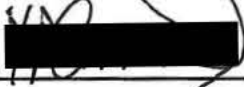


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 65895/18

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
23/09/2025	
DATE	SIGNATURE

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

First Applicant

and

DAVID ANTHONY SMITH

First Respondent

RAPHAEL & DAVID SMITH INC

Second Respondent

Delivered: This judgment was prepared and authored by the Judge(s) whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 SEPTEMBER 2025

JUDGMENT

CARRIM AJ

Introduction

[1] This is an application in terms of section 22(1) of the now repealed Attorneys Act 28 of 2014 (**the Attorneys Act**). Section 22(1) conferred a discretion on this Court to strike off or suspend any person who has been admitted as an attorney if they are not fit and proper to continue practising as such. The application to strike the First Respondent off the roll of attorneys was brought by the Law Society of the Northern Provinces ("the Law Society") on 10 September 2018. The Legal Practice Council (LPC) established by the Legal Practice Act No. 28 of 2014 (**LPA**) now exercises oversight over the conduct of legal practitioners. The LPC continues with this application.¹ For ease of reference, I will refer to the Applicant either as such or as the LPC, albeit that some of the events occurred prior to the establishment of the LPC.

[2] The Applicant relies on a report of an investigation conducted by Mr Vincent Faris² (the Faris Report) and more than sixty (60) complaints lodged against the Second Respondent ("the firm") in support of this application.

[3] At least twenty-one (21) grounds of misconduct are levelled against the Respondents.³

[4] The relief sought is for Mr David Smith to be struck off the roll of legal practitioners and for the firm to be placed under curatorship. However, at the end of the hearing the LPC persisted only with relief against Mr Smith; and none against the firm.

¹ As it was entitled and obliged to do under section 116(1) of the Legal Practice Act.

² Mr Faris was a chartered accountant and auditor practising under the style of Vincent Faris Chartered Accountant.

³ See LPC Note for Argument (the Note) 024-275ff

Background and Procedural History

[5] The application was launched in 2018 and was heard almost seven years later in the week of 5-9 May 2025.

[6] Unlike in most striking off or suspension applications brought by the LPC, the First Respondents' practice is not that of a sole practitioner.

[7] The First Respondent (hereafter Mr Smith) was admitted to practice in 1986. He became a partner in his father's law practice in 1992. The partnership was converted into a professional company in 1997, being the Second Respondent. Mr Smith and his father were two co-directors. The major component of the firm's work was litigation against the Road Accident Fund ("RAF"); the cases against the RAF running into approximately one thousand (1 000) cases per annum.⁴

[8] Until his death on 13 October 2012, Mr Raphael Smith was the managing director/partner of the firm. The functions carried out by Mr Raphael Smith were taken over by Mr Smith after the former's demise.

[9] The allegations of misconduct are numerous and some are very serious. However, curiously and unlike as happens in many applications of this sort, an order was not sought suspending Mr Smith from practice when the application was launched in 2018, nor for that matter at any time thereafter.

[10] The procedural history stretches back to an application brought by the Applicant in 2011 under section 70 of the Attorneys Act ("s70 application") against Mr Smith and his late father Rapheal Smith compelling them to provide records for purposes of an investigation of the entire practice based on thirty-one (31) complaints received against the firm. Prinsloo J granted the order on 22 July 2016.⁵

[11] Mr Rapheal Smith died prior to the judgment by Prinsloo J ("the Prinsloo J judgment"). Mr Smith remained a Respondent and he⁶ appealed the Prinsloo J

⁴ This is an estimate. In the AA dated 24 April 2019 Mr Smith states that the firm had by that stage handled approximately 30 000 files.

⁵ See the judgment at 002-211 *Law Society of the Northern Provinces and Raphael Smith, David Anthony Smith and Rapheal & David Smith Inc*

⁶ By the two remaining Respondents but since Mr Smith was the sole director at the time, no distinction is made between him and the firm for purposes of this discussion.

judgment to the Supreme Court of Appeal and ultimately to the Constitutional Court. He was unsuccessful in both courts.

[12] Mr Smith⁷ contends that the Applicant's request for inspection and the s70 application was driven at the time by Mr Bobroff, the President of the Law Society at the time, and a competitor of Mr Raphael Smith. Mr Smith avers that Mr Bobroff's actions were motivated by malice. Similar arguments have been resuscitated in these proceedings with the Respondents arguing that this application is nothing more than a continuation of the "Bobroff"⁸ malice and is motivated by bias and suspicion on the part of the LPC.

[13] The judgment of Prinsloo J is a matter of public record. In granting the s70 order, Prinsloo J considered these arguments and made short shrift of them. For purposes of this judgment, it is not considered necessary to decide the veracity of the claims of malice and bias.⁹

[14] After the section 70 order was obtained, the Applicant instructed Mr Faris to proceed with his investigation. Mr Faris' mandate emanated from the Prinsloo judgment and was limited to an inspection of the accounting records relating to all claims handled on behalf of clients against the RAF, the complete office files relating to such claims, books and/or records relating to the practice of the attorneys and the records/data of all clients in relation to RAF matters.¹⁰

[15] Mr Faris conducted the investigation on 27 June 2017 and delivered his report to the Applicant on 26 October 2017.

[16] While his mandate extended to all matters in which the Law Society had received complaints Mr Faris noted in his report that he had not understood his mandate to investigate all the RAF matters handled by the firm which were in the region of 2000/3000. For this reason, he investigated a sample of files based on his years of experience. He also noted that no audits were undertaken, and it was

⁷ Mr Smith was the deponent on behalf of both Respondents. A reference to him includes a reference to the firm unless the context requires a distinction to be made.

⁸ It is well-known that Mr Bobroff is a fugitive from justice, and his name has been struck from the roll of legal practitioners.

⁹ The record of the s70 proceedings were also filed.

¹⁰ 002-286 Annexure B to investigation report

assumed that other than the matters investigated by him in relation to specific doctor's accounts no information was given to him of any other complaints lodged with the Law Society against the firm and it had been accepted by him that the matters which initiated the mandate in 2006 had been resolved.¹¹

[17] Almost a year later, on 10 September 2018, the LPC launched these proceedings without first sharing the Faris Report with the Respondents.

[18] The Respondents filed an answering affidavit on 24 April 2019.¹² Mr Smith responded to each complaint attached to the founding affidavit although not a single one involved him personally.¹³ In order to fully respond to the concerns raised in the Faris Report, Mr Smith tasked his auditor Mr Russon,¹⁴ a Chartered Accountant, to prepare a report to answer the concerns raised in the Faris Report. Mr Russon's first report is dated 22 October 2018. He prepared a further report which is dated 18 March 2019.¹⁵ Furthermore, Mr Smith obtained a report from an independent auditor Mr Selbst¹⁶ to comment on Mr Russon's findings.

[19] On 22 June 2020 the Applicant filed a replying affidavit and a supplementary founding affidavit in which additional or new complaints were attached.¹⁷ This was fourteen months after the answering affidavit had been filed.

[20] A further Russon report and a further Selbst report were commissioned by the Respondents.¹⁸ The Russon report is dated 20 October 2020. Mr Selbst's report is dated 2 November 2020.

[21] A supplementary answering affidavit was served on 3 December 2020.¹⁹

[22] On 9 November 2022, some twenty months after the supplementary answering affidavit was served, the Applicant filed a supplementary replying affidavit.

¹¹ 002-280 Investigation Report

¹² Running into more than 500 pages

¹³ See Annexure AA1. 008-103

¹⁴ 22 Oct 2018 Russon Factual Findings Report 008 –63

¹⁵ 008-509

¹⁶ Mr Ernest Selbst Report 008- 514

¹⁷ 009-5

¹⁸ 014-145 and 014-189

¹⁹ 014-1

[23] Ten months later, the Applicant delivered a further supplementary replying affidavit on 1 September 2023.²⁰

[24] In response to the further supplementary replying affidavit the Respondents filed an affidavit on 6 October 2023.

[25] Then yet another further supplementary replying affidavit was filed by the Applicant on 19 January 2024.²¹ In this affidavit for the first time the passing of Mr Faris ²²is disclosed to the Court and an attempt is made to substitute the late Mr Faris's opinion with that of Mr Ashwin Reddy.

[26] Neither party sought condonation for the filing of all these supplementary affidavits. The Applicant claimed that it was entitled to put new facts before this Court without seeking condonation. I am not persuaded that the submission is correct. Be that as it may, I do not consider it necessary to decide whether the Applicant was obliged to apply for leave to file the supplementary affidavits or apply to condone their delivery. In any event, the Respondents have already answered to the supplementary affidavits.

[27] Prior to the hearing of the matter the parties were asked in a case management meeting to reduce the volume of paper, narrow the disputes, and to produce a core bundle. This request yielded no beneficial outcomes whatsoever, the range of disputes were not narrowed, a core bundle produced by the LPC was incomplete and page references became confusing. They did not match the page numbers in the main bundle. All-in-all the manner in which the papers were put before the court by the *dominus litis* was disappointing to say the least. Regrettably, much scarce judicial time had to be expended in trudging through the papers. The Respondents eventually produced a chronology document which became a useful tool to navigate this impossibly voluminous record. The record stood at roughly 5000 pages with the evidence relied upon by the Applicant alone spread across a multitude of affidavits.

²⁰ 022-1

²¹ 025-1

²² Sadly, Mr Faris passed away on 12 June 2021.

[28] The Respondents allege that the way the LPC conducted itself in this matter was grossly unfair to them and that they have felt themselves at the receiving end of a constantly evolving case. They asked that the matter be dismissed on this basis without considering the merits. This was raised as a type of *point in limine*. I turn to consider this issue now.

Point in Limine

[29] The cornerstone of the point *in limine* raised by the Respondents is that the LPC conducted the matter in such a grossly unfair manner that this Court should record its displeasure by simply dismissing it on this basis.²³

[30] The Respondents submit that the unfairness attaches not only to the procedure prior to the launching of court proceedings but also to the conduct of the Applicant in these proceedings. They submit that the Applicant ought to have first conducted an internal disciplinary enquiry against Mr Smith and the firm with properly formulated charges prior to approaching the Court. They contend this was indeed contemplated in the s70 application. They submit that such a process would have enabled Mr Smith to understand the case against him, cross-examine witnesses and lead his own evidence. As it stands it is unclear what charges are levelled against him personally to warrant his striking off. As to the complaints against the firm, the respondents submit that a disciplinary enquiry would have weeded out unmeritorious complaints and/or an approach to the Court might not have been necessary at all. The Respondents argue that the unfairness extends to the conduct of the LPC in these proceedings. In this regard, they submit that the LPC recycled old complaints (older than 10 years—contrary to its own directive); it relied on complaints even though the files relating to those complaints had been closed; dormant complaints which had already been investigated and included new complaints which had not previously been sent to the firm. Furthermore, they contend that the filing of numerous affidavits, without the leave of the Court, and burdening the court record unnecessarily with irrelevant material, was unprecedented. They complain that the application was run in a grossly unfair manner where the Respondents were required to answer an ever-evolving case. Every time the Respondents answered an

²³ A number of other points were raised about the Notice of Motion, but nothing turns on them.

allegation, a new one was levelled against them flowing from the answer itself. According to them, the unfairness also stemmed from the Faris Report in that the LPC did not follow the recommendations of its own expert, namely Mr Faris's recommendation that Mr Smith together with the auditor should engage with Mr Faris. Added to this the Faris report was not shared with the Respondents prior to the application being launched. They submit that they were severely prejudiced in having to answer to Mr Faris' findings or concerns within the limitations of motion proceedings as opposed to in a discussion with Faris and his team who had *de facto* knowledge of the firm's accounting systems. In terms of relief that should be granted, the Respondents submitted that the matter should be dismissed. They argued that the LPC could, notwithstanding the dismissal of the application, still conduct a proper disciplinary enquiry against Mr Smith on clearly formulated charges so that the Respondents know what case they have to meet.

[31] Mr Stocker on behalf of the LPC submitted that the LPC was entitled to approach the Court directly without first conducting an internal disciplinary enquiry. He argued that once the LPC had formed the view that a practitioner was not fit and proper to continue practising, little would be served by holding an internal enquiry. And proceeding to court directly would be more efficient and would be to the benefit of the public. He submitted that in this case the LPC had already formed the view that Mr Smith was not fit and proper and accordingly proceeded directly to Court. He argued further that the Respondents' point *in limine* was not a proper legal point and could not be decided without going into the application.

[32] The question whether the LPC is required to conduct a prior disciplinary hearing has been considered by the Supreme Court of Appeal. In *Law Society of the Northern Provinces v Morobadi*²⁴ the SCA held that

"in 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 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".

²⁴ (1151/2017) [2018] ZASCA 185 (11 December 2018) at par [25].

[33] This principle has also found application recently.²⁵

[34] That this is expressed as a general principle rather than a hard and fast rule, suggests that there may well be circumstances where proceeding with an application prior to instituting internal disciplinary proceedings might not be appropriate.

[35] Whether or not the LPC proceeds directly to court or first initiates an internal disciplinary enquiry is a matter of discretion on its part. However, in exercising its discretion in favour of a direct approach to court without first initiating an internal disciplinary enquiry, the LPC might run the risk of a poorly investigated complaint on its part or be surprised by the evidence that a respondent might lead before the court.

[36] Thus, the decision by the Applicant to proceed to Court without first instituting an internal disciplinary enquiry and its failure to do so in this instance is not *ipso facto* unfair. It was entitled to proceed with this election with all the attendant risks involved in application proceedings. Would a prior disciplinary process have weeded out unmeritorious complaints or clarified the case against Mr Smith? Possibly. But any alleged unfairness to the Respondents can only be considered by having regard to the application itself.

[37] In this application, even though the LPC's case against the Respondents was amplified since the application was first brought, the grievance that Mr Smith could have understood the case against him if a prior disciplinary enquiry had been held is not borne out by the papers. Mr Smith has been a party to these proceedings from inception. At the time of the s70 proceedings he was already a director of the firm and prior to that a partner.²⁶ He took over the management of the firm and directed the litigation after his father's death in 2012 all the way to the Constitutional Court. Mr Smith has filed comprehensive affidavits in response to the averments against the Respondents, albeit that in his view the case against him was not clear.

[38] In the circumstances, while the LPC could have acted differently, we cannot find that the Respondents did not or could not understand the case against them.

²⁵ *South African Legal Practice Council v Selota* (43012/2018) [2025] ZAGPPHC 475 (15 May 2025).

²⁶ Appointed on 1 January 2004.

[39] However, the unsatisfactory manner in which the LPC has conducted this matter is taken into account when the issue of costs is discussed.

[40] For these reasons, the point in limine is dismissed and I now turn to consider the merits of the matter.

The Test

[41] It is trite that applications for the suspension or striking off a legal practitioner involves a three-stage enquiry. The first stage is determining whether the alleged offending conduct had been established on a preponderance of probabilities. This is a factual enquiry. The second stage is to determine whether the practitioner is fit and proper to continue to practice. This is a discretionary exercise. The third stage is to determine what sanction should be imposed and whether an order of suspension from practice would suffice or whether the practitioner should be struck off.²⁷

[42] In *Law Society, Northern Provinces v Mogami and Others*²⁸ the court stated:

a. “[4] Applications for the suspension or removal from the roll require a three-stage enquiry. First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. Second, it must consider whether the person concerned is ‘in the discretion of the court’ not a fit and proper person to continue to practice. This involves a weighing-up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. And third, the court must enquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice”.

[43] It is also trite that these applications are a type of disciplinary enquiry by the Court into the conduct of the practitioner concerned. However, while they are brought on application (motion proceedings) they are *sui generis* in nature. A Court has an inherent discretion, over and above the provisions of statute. It is also within a

²⁷ *Law Society of the Northern Provinces v Magami* 2010 (1) SA 186 (SCA) at par 4 and *Summerly v Law Society of the Northern Provinces* 2006 (5) SA 613 (SCA) at par 2.

²⁸ 2010 (1) SA 186 (SCA).

Court's discretion to impose an appropriate sanction in the circumstances of each case.

[44] In *Wild v Legal Practice Council*, it was stated that:

a. "Therefore an application to suspend or strike an advocate (or an attorney) from the roll was not the pursuit of a cause of action in the true sense, The applicant merely submitted to the Court facts which it contended constitute unprofessional conduct and then left it to the Court to determine how it should deal with the respondent in question. These were in fact *sui generis* or distinctive proceedings as opposed to ordinary civil litigation (see *van Blommestein, Professional Practice for Attorneys*, (1965), p 89 where this is explained with reference to the previous Law Societies as applicants, but the same principle also applied to the Bars as applicants, and still applies today)." ²⁹

[45] The LPC, as an applicant, acts as the *custos morum* of the legal profession. It places facts before a court for a decision. It is for the court to weigh up those facts and decide whether the practitioner is fit and proper to remain in practice.

[46] Even though these types of proceedings are invariably brought on application, the usual approach to motion proceedings where a dispute of fact arises are generally not appropriate. The *Plascon Evans* principle has been found to be inappropriate.

[47] In this regard in *Van der Berg v General Council of the Bar of South Africa* (*per Nugent J*) it was observed:

a. 'Proceedings to discipline a practitioner are generally commenced on notice of motion but the ordinary approach as outlined in *Plascon-Evans* is not appropriate to applications of that kind. The applicant's role in bringing such proceedings is not that of an ordinary adversarial litigant but is rather to bring evidence of a practitioner's misconduct to the attention of the court, in the interests of the court, the profession and the public at large, to enable a court to exercise its disciplinary powers.' ³⁰

²⁹ [2023] ZAGPPHC 2086; 31130/2019 (24 April 2023) para [62].

³⁰ [2007] ZASCA 16; [2007] SCA 16 (RSA); [2007] 2 All SA 499 at [12]

The Alleged Conduct

[48] The LPC relied on more than sixty complaints³¹ from clients against the firm and the findings in the Faris Report to justify a striking off. But it also relied on the Prinsloo J findings and the conduct of the Respondents in these proceedings to level additional charges of obstructionism and dishonesty against Mr Smith.

[49] The Applicant conveniently dealt with the charges against the Respondents thematically under the following headings:

- (i) Touting;
- (ii) Failing to advise clients on costs involved;
- (iii) Taking undue advantage of clients and pressurising clients to agree to a fee and to waive the right to demand the taxation of the fees charged;
- (iv) Entering into illegal contingency fee arrangements;
- (v) Overreaching;
- (vi) Misappropriating money owed to clients;
- (vii) Failing to properly account to clients,
- (viii) Delaying Payments to Clients
- (ix) Failing to address correspondence to clients and keep them updated on the progress in their case;
- (x) Findings against the First Respondent by Prinsloo J;
- (xi) Failing to keep proper accounting records (based on the findings in the Faris Report),
- (xii) Debit balances in the firms' trust creditors' accounts and the failure to report these;

³¹ Number of complaints = 56 (see Annexure AA1). Number of 'new' complaints in Supplementary FA = 13. (SAA A4-1366). Total = 69, reduced to 60 in the Note. Further reduced during argument

- (xiii) Trust Deficits and the failure to report these to the Law Society;
- (xiv) Issuing Trust Cheques to Cash;
- (xv) Failing to exercise proper supervision and control over employees;
- (xvi) Failing to respond to correspondence either timeously or at all;
- (xvii) Failing to carry out the client's mandate with the necessary skill,
- (xviii) Dishonesty in this application;
- (xix) Refusing to withdraw as the client's attorney notwithstanding the mandate being withdrawn;
- (xx) Procuring from clients the withdrawal of complaints lodged by them with the LPC; and
- (xxi) Destroying records.

[50] During argument Mr Stocker on behalf of the LPC, elected not to persist against Mr Smith for having practised without a Fidelity Fund Certificate (FFC) on three occasions in the distant past for very short periods of time.³² He persisted only with 43 complaints listed in his additional Practice Note ("the Note").³³ The number of touting complaints were also further reduced.³⁴

[51] At the end of the hearing two critical facts emerged: the first was that Mr Smith had not been issued with his FFC since 2018³⁵ when these proceedings were launched (and could not effectively practice as an attorney) and the second, a new director, Ms Amalia Smith had been appointed as director on 11 December 2018.³⁶ Mr Stocker confirmed that because of these new facts the LPC would not be seeking relief against the firm.

³² 1 March 1995-31 Dec 1995, 1 Jan 1996-2 Oct 1996, 1 Jan 2006-13 Jan 2006. A charge levelled against him in the FA at 002-124 at [14.4]

³³ 024-372

³⁴ Transcript 9 May 2025 page 151 ln 4.

³⁵ 033-2

³⁶ 033-10

[52] I turn to consider the merits of the matter in the following manner. I first deal with the clients' complaints. I then deal with the Faris Report and finally the issue of Contingency Fees and Related Matters. The issues of relief and costs are dealt with at the end before the order is granted.

The Client Complaints

[53] This section relates to the behavioural type of conduct (failure to account, failure to respond to queries, correspondence, emails of clients and colleagues, delayed payments, procuring withdrawal of complaints and the like). Included in these discussions are also the allegations of touting and residual complaints of dishonesty and obstructionism.

[54] In the founding affidavit the LPC alleges that it received more than four hundred (400) complaints against the firm. The impression created by this manner of pleading is that there were a multitude of complaints against the Respondents, which justify immediately striking off Mr Smith and placing the firm under curatorship.³⁷

[55] The LPC then attached fifty-two (52) complaints to the founding affidavit. The LPC provides no analysis of the complaints based on age (how old), status (whether ongoing or closed), whether it had been investigated and/or whether it had been shared with the firm.

[56] In the answering affidavit Mr Smith provides an analysis of the complaints based on status, age, dormancy and whether it had been shared with the firm before being included in these proceedings.³⁸ A response to each complaint can be found in annexure AA1.³⁹

³⁷ Those were apparently shared with the firm during these proceedings but nothing more was said about them.

³⁸ Para [7] of AA

³⁹ 008-103

[57] The LPC then attached additional complaints (called 'new' by the Respondents) to the supplementary founding affidavit.⁴⁰ A detailed response to these was provided by the Respondents in the supplementary answering affidavit.⁴¹

[58] In his Note, Mr Stocker relied only on forty-three (43) of the sixty (60) complaints. This number decreased to thirty-four (34) during the hearing because nine (9) complaints relating to alleged touting were dropped.

[59] An initial analysis of the remaining thirty-four (34) complaints shows the following:

- a. Complaints against Mr Smith personally = 0 (nil)
- b. File closed by LPC = 8 (eight)
- c. Complaints older than 10 (ten) years = 4 (four)
- d. Not clients of the firm = 1 (perhaps 2 because one is unclear)
- e. Complaints not seen by the firm before these proceedings = 9 (nine)

[60] The analysis above shows that of the thirty-four (34) complaints relied upon by the LPC, none are against Mr Smith personally. In all cases the complaint is against an employee of the firm. Additionally, many of these complaints have been closed, several are more than 10 years old, or dormant, and some were not sent to the firm before this application was brought.

[61] One would expect the LPC to explain why it is relying on complaints, which it closed as well as those older than 5-10 years, despite its own directive that it would not inspect old complaints "*due to a long time having expired before a complaint had been lodged with the Law Society*".⁴² Likewise in the case of dormant complaints.

⁴⁰ 010-5

⁴¹ 014-3

⁴² Law Society of Northern Provinces Circular "*Kindly take note that in terms of the Rulings of the Law Society of the Northern provinces, it has been resolved by the Council that the Society would not proceed with an investigation of a complaint if the Society was of the view that it would be unfair to a practitioner to deal with the matter, due to a long time having expired before a complaint had been lodged with the Law Society.*"

[62] Mr Stocker during argument submitted that the LPC was 'entitled to re-open a complaint'. That might be so, but then as a matter of fairness it should explain to Mr Smith, and this Court, why it has decided to do so. None has been given.

[63] In relation to the complaints not shared with the firm Mr Stocker submitted that the LPC was entitled to place new evidence of the Respondents' conduct before the Court and that they now had an opportunity to respond to it. Again, this is not *per se* impermissible; the LPC is entitled to put new evidence before the court. However there should be an explanation why the evidence was not placed before the court in the first place, and also why the information was not placed before the court as soon as it came to hand. Apart from this, one would expect a regulator, such as the LPC, to tell the court whether it investigated the veracity of the new evidence and if it did not, why not.

[64] During argument Mr Stocker was asked to deal with each complaint he relied on, the Respondents' response thereto, the LPC's reply thereto and where in the record these could be found. The Court's request was not accommodated. Instead, a broad thematic approach only occasionally touching on details of a complaint to support the alleged misconduct was pursued. A complaint was relied upon for more than one type of alleged misconduct.⁴³

[65] The LPC's approach here is "volume-based". It seems to be an attempt to show that over the years a large number of similar complaints of misconduct were lodged against employees of the firm and that the sheer volume of the complaints proves that the firm, and Mr Smith, have contravened provisions of the LPA, the Attorneys Act and/or Rules. Because the conduct complained of related to employees of the firm, and not Mr Smith himself, the only approach that could be adopted was a thematic categorisation of the misconduct complained of against the firm's employees, and then occasionally latch onto something in a complaint, or a statement in, or some aspect of the Faris Report to support charges lumped together under one or other theme.

[66] The Respondents on the other hand, followed a "details-hearsay approach", pointing to each complaint to show that Mr Smith was not implicated in any of these,

⁴³ See the Note

and argued that the complaints amounted to hearsay evidence against him. They also argued the alleged conduct had to be evaluated in accordance with the *Mogami* test and that this Court has to make factual findings on each complaint on a balance of probabilities.

[67] It is improper for the LPC – without explanation - to burden this Court with complaints about files that *it itself* closed, or about conduct stretching back *more than 10 years ago*, and dormant files in respect of which *it remained silent or took no steps* against the implicated attorneys at that time and then ask this Court in exercising its oversight functions to have regard to them for a striking off or suspension of Mr Smith.

[68] The LPC has not taken any steps against the implicated employees in a particular complaint, instead it has taken a broad thematic approach, relying on complaints lodged against individuals in the firm, to make its case against Mr Smith. This is why a slavish application of the *Mogami* test to each complaint - as argued by Mr Van der Spuy on behalf of the Respondents - to assess Mr Smith's conduct is not appropriate in this matter. This is also why the details of each complaint relied upon by the LPC will not be considered in this judgment and a broad thematic approach will be followed to assess whether on a balance of probabilities Mr Smith's conduct constitutes a contravention of the Act and/or the rules that is so egregious as to warrant a striking off. However, some details might be referred to for purposes of context or a theme.

[69] Thrown in the mix was a debate about whether Plascon-Evans had application in the event of a factual dispute. The Respondents argued that the Plascon – Evans principle applied in applications of this sort, with Mr Stocker arguing that because these were *sui generis* proceedings it did not. This was an unhelpful debate because it has already been settled in *Van der Berg v General Council of the Bar of South Africa* that the Plascon- Evans approach might not be appropriate in matters of this nature.

[70] The LPC is no longer persisting with relief against the firm. Thus, the only Respondent in the room is Mr Smith.

Mr Smith's position

[71] It is common cause that Mr Smith was not personally involved in any of the complaints and that the conduct complained of involves other employees of the firm.

[72] Mr Stocker submitted that because Mr Smith was a director of the firm since 2004, he should be held personally accountable for the conduct of his employees for all complaints going back to 2007.

[73] However, while Mr Smith has been a director of the firm from January 2004,⁴⁴ Mr Raphael Smith was the managing director until his death on 13 October 2012. Mr Smith has set out how the firm was managed by Mr Raphael Smith who also dealt with any complaints from the LPC. To some extent this is confirmed by Mr Ngwenya in his complaint where he sets out his dispute with Mr Raphael Smith.⁴⁵

[74] Mr Smith took over the management of the firm after his father's death. Until the appointment of Ms Amalia Smith as director in 2018⁴⁶ he was the sole and managing director of the firm. He was thus the controlling mind of the firm from 2013 (from the time he became managing director) to 2018.

[75] In *Legal Practice Council v Mkhize*⁴⁷ (the case involved an advocate) the Court held that

a. *"Counsel cannot hide behind the conduct of those that assist them in practice, to avoid the binding principles of their profession. It would counteract the accountability the LPC's code seeks to create and the ethics of the profession."*

[76] In *Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and others*, the SCA dealt with the issue of the liability of all directors of a law firm, when financial misconduct had allegedly been committed by only one director. The SCA held that every director has a fiduciary duty towards the company of which they are a director.

⁴⁴ 033-10

⁴⁵ 002-1192

⁴⁶ 033-10

⁴⁷ 2024 (1) SA 189 (GP)

[77] I would say that the same principle applies here. A director and more so a *managing director* of a law firm cannot transfer blame onto his employees and permit them to flout the ethics and standards of the profession, with impunity.

[78] Whether he was the managing director or an ordinary director, Mr Smith still bears both legal and professional responsibility for the conduct of his employees including the professional assistants of the firm.

[79] The complaints under consideration during Mr Smith's tenure as co-director with Mr Raphael Smith were reduced to thirty-four (34). An age analysis of the thirty-four (34) complaints reduces the complaints under Mr Smith's watch as managing director to fifteen (15).⁴⁸ Of these the number reduces further to twelve (12) because three (3) are no longer persisted with by the LPC.⁴⁹ This is still a number large enough to raise a few concerns. As to the alleged misconduct, these complaints cover the range alleged by the LPC such as failure to respond to calls, correspondence, failure to account, delayed payment and the like.⁵⁰

[80] In his answering affidavit, Mr Smith explains how he manages his professional staff.⁵¹ He states that he does not micromanage them because in his view the professional assistants are all capable of independently running their own accounts. Their track records with the firm attest to reliability, stability and excellence. Not even one of them has ever been found guilty of misconduct. Over the years their level of independence and autonomy has been vindicated because:

- a. The firm consistently obtains favourable settlements or judgments for its clients in RAF matters.
- b. In the past fifteen years, the firm has not lost the merits of a single RAF matter and has never failed to beat an RAF offer which it has asked the Court to test in a quantum dispute.
- c. The firm has never let a matter prescribe.

⁴⁸ 2013-209 being the last complaint

⁴⁹ 024-377. #1, 2, 3 on Mr Stoker's Note.

⁵⁰ See the Note. Complaints 14, 15, 16, 17, 24, 25, 31, 32, 33, 42, 43.

⁵¹ Consisting of 9 attorneys at the time.

[81] He sets out how things work in the firm: the professional assistants have autonomy when dealing with clients, colleagues, court officials and all and any of the other incidents of the attorney-client relationship. They deal with both High Court and Magistrates' court litigation with complete independence from the very inception of a matter to its conclusion. This includes either agreeing on a fee with client, or, if agreement is not possible, instructing a costs consultant to draw up and tax an attorney and own client account.

[82] The only time his attention is drawn to a matter handled by another attorney is in the event of a difficulty being escalated for his attention. All LPC complaints are referred to him. He assesses the complaint and obtains a full report from the attorney and depending on the LPC's response the matter may be escalated to him again.

[83] Thus, the firm is run with a combination of autonomy for experienced professionals and light touch supervision by the managing director.

[84] However, this firm is not an ordinary attorney's practice. The large bulk of its work involves RAF matters, not ordinary commercial matters or private civil disputes. For the most part it holds money in Trust on behalf of vulnerable clients - victims or their dependants - in a fiduciary capacity.

[85] It was submitted by Mr Van der Spuy on behalf of the Respondents that despite the large number of complaints relied upon by the LPC these constitute a small fraction when considered as a percentage of the large volume of matters that the firm deals with. There was also a suggestion that the type of work done by the firm namely RAF matters involves many 'unsophisticated' clients who do not necessarily understand how things work.

[86] The earlier argument would be more appropriate to a FMCG⁵² firm, selling large volumes of consumer goods, and reporting its performance to shareholders. Not to an attorney's firm rendering services to vulnerable members of the public. As for the latter argument, the fact that a large proportion of the client base may be unsophisticated is precisely the reason why attorneys who act in a fiduciary capacity for vulnerable individuals should be held to higher professional and ethical standards.

⁵² Fast moving consumer goods

It would seem to me that in such circumstances more is required from the managing director to ensure that employees of the firm – attorneys, paralegals and assistants alike – show a greater degree of sensitivity and courtesy to their clients, from whose awards their fees are earned.

[87] The culture of the firm and the attitude of its professional employees, whether these be attorneys, paralegals or clerks, flow directly from the leader of the organisation. Given the history of this litigation, I find it surprising that Mr Smith had not - when he took over as managing director- conducted a review of the firm's controls – whether these relate to the conduct of the attorneys or financial employees - to assess the strengths and weaknesses thereof and to find improvements in an effort to reduce risk. While he implemented a new financial reporting system (discussed below) he simply continued with this light touch approach to his legal professional staff, being reactive rather than pro-active in his role as managing director.

[88] On the whole, I find that Mr Smith as director and/or managing director of the firm during 2004-2018 failed or neglected to exercise proper control and supervision over the employees of the firm as is required by a senior attorney of his experience and standing in contravention of Rule 49.3 of Rules for the Attorneys Profession which provides that a member shall exercise proper control and supervision over his or her staff and offices.⁵³ I discuss the issue of sanction later bearing in mind that Mr Smith has not been practising since 2018 and that the conduct we are dealing with is more than seven years old.

Touting, Obstructionism and Dishonesty

[89] In relation to touting, the LPC eventually relied on two complaints namely Ngwenya⁵⁴ and P Sehloho.⁵⁵ Mr Ngwenya was an employee of the firm. In his complaint dated 28 January 2009, he alleges that he started working for the firm in 1997. His job was to bring them motor vehicle accident victims to their offices, and he was paid for each victim he brought. He was then given a clerical job (no date given). He describes his job as helping clients in the waiting room, interpreting and

⁵³ Rules for the Attorneys' Profession, Government Gazette No. 39740 26 February 2016.

⁵⁴ 002- 1192. #11 on the Note

⁵⁵ 002-1192 #9 on the Note

delivering files. Most of the time was spent in the waiting room attending to clients who came to check their claims and medical appointments. He then had a dispute with Mr Raphael Smith. An internal disciplinary hearing was heard on 23 November (no date given, assume 2007) which resulted in his dismissal. He took the matter to the CCMA, but it was dismissed. He took the matter to the Labour Court where it was also dismissed. He went to the Legal Aid Board for professional help on 8 May 2008 but was still waiting for assistance from them. He asks that the Law Society "assist him to get compensated for the damages caused by the above-mentioned entities" and that he was prepared to go to the Minister of Labour and to the media. From this 2009 complaint – which is clearly a labour dispute - the LPC formulated a touting complaint against the Respondents. The LPC did not attach any update on this complaint, nor are Mr Ngwenya's recent whereabouts provided.

[90] According to Mr Smith this complaint was not shared with the firm at the time and only emerges in the founding affidavit and is in any event directed at Mr Raphael Smith comprising a labour dispute.⁵⁶

[91] The Sehlolo complaint is referred to as the PS Mofokeng complaint in the Respondents' papers.⁵⁷ Ms Sehlolo filed a complaint with the LPC on 12 September 2011. The complaint is directed at Ms T, who according to the complainant, has not responded to her enquiries for the last 10 years. The complaint is about her receiving too little money. The RAF advised her to speak to Ms T. According to the complainant, her mother was recruited by Sipho Ngwenya at Baragwanath hospital. On the complaint itself no dates are given by Ms Sehlolo. The LPC relied on this complaint as supporting evidence of touting on the part of the firm.

[92] The Respondents explain in Annexure AA1⁵⁸ that the matter was attended by Ms K who left the firm over 15 years ago. The complaint served in the s70 proceedings,⁵⁹ and the matter had been finalised well before the third s70 proceedings. No records were available. Ms T took over the file after the settlement of the matter in an effort to obtain a medical undertaking from the RAF which had not

⁵⁶ 008-171

⁵⁷ 008-160 and 021-282

⁵⁸ 008-161

⁵⁹ 021-282

been given by the RAF. Ms T had provided a comprehensive response to the Law Society in 2011, but nothing further was heard.

[93] In summary, the evidence on the alleged touting shows that Mr Ngwenya's complaint was really about a labour dispute with Mr Raphael Smith. His role in bringing clients to the firm in 1997 was not clarified with him by the LPC and no further information was obtained from him by the LPC. Ms Sehlolo's complaint was about the lack of a response from Ms T. In this complaint she makes a passing reference to Mr Ngwenya – that her mother who appears to be deceased – was recruited by him. Again, no details are given about Mr Ngwenya's position in the firm by the LPC but on the face of it from his complaint it seems that he was an employee. Both these complaints lack any facts to support the allegation of touting. Moreover, they relate to events that occurred more than ten (10) years ago.

[94] The touting allegations cannot be sustained by such weak evidence. I cannot find on a balance of probabilities that Mr Smith or the firm was engaged in any touting for clients.

[95] As to Mr Smith being obstructive and dishonest in these proceedings, it appears that these allegations have just been tacked on by the LPC as an afterthought. The obstructionist charges stem from Mr Smith's decision to appeal the Prinsloo J judgment in 2016. In these proceedings Mr Smith has been anything but obstructionist, he has responded to each, and every allegation put up by the LPC in its very many affidavits. Furthermore, in Mr Faris' view Mr Smith gave him his full cooperation during the investigation. The dishonesty allegations stem from one statement made by Mr Smith, in a record spanning almost 5000 pages, in response to the Peters complaint⁶⁰ where he says that he does not know Ms Field the daughter of Mr Peters who was the client. It later turned out that Ms Field was known to Mr K, the attorney handling the Peters matter. These allegations have simply been made up on the hoof. In my view, it has not been shown on a balance of probabilities that Mr Smith has been obstructionist or dishonest in these proceedings.

The Faris Report

⁶⁰ 010-56

[96] This section focuses on the outcome of the investigation done by Mr Faris and on the internal accounting controls of the firm. Some aspects of the Faris Report and some client complaints were relied upon by the LPC in support of illegal contingency arrangements, misappropriation, undue advantage, overreaching. These are also discussed in the next section.

[97] The genesis of the Faris Report⁶¹ was dealt with earlier. Mr Faris and his team⁶² proceeded to conduct the investigation after the Prinsloo order was obtained. The procedure included interviews with Mr Smith, the bookkeeper and a review of the accounting and supporting records, subsidiary and source books, and documents, administrative, operational and financial systems in order to express an opinion and report on whether:

- a. the firm has complied with the relevant provisions of Section 78 of the Attorneys Act, and if not, the identification and disclosure of the extent of any contraventions and/or irregularities;
- b. the firm has complied with the relevant provisions of the Law Society's Rules 68, 69 and 70 ("the Rules"), (Rule 35 of the New Rules), and if not, the identification and extent of any contraventions and / or irregularities; and
- c. the existence of any other irregularities and/or contraventions of the Act and the Rules which may manifest themselves during the course of the investigation, the identification and disclosure of the extent of any such contraventions and/or irregularities.

[98] The investigation was limited only to RAF aspects of the firm's practice and did not deal with the client complaints that had initiated the mandate because it was assumed that these had been resolved. The content of the report and the supporting Annexures was claimed to be confidential and intended only for the LPC's use.

[99] Mr Faris provided details of several transactions in which *inter alia* large amounts were transferred from the Trust account to business, frequent debit

⁶¹ 002-230

⁶² It is assumed that a team of people and not Mr Faris on his own conducted the investigation because the report refers to them in the plural.

balances were found in Trust accounts, frequent credit balances in the Business account and many unspecified journal entries one of which was a large amount in the account Unallocated Payments Account (SUNALLO). The SUNALLO account consists of payments from the RAF into the firm's Trust account which could not immediately be allocated to specific clients. An analysis of a sample of individual client accounts was also done. It was also alleged that the firm held over clients' party-party costs as part of its fees.

[100] The following concerns were identified in the report:

a. *"The firm's Trust and Business accounting records have been properly kept, are up to date and have been properly balanced. In determining the true state of the Trust account and the Trust positions our main concerns and questions relate to the following:*

- i. *The fact that the Unallocated Payments Account has not been properly reconciled;^{*63}*
- ii. *The existence of clients' trust debit balances;**
- iii. *The existence of client's Business credit balances; **
- iv. *Whether the firm is subject to the provisions of the CPA; **
- v. *The charging of 30% on the capital awards as fees and the subsequent reduction thereof to 25%; **
- vi. *The failure to keep proper time records to be able to support and justify the fee charges to clients;*
- vii. *The possible failure to account to clients for the party and party fee component of the costs contribution; **
- viii. *Whether Annexure NIM can be regarded as a fee agreement. **

⁶³ The * indicates that these are also discussed under the heading Contingency Fees and Related Matters

- ix. *The failure to have a fee agreement at the commencement of the mandate.**
- x. *The existence of long outstanding Trust credit balances places doubt on the reliability and accuracy of the true Trust liabilities".* ⁶⁴

[101] In Mr Faris' view all these concerns led him to conclude that proper accounting records have not been kept in accordance with the provisions and intentions of the Act and the Law Society's Rules

[102] Finally, the report notes in conclusion that it is the opinion of the team that the firm has contravened the following sections of the Attorneys Act and the provisions of the Rules:

- a. Section 78(1) of the Act in that it failed to hold and keep sufficient monies in its Trust banking account to cover its obligations to Trust creditors. This conclusion is based on the unreliability of the Unallocated Payments account balance, the existence of the Trust debit balances, the existence of the Business credit balances and the impact that the reduction of the fee debits has on the Trust liabilities;
- b. Section 78(4) read together with Section 78(6)(d) of the Act in that it has failed to keep proper accounting records as required by the sub-sections. This conclusion is also based on the unreliability of the Unallocated Payments account balance, the existence of the Trust debit balances, the existence of the Business credit balances and the impact that the reduction of the fee debits has on the Trust liabilities;
- c. Rule 69.3.1 of the Rules in that it failed to hold and keep sufficient monies in its Trust banking account to cover its obligations to Trust creditors for the same reasons set out in (a) above.

[103] The conclusion records that -

- a. *"Depending on the outcome of further information and explanations from Mr Smith relating to our concerns expressed in paragraph 15.1.3 above, the possibility of the contravention of Rule 68.8 of the Rules relating to accounting to clients within*

⁶⁴ Para 15.1.4.

a reasonable time cannot be excluded. Until the true Trust positions can be established and whether the firm is subject to the CFA we are of the opinion that Attorneys Fidelity Fund is at risk. Both Mr Smith and his bookkeeper have given us their complete co-operation and assistance throughout the inspection.” ⁶⁵(own emphasis)

[104] Mr Faris records however that he is not qualified to express any opinions on the professional conduct of the firm or the quantum of fees charged (overreaching and / or overcharging). He records that they find it difficult to accept that Mr Smith did not have knowledge of the existence of the Unallocated Payments account or the existence of the long outstanding credit balances. He seems to have relied on the firm's bookkeeper and auditor. In this regard they would've expected Mr Smith to have sight of the Trust transfer reports which would have disclosed the existence of the Trust debit balances and the Business credit balances.

[105] A few observations can be made from the Faris Report. The first is that nowhere in the report does Mr Faris make conclusive findings. The concerns and findings are all provisional and clearly contemplate more information and further engagement with Mr Smith and the auditor. The second is that he makes no recommendations of immediate remedial steps or suspension or striking off. The risk to the Attorney's Fidelity Fund is only contemplated as a possibility depending on the outcome of further information.

[106] In his answering affidavit, Mr Smith expressed surprise about the concerns raised by Mr Faris, especially in relation to the Trust positions. He alleges that Mr Faris' views were never discussed with him in the way they have been formulated in his report, nor were they discussed with Mr Russon.⁶⁶ Mr Smith deals with all of Mr Faris' concerns, including concerns about individual client accounts, cash cheques, frequent debit balances in the Trust accounts, Business credit balances, and claims that Mr Faris knew the amount of R 4 637 508.00 listed on 10 May 2013 in the SUNALLO ledger was not a physical payment.

⁶⁵ 002-283

⁶⁶ 008-62 at [150], 008-62 at [152]

[107] He admits that he does not have a lot of experience in accounting issues which he conveyed to Mr Faris and relied to a large extent on his bookkeeper. However, he points to the fact that the firm had never received a qualified audit in its lifetime and had in fact received awards for its Trust positions

[108] In an effort to respond to specifics of the Faris Report he requested Mr Russon, the firm's auditor and later Mr Selbst to address the concerns raised.

[109] Mr Jonathan Russon is the firm's auditor and is a chartered accountant, with his own practice Russon & Associates.⁶⁷ Mr Edwin Selbst is an independent chartered accountant at the firm of W Technical Consulting Risk and Governance).⁶⁸ His report was obtained by Mr Smith lest Mr Russon be accused of bias. Mr Selbst confirms Mr Russon's approach and findings.

[110] The salient aspects of the Russon report and Mr Smith's responses are as follows:

- a. The accounting system had been changed in 2013 from Lexpro to AJS. A number of problems had been experienced in moving from the one system to the other. In fact the consultant for the new system had to be called for an explanation when the Faris team was doing its investigation. Mr Faris did not understand some features of the system.
- b. Mr Russon conducted a review of the transactions that the Faris team had relied on for their conclusions and found *inter alia* that several errors had crept into the system either because of its design or because of human error. The Trust debit balances, and Business credit balances were due to such errors.
- c. The Unallocated Payments account (SUNALLO) had now been reconciled.
- d. The actual Trust position in the Trust bank account reconciled to the Trust account. The Trust ledger were journal entries to enable the bookkeepers to continue the next month's processing.

⁶⁷ 008-205. Mr Russon was asked to do a second report found at 008-509.

⁶⁸ 008-514

e. The amount R4 637 508.00⁶⁹ recorded was not an actual, it was fictitious i.e. no money had actually been withdrawn from the Trust bank account. (my emphasis)

f. There was approximately R17m in the Trust account which the firm had retained and not utilised improperly for its own benefit.

[111] The LPC attempted to fashion a response in its supplementary replying affidavit, the further supplementary affidavit and then in its last supplementary replying affidavit, to the Russon and Selbst reports.

[112] In the further supplementary replying affidavit of 1 September 2023 the LPC provided detailed responses to the Russon and Selbst reports as if it were the views and opinions of Mr Faris. The views attributed to Mr Faris were not confirmed by him.⁷⁰

[113] It is only in the further supplementary replying affidavit of 19 January 2024, that the LPC advises the Court that Mr Faris had passed away on 12 June 2021. However, it appears that the Russon and Selbst Reports were considered by Mr Faris, and his comments and responses thereto were detailed in the LPC affidavit of 1 September 2023 but that he had not signed a confirmatory affidavit before his passing.⁷¹

[114] Mr Ashwin Reddy's views were then obtained by the LPC *ex post facto* as a substitute expert for Mr Faris in the further supplementary replying affidavit of 19 January 2024. His opinions about Mr Faris' opinions are based on a review of the various affidavits and reports in record and he confirms that he is satisfied with the accuracy of the content thereof.

[115] The Respondents objected to Mr Reddy's affidavit on the basis that it was *ex post facto* expert evidence. Unlike Mr Faris who attended at the premises, inspected files and documents, gained insights into the accounting systems of the firms, Mr Reddy, a chartered accountant, was not part of the investigation, nor does he have insight into the Respondents' accounting systems in use at the time. Admittedly the

⁶⁹ Faris noted a debit raised on 10 May 2013. However, no payment from the trust account could be identified to support the debit entry.

⁷⁰ An unsigned confirmatory affidavit of Mr Faris was attached.

⁷¹ 025-5 paras 10-13

difficulties occasioned by Mr Faris' demise were beyond the control of the LPC and it had been placed in an invidious position.

[116] However, when all the dust from the flurry of supplementary affidavits has settled there is an inescapable conclusion that can be drawn from Mr Russon's report, and this is that it actually serves to confirm some of Mr Faris' concerns because Mr Russon *inter alia*:

- a. confirms that a number of Trust debit balances and Business credit balances ought not to have occurred but attributes their occurrence *inter alia* to system and human error
- b. confirms that the Unallocated Payments had to be reconciled.
- c. confirms that the amount of R4 637 508.00 recorded in the Trust ledger as withdrawals was fictitious i.e. no money had actually been withdrawn.

[117] What this confirms is that large amounts of money were moved around through a number of unexplained journal entries suggesting poor internal controls.

[118] During argument Mr van der Spuy made much of the first sentence in para 15.1. 4 in the Faris Report which states:

- a. *"The firm's Trust and Business accounting records have been properly kept, are up to date and have been properly balanced. In determining the true state of the Trust account and the Trust positions our main concerns and questions relate to the following:"*

[119] Indeed, many an accounting book can be properly balanced, but the true financial position of a firm may still not be evident from books so finely balanced. The true state of finances of any firm can only be gleaned from a forensic investigation such as the Faris type.

[120] Unexplained fictitious transactions from Trust to business presents huge risks to firms and clients alike. There is no suggestion here that Mr Smith or any of his senior associates had personally benefited from these transfers. However weak

internal controls and messy accounting has led to many firms being fleeced of Trust funds by their own employees.

[121] The financial records of an attorney's firm are as much the responsibility of the director or managing director. Trust funds held by a firm on behalf of vulnerable clients places a greater duty on the shoulders of directors to ensure books of account are properly managed and these funds are not placed at risk by weak internal controls.

[122] Having regard to all the above I find that Mr Smith as director and/or managing director has failed to maintain adequate internal controls in contravention of Rule 35.13.7.1 – 35.13.7.4 of the Rules for the Attorneys Profession.⁷²

[123] I turn now to consider the allegation of illegal contingency fee arrangements and related matters drawn from both client complaints and the Faris Report.

Contingency Fee Arrangements & Related Matters

[124] Under this heading I deal with all the issues that arise from an assumption by the LPC that the firm concludes contingency agreements with clients and is in contravention of the Contingency Fee Act in several ways. Linked to these are the allegations of misappropriation of trust funds, overreaching, taking undue advantage of clients and the like. The LPC relies on client complaints and findings or concerns raised in the Faris Report for these allegations.

[125] The LPC submits that from the client complaints it is obvious that the firm operates on contingency fee arrangements. Many clients complained that the firm was supposed to charge only 25% contingency fees but instead charged more than that, at times almost 50%.

⁷² Rule 35.13.7 provides: Internal controls 35.13.7.1 that adequate internal controls are implemented to ensure compliance with these rules and to ensure that trust funds are safeguarded; and in particular to ensure - 35.13.7.1.1 that the design of the internal controls is appropriate to address identified risks; 35.13.7.1.2, that the internal controls have been implemented as designed; 35.13.7.1.3 that the internal controls which have been implemented operate effectively throughout the period ; 35.13.7.1.4 that the effective operation of the internal controls is monitored regularly by designated persons in the firm having the appropriate authority; No. 39740 GOVERNMENT GAZETTE, 26 FEBRUARY 2016

[126] During his investigation Mr Faris noted that at times a fee of more than 25% was taken from the capital amount (payment from RAF) paid to client. He was also concerned that party-party costs recovered from the RAF were not paid over to the client. This latter issue was addressed by Mr Russon in his report where he finds that this was not the case.⁷³

[127] Mr Faris did however record that it was not within his expertise to express the view that the Contingency Fee Act⁷⁴(CFA) had been contravened. But he does record that in the sample of client files inspected by Mr Faris very little information was contained in them relating to hours spent on a matter.

[128] He expressed doubts whether a document given to him could be properly said to comply with the requirements of a client fee agreement or mandate.

[129] Mr Stocker relies on these transactions for the allegations of misappropriation arguing that the firm was withdrawing money from clients' capital amounts held in Trust without being authorised to do so.

[130] The Respondents deny all these allegations and insist that they are lawfully entitled to conduct the practice in the way they do.

[131] Their practice (business model) in respect of RAF matters, found in different parts of the record,⁷⁵ can be summarised as follows:

- a. The firm does not do work based on contingency fee arrangements. At the same time, it does not seek to recover fees from clients when the prospects of recovery are low or non-existent.
- b. When a client is taken on, the client is required to sign a client mandate and a fee agreement. The fee agreement sets out the hourly rate and an explanation of the type of costs. They are not able to provide an estimate of costs at inception to the client because often it is difficult to predict how much work would be involved.

⁷³ 008-205

⁷⁴ Contingency Fees Act 66 of 1997.

⁷⁵ See Mr K's response to LD Peters complaint at 014-250, Smith SAA 014-99

- c. The client is also required to sign a special power of attorney in terms of which the firm is entitled to deduct its fees from the capital paid by the RAF.
- d. If the client does not agree to sign these documents the client will not be taken on. In addition, the firm only takes on matters with reasonable prospects of success because of the costs involved.
- e. When the RAF pays out the capital amount, this is paid directly into the Trust account of the firm and not in the firm's business account. The firm may deduct a 'provisional' fee in a particular case at that time from this capital amount. These are the type of transactions that were observed by Mr Faris and which the LPC describes as misappropriation. They submit that they are entitled to deduct a fee in this manner because the client has given them a special power of attorney.
- f. At the end of a matter, an explanation of the costs and the fees are provided to the client. If the client is unhappy with the fee, the bill of costs is taxed. In all cases the taxed bill shows a reasonable fee was charged by the firm. In some cases a portion of the provisional fee is written back to the Trust account depending on whether the client was unhappy, and this might explain some of the transactions observed by Mr Faris.
- g. If the client agrees, the client signs an acknowledgement which contains a breakdown of RAF payments, professional fees taken by the firm and third-party costs. In this acknowledgement the client also waives the right to have the fees taxed.
- h. In smaller matters the fee is often higher percentage (30-45%) of the capital amount to cover the costs of running the litigation. At times though especially when the capital amount is very small, they have taken a very small fee. In larger matters where the capital payments run into millions the fees hover at the 25% level because the amounts are large enough to cover the firm's own costs (not third-party costs) but they could be below this percentage and are not to be conflated with the cap contained in section 2(2) of the CFA.
- i. Fees are raised for all matters and there was sufficient information in each file to draw a bill of costs if so required.

[132] The LPC submits that this fee arrangement is still *effectively* a contingency fee arrangement because the firm does not require any upfront costs from the client and does not provide an estimate of the costs that would be involved in the case. On its own version, because the Respondent only recovers fees on success and waives any fees that might be 'due' by a client this is a type of 'no win no fee' arrangement. Furthermore, the client's relative bargaining position is weakened because fees are only negotiated on success *after* the RAF has paid out the capital into the firm's account. This allows the firm to take undue advantage of the client, to overreach and charge a fee more than 25% in contravention of the CFA. When the firm deducts a fee from the client's capital amount it is effectively misappropriating funds from the Trust account. Retaining the party-party costs recovered from the RAF or a portion thereof is also an act of misappropriation.

[133] A fair amount of time was spent by Mr Van der Spuy during argument about why a contingency fee arrangement occurred at the beginning of an attorney-client relationship, but this was rather unhelpful because the LPC's case is not that there was a contingency fee arrangement in place which the firm had contravened but that the fee arrangement in place was *effectively* a contingency fee arrangement and not in compliance with the CFA.

[134] The LPC has mounted a case of illegality – namely that the firm is engaged in contingency fee arrangements in contravention of the CFA. The Respondents, on the other hand, deny that they are in contingency fee arrangements and say that they are justified in charging fees higher than the cap in the CFA because their costs run much higher than the cap imposed by the CFA. On their version, they are operating *outside* and not within the confines of the CFA, and in compliance with the relevant rules. They argued further that their business model/practice has been approved by the SCA.

[135] In *Majope and Others v The Road Accident Fund*⁷⁶ the SCA had occasion to consider a similar fee agreement and found that it does not require judicial approval. In that case, the court *a quo* was concerned that an unemployed plaintiff had no contingency fee agreement with the attorneys of record.

⁷⁶ [2023] ZASCA 145 (8 November 2023)

[136] A similar concern was raised by Legodi J in *Thobile Khethiwe Mucavele obo Mpho Siboniso Mucavele v The MEC of Health (Mucavele)*.⁷⁷ In that case, the court refused to make a settlement agreement concluded between the plaintiff and her legal representatives a court order because it was of the view that a fee agreement which they had concluded was a contingency fee agreement which did not comply with the provisions of the CFA. The matter was overturned on appeal to the SCA on similar grounds to that in *Road Accident Fund v Taylor and other matters*⁷⁸ on the basis that the fee agreement was unrelated to the litigation.

[137] *Majope* and *Mucavele* cannot be relied upon as blanket approval by the Respondents for their fee arrangements in general.

[138] A significant difficulty that emerges in this debate is that none of the individual complaints relied upon by the LPC were investigated further in a disciplinary enquiry and no further evidence was sought from them for purposes of this application. The one-line references to '25%' or 'contingency fee' in a complaint document or a paragraph that says something along the lines that 'the firm was only entitled to take 25% but they took more' cannot be elevated to conclusive proof. Such broad statements made at a particular point in time, without the benefit of insights gained during an investigation or cross-examination, are only suggestive of a problem that requires further investigation. It would have assisted the LPC's case greatly if it had obtained further details from these complainants about the fee discussions at the time their matter was taken on.

[139] In my view, this is precisely the type of matter that warrants an internal disciplinary enquiry by the LPC before bringing it to Court. Through that process the LPC could've obtained more factual evidence directly from clients rather than rely on this Court to make factual findings from outdated, limited and contested evidence on paper.

[140] There was a suggestion by Mr Van der Spuy in argument that the firm's fee arrangement was an acceptable practice in the profession. If that is the case, then a fuller market-wide enquiry might be required. The LPC if it considers this practice

⁷⁷ [2022] ZAMPMBHC 33

⁷⁸ [2023] ZASCA 64; 2023 (5) SA 147 (SCA)

to be a contravention of the CFA that enables overreaching ought not to be waiting on Courts to make decisions on a case-by-case basis. It, as the regulating body for the profession has a statutory mandate to provide guidance to practitioners and to protect the public from unscrupulous practitioners. It enjoys investigative powers and has the appropriate institutional mechanisms to conduct a properly constituted inquiry. Through this mechanism it could call for submissions from members of the profession, the public and policy makers alike and *viva voce* evidence to make recommendations for the profession or call for legal reform.

[141] In relation to the retention of party-party costs, Mr Russon in his report dated 22 October 2018 attempted to show that this was not the case. In this report entitled Factual Findings Report, Mr Russon goes through each of the transactions identified in Mr Faris's report in an effort to understand and explain the entries. He also deals with specific client ledgers. His further report dated 20 October 2020 also attempts to reconcile the specific client ledgers and gremlins that had plagued the previous accounting system.⁷⁹ Unfortunately, Mr Faris could not contest any of this due to his passing. Mr Reddy was not involved in the investigation and could not reliably deal with any of the accounting entries investigated by Mr Faris at the time or Mr Russon's responses.⁸⁰ The accounting system has been changed since then. Again, this issue might have benefited from a disciplinary enquiry at the time – rather than in application proceedings almost seven years later - where the records could have been properly interrogated.

[142] Due to the insufficiency of the evidence before us I cannot find on balance that the Respondents' business model contravened the CFA. A disciplinary process, with the leading and cross examination of witnesses might have yielded a better outcome. As a result, I am unable to find on a balance of probabilities that the allegations such as misappropriation, overreaching, taking undue advantage of clients, retention of party-party costs contravened the CFA.

⁷⁹ 01-145

⁸⁰ Mr Stocker in argument made a valiant effort to go through the details of individual client accounts contained in Mr Faris' report. This was just evidence from the Bar. Mr Stocker was not a member of the Faris team at the inspection in loco and could not attest to the accuracy or otherwise of any of these transactions.

[143] First Respondent has, however, contravened Rule 49.3 and Rule 35.13.7.1-4 of the Rules for the Attorneys Profession

Sanction

[144] The LPC sought an order for striking off. During argument, the Court canvassed the possibility of alternative relief with Mr Stocker. Other than a possible suspension very little else was placed before the Court.

[145] In terms of the *Mogami* test, this Court is required to make factual findings on a balance of probabilities and then assess against these whether the practitioner is fit and proper, the latter being a weighing-up exercise and a judgment call. However, as has been demonstrated this case is unusual. In the factual enquiry no complaint attaches to Mr Smith and the most that we can conclude is that he failed to supervise his employees properly and was in contravention of Rule 49.3 and Rule 35.13.7.1 – 35.13.7.4 of the Rules for Attorneys Profession.

[146] Does this contravention warrant a striking off or a suspension? In *Jasat v Natal Law Society*⁸¹ the Supreme Court of Appeal held, that a three-stage enquiry is envisaged in applications of this nature. First, the Court is required to make factual findings as to whether the alleged offending conduct has been established on a balance of probabilities. Second, decide whether in the discretion of the Court, the person concerned is a fit and proper person to continue to practice. The exercise of this discretion involves a weighing up of the conduct complained of against the conduct expected of a legal practitioner. This inquiry entails a value judgment.

[147] The first factor to consider in this matter is that the contravention and the alleged misconduct occurred more than seven years ago. In relation to the firm's internal accounting records, this was a mere snapshot of the books of account at a particular time. Since then, the systems have changed again.

[148] A second factor to consider is that the LPC did not seek an urgent suspension order against the Respondents in 2018 and they were allowed to continue unhindered for seven years. One can assume therefore that it did not consider the

⁸¹ 2002 (2) ALL SA 310 (A)

alleged conduct to be so egregious as to warrant a striking off, or a suspension, of Mr Smith.

[149] Third, Mr Smith is a senior attorney in practice for a long time. He alleges a fact not denied by the LPC that he has had only three complaints against him throughout his many years of practice, one which he self-reported of Trust fund deficits. He has also effectively been suspended since 2018 because he was not issued with an FFC since then. There is also no suggestion that he had misappropriated any Trust funds for his own benefit.

[150] Fourth, the fact that the LPC is not seeking relief against the firm means that the firm is allowed to continue providing services to members of the public, irrespective of Mr Smith's position. Nor has the LPC sought relief against any of the implicated employees which means they are at liberty to continue unhindered. An order striking off Mr Smith in these circumstances will not address any possible harm to the public caused by the firm or its employees in the event of any misconduct on their part.

[151] While nothing could be gained from striking off Mr Smith, much could be gained from requiring Mr Smith to take some time to reflect on his conduct, as a senior attorney and a director of a large firm, and whether adequate controls ought to have been put in place by him to prevent a recurrence of these contraventions and to ensure- when he resumes practice - that he exercises closer and improved supervision over his employees.

[152] Accordingly, a more appropriate order would be to suspend Mr Smith for 1 (one) year from date hereof and to require him to attend a practice management course which would include an accounting course.

[153] In addition, it would go a long way for the reputation of the firm and the public at large if steps were taken against the implicated employees. However, such an order was not sought by the LPC, so it is hoped that Mr Smith will ensure that improved systems and a better culture is implemented in the firm going forward when he resumes practice.

Costs

[154] The manner in which the LPC has run the matter has been highly unsatisfactory. It has provided very little assistance to the Court in navigating a voluminous record. It allowed the matter to run for so long that the relief sought against the firm and/or Mr Smith served little value. It attempted to bring in evidence of Mr Reddy *ex post facto* rather than take the Court into its confidence when Mr Faris had passed away. In the course of the proceedings, it attempted to expand the allegations of misconduct levelled at Mr Smith from the very answers and explanations provided in the papers, thus engaging in a strategy of an ever-evolving case. It provided no explanations for why it relied on complaints that had been closed by it or those more than 10 years old.

[155] The LPC is the body entrusted with oversight of professional ethics and standards. While it has no private *lis* against the Respondents it cannot adopt a neutral or passive stance in applications which at the core are disciplinary proceedings. As the guardian of professional standards and ethics, it has a duty to actively investigate matters thoroughly and to ensure that it obtains the best evidence to place before the Court. At times when events are beyond its control like in this case where the death of Mr Faris posed a serious conundrum for the LPC, it should not shy away from going back to the drawing board.

[156] Perhaps this is why in matters such as this one it would've been more appropriate for the LPC to pursue an internal enquiry to obtain more information or evidence before approaching the Court directly.

[157] The Respondents on the other hand could have done a lot more to bring matters to a quick resolution. They could have for example offered to settle the matter by providing undertakings along the lines of the order granted below.

[158] Hence, an appropriate order in these circumstances is for each party to bear its own costs.

Order

- (a) The First Respondent is hereby suspended for a period of 1 (one) year from date hereof.
- (b) Should the First Respondent wish to commence/resume practice as a legal practitioner (attorney) after the expiry of the period of suspension referred to in paragraph (a) above, he must satisfy the Applicant that subsequent to this order he completed the legal practice management training course contemplated in rule 27 (1) of the South African Legal Practice Council Rules made under section 95(1) of the Legal Practice Act, Act No. 28 of 2014
- (c) A certificate of attendance provided to the Applicant on affidavit will suffice as proof of compliance.
- (d) The respondent may not resume/commence practice unless he has complied with the provisions of paragraph (b) above
- (e) The parties are to bear their own costs.



Y CARRIM
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE, AND IT IS SO ORDERED



SK HASSIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

For the Applicant: Mr R Stocker

For the Respondents: Adv C van der Spuy