view that an appropriate and fair order to be made is one whereby the respondent is to be suspended from practice as a legal practitioner for a period of three years, which suspension in turn is wholly suspended and antedated to 1 April 2023, subject to certain conditions which were proposed by the parties, in an agreed draft order.

Costs

[58] Finally, as far as costs are concerned, whereas it is customary in matters such as these to hold the defaulting practitioner liable for the costs of the application, the LPC fairly and properly conceded (given that the respondent has already paid R458 000 out of her own pocket for her error of judgment) that, in the event that the court was of the view that any order of suspension should in turn be suspended, the fair and proper order to make should be that the parties were to be liable for their own costs.

Order

[59] In the result, I would make the following order:

[60] Having paid the fines imposed by the Disciplinary Committee in the sum of R45 000 and having complied with the Disciplinary Committee's further direction not to appoint any more candidate attorneys for a period of three years from 15 March 2023, and having provided proof of her registration with Prescription Alert, the respondent is suspended from practice as a legal practitioner for a period of three years, which suspension is wholly suspended for a period of three years, antedated to 1 April 2023 on the following conditions:

60.1 That the respondent does not commit any acts of misconduct as encompassed in the Legal Practice Act 28 of 2014, the LPC Code of Conduct and/or the LPC Rules and Regulations, of which dishonesty is an element, or which amounts to gross negligence in the performance of her duties and responsibilities as an attorney.

60.2 That the respondent remains registered with Prescription Alert.

61. In the event that the respondent breaches any of the conditions set out above, the LPC may approach this court on the same papers, duly supplemented, for such further order or relief against the respondent, as may be fit and appropriate.

62. The parties shall each be liable for their own costs.

LEKHULENI JD
JUDGE OF THE HIGH COURT

I agree and it is so ordered.

M SHER
JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: Ms Mahomed
Instructed by: Cowan-Harper-Madikizela Attorneys

For the Respondents: Mr Jacobs SC
Mr Abass
Instructed by: Parkar Attorneys Inc