THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 277/12

Reportable

In the matter between:

THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA	**Appellant**

and

BRENTON PATRICK GEACH	**1st Respondent**
JOHANNES STEPHANUS MARITZ GÜLDENPFENNIG	**2nd Respondent**
MARK UPTON	**3rd Respondent**
JOHN O'DONOVAN WILLIAMS	**4th Respondent**
EPHRAIM SEIMA	**5th Respondent**
CAS GREYLING JORDAAN	**6th Respondent**
COLIN ROY VAN ONSELEN	**7th Respondent**
THE PRETORIA SOCIETY OF ADVOCATES	**8thRespondent**

And in the matters between:

THILLAY PILLAY (273/12)	**Appellant in case no 273/12**
MATTHEUS JOHANNES BOTHA	**Appellant in case no 281/12**
MARTHINUS CHRISTOFFEL CORNELIUS DE KLERK	**Appellant in case no 280/12**

PERCY MAKGOTSHE LEOPENG **Appellant in case no 275/12**
DANIEL POLI MOGAGABE **Appellant in case no 274/12**

and

THE PRETORIA SOCIETY OF ADVOCATES **1st Respondent**
THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA **2nd Respondent**

And in the matter between:

Case No: 278/12

LEONARD FRANCOIS BEZUIDENHOUT **Appellant**

and

THE PRETORIA SOCIETY OF ADVOCATES **Respondent**

Neutral citation:	*The General Council of the Bar of SA v Geach & others* (277/12; 273/12; 274/12; 275/12; 278/12; 280/12; 281/12) [2012] ZASCA 175 (29 November 2012)
Coram:	MPATI P, NUGENT, PONNAN, LEACH and WALLIS JJA
Heard:	**4 SEPTEMBER 2012**
Delivered:	**29 NOVEMBER 2012**
Summary:	Admission of Advocates Act 74 of 1964 – Section 7(1)(d) – applications for striking off – appeal from high court.

ORDER

Appeals from orders of North Gauteng High Court, Pretoria (Van Dijkhorst, P C Combrinck and De Villiers AJJ) sitting as court of first instance.

Per NUGENT JA, MPATI P and PONNAN JA concurring, LEACH and WALLIS JJA dissenting in part. (The order appears at para 86).

1. The appeal of the General Council of the Bar is dismissed. The first to seventh respondents in that appeal are to pay the costs of the General Council of the Bar and those of the Pretoria Society of Advocates, jointly and severally, which are to include the costs of two counsel.

2. The orders for repayment of moneys made against the appellant advocates in appeals 273/12, 281/12, 280/12, 275/12, 274/12 and 278/12 are set aside. That apart, their appeals are dismissed, in each case with costs that include the costs of two counsel.

JUDGMENT

NUGENT JA (MPATI P and PONNAN JA CONCURRING)

[1] These appeals concern thirteen practising advocates who are members of the Pretoria Society of Advocates. Twelve[1] of the advocates were found guilty by the Bar Council of the Society, on their own admissions, of unprofessional conduct. In each case the Bar Council visited their conduct with disciplinary sanctions. The Society thereupon applied to the North Gauteng High Court for orders 'noting' the disciplinary action that had been taken. It also applied for an order striking the name of a thirteenth advocate[2] from the roll of advocates. The General Council of the Bar (GCB) intervened in the proceedings and sought orders striking the names of all the advocates from the roll.

[2] The applications were heard together by a Full Court (Van Dijkhorst, PC Combrinck and De Villiers AJJ).[3] It imposed further sanctions upon seven[4] of the twelve who had been disciplined by the Bar Council, which included paying various amounts to the Road Accident Fund. As for the remaining five,[5] and the thirteenth[6] advocate who had not been sanctioned by the Bar Council, it ordered

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[1] B P Geach SC, J O'D Williams SC, J S M Güldenpfennig, T Pillay, M Upton, M J Botha, E Seima, M C C De Klerk, C G Jordaan, C R Van Onselen, P M Leopeng, D P Mogagabe.
[2] L F Bezuidenhout.
[3] Pretoria Society of Advocates v Geach 2011 (6) SA 441 (Ngoza).
[4] Geach SC, Williams SC, Güldenpfennig, Upton, Seima, Jordaan, Van Onselen.
[5] Pillay, Botha, De Klerk, Leopeng, Mogagabe.
[6] Bezuidenhout.

them to pay various amounts to the Fund, and struck their names from the roll of advocates.

[3] The GCB appeals the orders made in respect of the seven advocates who were not struck from the roll, contending that they ought to have been. The remaining six advocates appeal the orders made against them, contending that it was not competent to order them to make payments to the Fund, and that they ought not to have been struck from the roll. All the appeals are before us with the leave of this court.

[4] I conclude that all the appeals should fail and I think it is useful at the outset to state briefly the basis upon which I reach that conclusion.

[5] As I expand upon later in this judgment the case called for three steps in the enquiry before the court below. The first two are not controversial. The appeal turns on the third step of its enquiry – which was whether the advocates concerned ought or ought not to have been struck off, as the case may be. That decision fell within the discretion of the court below and there are limited grounds upon which an appeal court may interfere. The only ground relied upon in this case (apart from reliance by two advocates upon perceived bias on the part of one member of that court, which is dealt with in the judgment of Ponnan JA) was that the court was said to have misdirected its enquiry in various ways. It is only if we conclude that it did misdirect its enquiry that we are entitled to embark upon that enquiry afresh and, if appropriate, substitute our decision for that of the court below.

[6] The enquiry before us thus falls to be conducted in two stages. The first enquiry is whether the court misdirected its enquiry. It is only if we conclude that it did that we move to the second stage.

[7] I see no proper grounds for finding that the court below indeed misdirected its enquiry. On that basis the second stage does not arise. It is on that basis that I dismiss all the appeals.

[8] Some background is necessary to understand the nature of the misconduct. The Road Accident Fund established under the Road Accident Fund Act 56 of 1996 is obliged to compensate any person for loss or damage from death or bodily injury caused by or arising from the negligent or other wrongful driving of a motor vehicle. A large majority of claims made against the Fund are meritorious. To the extent that any dispute exists in those cases the dispute is generally confined to the apportionment of responsibility or to the amount of compensation to which the claimant is entitled, or to both. For those who are experienced in that field, settling disputes of that kind is often relatively straightforward. Thus it might be expected that many claims against the Fund would be promptly assessed and paid, perhaps after discussion with attorneys for the claimants to settle disputed issues, thereby minimising legal costs and ensuring that claimants promptly receive their due.

[9] But that is not how the Fund conducted its affairs at the relevant time. For some years the administration of the Fund had been in disarray. Claims were not being evaluated and settled promptly, and claimants found themselves compelled to institute action. Even then the Fund would procrastinate and claimants would be compelled to bring the pleadings to a close, and to set the actions down on the trial roll, even when claims were not truly disputed. In the belief that procrastination

would ease its cash flow the Fund went so far as to have as its policy that claims would not be settled more than twenty days before the date set for the trial.

[10] The situation that prevailed was described in his affidavit by the Chairman of the GCB as follows:

'The Fund is frequently wholly unprepared for trial and has often incurred substantial expenses in taking to trial or appeal matters which it should responsibly have not contested and should have resolved. The Fund has sought to manage its ongoing cash flow problems by delays in conceding liability, forcing matters to trial and only conceding liability after a trial matter has been called at roll call. The Fund's inadequate and inefficient administration has resulted in legal costs being driven up by the Fund drawing out litigation and by generating unnecessary litigation with the overall intention of settling matters at the doors of the court. A vast number of RAF trials do not start or run but are settled at court. Moreover, settlements are invariably concluded on the basis that the Fund either makes a contribution towards or agrees to pay the claimants' costs. It has been financially constrained which has impeded its ability to pay claims, and to a large extent the Fund has been dysfunctional.'

[11] The Fund's procrastination in promptly settling and paying meritorious claims can only be deprecated. Not only was its conduct increasing legal costs that became payable by the Fund – both its own costs and the costs that were incurred by claimants, for which the Fund would invariably be liable – but it kept claimants from the compensation that they were entitled to.

[12] Its conduct also had adverse consequences for the management of the trial roll in the North Gauteng High Court. It became inundated with actions that claimants were compelled to set down for trial, even though no trial was anticipated, only to bring matters to a head. The problem became so acute that the

Deputy President of that court found it necessary to compile a separate roll for actions against the Fund on which 70 actions against the Fund were listed per day.

[13] Needless to say, the burden imposed on the court, and upon attorneys acting for claimants, was intolerable. To find 140 or more advocates every day – one for the claimant and one for the Fund – to bring each of those cases to finality would be well nigh impossible. Moreover, it could hardly be expected that advocates would hold themselves available for a full day in matters that were clearly destined to be settled or postponed. And so a practice developed that advocates would receive and accept briefs for multiple cases that had been set down on the trial roll on one day.

[14] Accepting briefs to conduct more than one trial on the same day is generally prohibited by the rules of the bar for the obvious reason that an advocate is not capable of conducting trials simultaneously. The consequence of holding briefs to conduct two trials on one day is inevitably that if both trials proceed the advocate will find himself or herself compelled to overcome the dilemma by directing at least one case to settlement, perhaps against the interests of the client, or by postponing one so as to continue with the other, again against the interests of the client, or by surrendering the brief to an unprepared colleague (assuming a colleague was willing to accept it). It is not surprising then that the practice of accepting potentially conflicting briefs – commonly called 'double-briefing' – is expressly prohibited by Rule 2.6 of the Uniform Rules of the bar:

'It is improper for counsel to retain a brief previously accepted by him if the circumstances are such that he should reasonably foresee … that he would have to surrender the brief for whatever reason, and that the surrender of such brief could cause inconvenience and/or embarrassment

and/or prejudice to his client and/or a colleague who is to succeed him in the brief and/or his instructing attorney'

[15] In its heads of argument the GCB submitted that an advocate transgresses the rule if he or she holds briefs even to settle two or more cases on the trial roll on a day but I do not think that is necessarily correct. The rule prohibits accepting a brief if the advocate 'should reasonably foresee' that it would have to be surrendered and whether that is so will depend on the particular case. No doubt there are cases in which settlement negotiations can be expected to be intense and protracted, calling for the advocate's full attention and time, but that will not always be so, particularly in road accident cases. Indeed, Rule 2.8 recognises that multiple briefs in such cases is not prohibited when it provides that

'[it] is not improper for counsel to accept a brief to settle a matter, as opposed to a brief on trial'

[16] An advocate who accepts a brief to conduct a trial must hold himself or herself available to do so. Because the advocate has held himself or herself available he or she is generally entitled to a full day's fee if the case settles on the day or even shortly before that and the advocate has been left with no other income for the day. But if his or her instructions are to postpone a case when the roll is called, or to note that the case has been settled, or to negotiate a settlement of the claim, then the fee must be commensurate with that service. To charge a trial fee where the instructions are not to conduct a trial but instead to do something else is overreaching.

[17] In the cases that are before us the advocates on numerous occasions held multiple briefs for cases on the trial roll on one day and in each case they charged a full trial free. They were charged by the Bar Council with multiple counts of

double-briefing and overreaching and in most cases they readily admitted the transgressions. At the same time they protested that their clients had not been prejudiced, nor had there even been potential prejudice, because their true instructions had usually been only to settle or to postpone, and in many cases that is probably true.

[18] Consistent with the evidence of the Chairman of the GCB that I have referred to this is how one advocate explained the position:

'In the matters in which I was briefed, the [Fund] very rarely, if ever, briefed counsel to appear on its behalf. Matters would always stand down for settlement. On the rare occasions when counsel were briefed it was in the greatest majority of cases not to run a trial at all but merely to facilitate the settlement thereof or to seek a postponement of quantum or of both liability and quantum. Witnesses from both sides were hardly ever present at Court. As a general rule, the [Fund] was never ready to proceed to trial and, often, neither party could have proceeded to trial. Experts were not in attendance nor even on standby. There was no doubt that the matters would not proceed to trial. In many instances, acceptable offers were or had been made and it was a question of only trying to persuade the [Fund] to increase the offer. These were not real trial briefs at all. It was not necessary to proceed on the basis that they would proceed to trial if not settled. In truth, in my case, they were virtually all briefs purely on settlement. This is illustrated by the fact that when I took more than one brief at a time they were mostly from the same attorney. The [Fund] would not properly consider settlement until the trial date was at hand. The extraordinarily few cases that would ultimately have to proceed to trial were readily identifiable in advance. That is why, as it transpired, I never encountered a situation where I prejudiced this Honourable Court, my clients, my colleagues, any attorneys or myself. There was, in fact, no juggling of briefs in my case. Matters always stood down for recalculations or simply for formal mandates from the [Fund] sometimes for days at a time. By then, these matters were for all practical purposes already settled. No-one was ever under any illusion that these matters would ever proceed to trial. I was under pressure from my briefing Attorneys who were themselves under pressure to assist them with multiple briefs daily. I found it extremely difficult to refuse.'

[19] Some advocates went so far as to say in their affidavits that by holding multiple briefs they had performed a valuable service to their attorneys and also to the court, because it had assisted to manage the congested trial roll. Indeed, the judges calling the trial roll complimented them at times for assisting to ease the congestion.

[20] To that extent there is no reason not to believe them. The practice of the Fund to pay claims only at the doors of the court can be expected to have resulted in cases being on the trial roll in which there was no dispute at all. What would have been required was only for the Fund to apply its mind to the claim and pay it. There must also have been cases in which the dispute was narrow and a ready settlement could be expected. There would also have been cases in which it would quickly become apparent that settlement was not possible and the case would have to be postponed to prepare for a trial. It is apparent from the affidavits that many of the multiple briefs must in truth have been briefs to perform services of that kind. In cases of that kind an advocate might indeed not 'reasonably foresee' a conflict arising as contemplated by Rule 2.6, and their conduct would not have amounted to double-briefing as contemplated by that rule. Yet they all admitted that they had indeed contravened the rule.

[21] To apply the law justly I think it should be applied to the facts as they are known to be, in preference to the facts as they are merely said to be, where the two conflict, and that applies as much to admissions that are made incorrectly. No doubt they were charged with double-briefing because their records reflected that in each case they had been briefed to conduct a trial. Yet on the facts they allege, in many cases neither they nor their attorneys intended that to occur, and the briefs were marked in that way as a sham. Rule 2.6 is concerned with what the advocate

is in truth called upon to do by his instructions, not to what is written on the briefing document. It is probably true that in many cases the manner in which they carried out their instructions indeed did not prejudice their clients and the admissions of double-briefing recede to the background. But simultaneously the further charges of overreaching come sharply to the fore.

[22] Because what the protestations of the advocates overlooks is that if their true instructions were indeed to postpone or settle cases, and not to conduct trials, then by their own admissions they were not entitled to charge a fee as if they had been briefed to conduct a trial.

[23] Yet in every case they, abetted by their attorneys, charged a fee as if they had been instructed to conduct a trial when, on their own versions, they knew full well that was not true. Most said their trial fees were reasonable, and perhaps they were, but that is beside the point: they were not entitled to a trial fee at all. As the high court expressed it:

'The respondents are on the horns of a dilemma: Should they say that the additional matter would surely settle, the question is: Why then mark a trial fee? Should they say we were ready to proceed to trial, the question is: What then about the other matter?'

[24] It is an extraordinary feature of these cases that some of the advocates, at least initially, seemed rather unconcerned at having charged those fees, and that was shared by senior colleagues at the bar. Indeed, after the GCB intervened, and questions were posed by the court below, some were dismayed that their honesty should be questioned. In argument before us counsel for one of the advocates even persisted in submitting that charging trial fees when there was no intention that the matter would go to trial was not dishonest.

[25] Why advocates should have thought it was not dishonest to charge trial fees when they knew full well that they were not briefed to conduct a trial remains a mystery to me. Mr Pelser SC, who appeared for the Society, could provide no explanation, but glimmerings were evident in some of the submissions. I have pointed out that it is accepted practice, within limitations, for an advocate who is briefed on trial to charge a full trial fee if the matter becomes settled on the day or shortly before then. Absent an alternative explanation I can only assume that it was believed, by extension, that a trial fee was permissible provided only that the case was on the trial roll, or that the brief was marked on trial, even if only as a sham. If that was indeed the belief then it is perturbing.

[26] Apart from the protestations that clients were not prejudiced because their true instructions in one case were capable of being carried out without prejudice to the other, most went on to say that claimants for whom they acted were also not financially prejudiced because the Fund was invariably liable for the costs. Though claimants may not have been financially prejudiced certainly there was prejudice to the Fund in paying fees to which the advocates were not entitled. It is no answer to say, as some of them did, that the administrators of the Fund were aware of what was occurring. Dereliction of duty by officials of a public fund is not the benchmark against which to measure the conduct of advocates.

[27] To summarise what occurred, the manner in which the affairs of the Fund were being conducted made it ripe for plundering, and the advocates concerned set about doing just that. To the extent that they double-briefed they transgressed and that was at least potentially prejudicial to their clients. But even where each instruction was capable of being fulfilled without prejudice to the others they

charged fees to which they were not entitled. To have charged trial fees in those circumstances was dishonest. It is unfortunate that the Pretoria Bar Council did not see things that way.

[28] Against that background I turn to the facts.

[29] During 2006 it came to the attention of the Bar Council that some members were announcing themselves at the roll call as having been briefed in more than one case, particularly in actions against the Fund. After investigation the Bar Council issued a circular to its members. The circular recorded the following:

'It has come to the attention of the Bar Council that some members appear at the roll call of civil trials in several matters set down for the same day. This phenomenon is prevalent especially in third party matters.

In the normal course the matters in which one counsel appears are either postponed or a settlement is made an order of court or noted, while in many instances the same counsel announces that he/she is ready to proceed in another matter, in some instances even having requested another matter to stand down for settlement.

What is further most alarming is that such counsel probably charge full fees in respect of preparation and appearance (a day fee) in each of such matters. Such conduct is viewed in a serious light as it undoubtedly amounts to double briefing, and in many instances even to multiple briefing, and overreaching.

1. Counsel may not retain more than one brief for the same day and charge a day fee in respect of more than one brief;
2. It is permissible to retain more than one brief for the same day strictly provided that:
    2.1 A full day fee may only be charged in respect of one brief, if counsel has been briefed for trial thereon and the matter becomes settled not more than two days before the trial date, or the matter proceeds to trial, or there is an opposed postponement or an opposed argument on costs.

2.2 In the other matters in which the same counsel appears, it will be assumed that counsel was briefed only to settle the matter in accordance with paragraph 2.8 of the Code of Conduct. Counsel will be entitled to charge for the time spent and the reasonable fee for the taking of the order or the postponement of the matter on an unopposed basis.

2.3 Retention of a brief under paragraph 2.2 above is only permissible if counsel's **specific mandate** is to **settle**. If there is any possibility of the matter proceeding to trial, or becoming an opposed postponement, or a costs argument, counsel shall not be entitled to take or retain the brief together with a brief falling under paragraph 2.1 above.

3. Members who take or retain a brief contrary to the guidelines in paragraph 2.3 above, act in contravention of paragraph 2.6 of the Code of Conduct and shall therefore be guilty of misconduct.

4. Charging a full day fee in respect of more than one trial shall be seen as overreaching and a contravention of paragraph 7.1.1 of the Code of Conduct.

5. In order to remove any misunderstanding, it shall be seen as misconduct if at roll call a matter is requested to stand down for settlement if counsel holds another brief in respect of which he has been briefed on trial.

8. The above scenarios are clearly to be distinguished from the case where counsel was briefed on trial and the matter is settled **before** the trial date and subsequent to settlement counsel is briefed on trial in another matter for the same day. In such case counsel is entitled to mark a normal reasonable reservation fee in respect of the matter which has become settled together with full fees in respect of the other matter.'

[30] The practice appeared to abate for a while but in September 2009 it came to the attention of the Bar Council that it had resumed. It instructed the convener of its Professional and Ethics Committee, Ellis SC, to investigate. The committee met and twelve of the advocates who are parties to these appeals were identified as suspects. Upton was later added to the list.

[31] It was agreed by the committee that the advocates concerned would be called upon to produce their fee books and diaries for the period from 1 March 2009, which would be submitted to an auditor for analysis. Ellis SC duly wrote to them asking for their books to be produced. Their books were not produced but instead various discussions ensued. The upshot was that six immediately confessed to transgressing,[7] four asked for the mandate of the committee to be reconsidered and proposed a general amnesty,[8] and two, according to Ellis SC, flatly refused to produce their books.[9] The confessions of the six were accepted and the request to produce their books was not pursued.

[32] Further discussions ensued with the implicated members. Meanwhile, the four members I referred to earlier wrote to the Bar Council advising, amongst other things, that approximately 62 other advocates had engaged in the practice, and that they were being subjected to unequal treatment, and proposing that there be a general amnesty.

[33] The committee made the following recommendations to the Bar Council:

'13.1 The two members who defied the Bar Council's instruction to surrender their books, should be referred to the disciplinary committee for appropriate action;

13.2 The proposal of an amnesty, proposed by Pillay, should be declined;

13.3 The signatories of the Pillay letter should be placed on terms to:

13.3.1 Divulge the names of the 62 members they allege are also guilty of double briefing or over-reaching; and

13.3.2 Tender their fee books and diaries to the convener, before close of business on 19 November 2009;

13.4 The "confessions" of the six be accepted, on the following terms:

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[7]Geach SC, Williams SC, Botha, Güldenpfenning, Seima, and Van Onselen

[8]Pillay, Leopeng, Mogagabe and Seima.

[9]De Klerk and Bezuidenhout.

13.4.1 They should pay the amounts tendered by them into a special fund, to be administered by the Bar Council, to assist junior members who are unable to pay their Bar fees, in the first year of their practice;

13.4.2 A finding of guilty of double briefing and overreaching be entered on their files;

13.4.3 Each should be suspended for one month, which suspension should be effective during the court term, over a period determined by the Bar Council.

13.5 The resolution in paragraph 13.4 above shall apply as benchmark to all other members who voluntarily submit similar tenders before 15 December 2009, to the convener of the committee, whether they are identified by the committee or not;

13.6 Future similar misconduct will be summarily dealt with by the Disciplinary Committee.'

[34] The recommendations of the committee were debated by the Bar Council and a committee comprising De Vos SC, SJ Maritz SC and LP Dicker was appointed to investigate the allegations and to report its findings to the Bar Council. NGD Maritz SC and FJ Labuschagne were appointed to assist in the investigation.

[35] The following day four members – Bezuidenhout, De Klerk, Pillay, Leopeng and Jordaan – sent a memorandum to the Bar Council that, although misguided, was clearly aimed at resisting disclosure of their books. Amongst other things they said the following:

'[From] this moment on we invoke our rights guaranteed to us under the Constitution of the Republic of South Africa, Act 108 of 1996, more specifically the rights afforded us under Chapter 2, Section 14 of the Constitution ….'[10]

[10] "Everyone has the right to privacy, which includes the right not to have -
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.'

[36] The investigating committee – I will call it the 'De Vos committee' to distinguish it from another committee that was subsequently appointed – commenced enquiring into the matter. Meanwhile N Maritz SC, acting as pro-forma prosecutor, had formulated charges against the various advocates. In each they were charged with multiple counts of double-briefing and corresponding counts of overreaching. He also formulated sanctions that he would recommend to the committee.

[37] Ten of the advocates were called before the committee and consented to it being converted to a disciplinary tribunal. They formally admitted the charges and the committee imposed sanctions on each of them.

[38] The disciplinary measures provided for in the Constitution of the Society allow for suspension from membership and for the imposition of a maximum fine of R2 000. The sanctions imposed by the committee all followed a standard form. I need only set out their effect. In each case the committee imposed a fine, suspended the advocate from membership of the Society, and placed him under a supervisory regime for 18 months after the suspension expired. I tabulate below the number of counts admitted by each advocate (in each case a count of double briefing and a corresponding count of overreaching), the fine that was imposed, and the period for which his membership was suspended.

Geach SC	82 counts	R164 000	3 months
Güldenpfennig	90 counts	R90 000	2 months
Upton	16 counts	R 16 000	4 weeks
Williams SC[11]	60 counts	R120 000	6 months
Seima	33 counts	R33000	5 weeks
Jordaan	20 counts	R 20 000	4 weeks

[11] An additional fine of R76 000 was imposed on 38 counts of failing to register a contingency fee agreement. The contingency fees were returned.

Van Onselen	133 counts	R133 000	3 months
Pillay	28 counts	R 28 000	5 weeks
Leopeng	315 counts	R157 500	6 months
Mogagabe	461 counts	R230 000	6 months

[39] In its report to the Bar Council the committee recorded, amongst other things, that it had had 'the fullest, candid and honest co-operation' of the members concerned, that the members had acted 'in wilful disregard of the ethical rules of practice of [the Society]', and that their conduct 'displayed a decided ongoing pattern of double-briefing and overreaching over a lengthy period'. The committee went on to report that 'there was no element of dishonesty on the part of the members': on the contrary they had performed their duties 'honestly, professionally, and with dedication in each instance' and that 'on the evidence before us it is also evident that neither the plaintiffs nor the [Fund] were prejudiced in the matters in which the affected members acted on brief.' It reported that the courts, the attorneys and counsel had 'co-operated in a concerted effort to remedy an insufferable situation that had arisen' and that as a result 'the incidences of double briefing pale to a significant extent.'

[40] It is astonishing that the committee should have held those latter views. I have already said that to charge a trial fee where an advocate is instructed to perform a service that is not to conduct a trial is dishonest and constitutes overreaching. That was made plain in the circular issued by the Bar Council in 2006.

[41] The Bar Council debated the report of the committee – the debate was said to have been 'vigorous' – and adopted the sanctions that had been recommended. It

resolved as well to place its decision before the High Court for orders to be made that I refer to presently.

[42] That disposed of the ten members leaving three. The Bar Council appointed a new committee to deal with them, comprising L Vorster SC, P Van Niekerk SC and A Laka (I refer to it as the Vorster committee). De Klerk and Botha appeared before the committee. At his request the investigation of Bezuidenhout was postponed to a later date.

[43] The Vorster committee took a different view of the matter. It found the two members to have acted without integrity, that their conduct had prejudiced the Fund, and it recommended that the Bar Council take steps to have them struck from the roll. The recommendations of the Vorster committee were rejected by the Bar Council. Instead the two advocates were sanctioned consistently with the other ten. The counts that each admitted, and the fines and effective periods of suspension imposed, were as follows:

Botha	170 counts	R170 000	5 months
De Klerk	74 counts	R 74 000	3 months

[44] That left only Bezuidenhout. He appeared again before the committee and applied for the recusal of its members, in view of the findings they had made in relation to Botha and De Klerk. The members declined. He announced his intention to apply to the high court to review their decision, whereupon the Bar Council revoked the mandate of the committee and launched an application for an order striking Bezuidenhout from the roll.

[45] At the same time the Society applied to the North Gauteng High Court, in separate applications in respect of each advocate, for orders as follows:

'1. That the disciplinary sanctions imposed upon the respondent by the [Society] be noted; and/or

2. That such other order be made as the Honourable Court may deem appropriate'.

[46] Thirteen separate applications were thus before the high court: twelve for the sanctions that had been imposed to be 'noted', or for such other appropriate order to be made, and in the case of Bezuidenhout, for an order striking him from the roll. After the advocates had filed answering affidavits the GCB was admitted as a party to the proceedings and asked for orders striking all the advocates from the roll. It advanced no further facts of its own but relied on the facts contained in the founding affidavit of the Society. Further affidavits were filed by the advocates in response to the orders sought by the GCB.

[47] At the time the applications were heard by the high court all the advocates had paid the fines imposed on them and had served their periods of suspension. In respect of seven of the advocates, it ordered them to pay varying amounts to the Fund. In four of those cases it ordered a further period of suspension, part of which was suspended for a period on certain conditions. In the remaining three cases a period of suspension was imposed, all of which was suspended. By the time the matter came before us all had paid the moneys and had served their further periods of suspension.

[48] I tabulate below the full sanction visited on each of the seven once the high court had made its orders under the following columns: the fine imposed by the Society, the amount the advocate was ordered to pay to the Fund, the total period

of actual suspension (those in bold are suspensions imposed by the Society that were not added to by the court) and, in brackets, the further period of suspension that was suspended.

Geach SC	R164 000	R984 000	12 months	(6 months)
Güldenpfennig	R 90 000	R864 000	12 months	(6 months)
Upton	R 16 000	R166 400	**4 weeks**	(6 months)
Williams SC	R120 000	R864 000	11 months	(7 months)
Seima	R33 000	R141 900	**5 weeks**	(6 months)
Jordaan	R 20 000	R 94 000	**4 weeks**	(6 months)
Van Onselen	R133 000	R967 800	9 months	(6 months)

[49] The other six advocates were struck off the roll and in addition they were ordered to pay the following amounts to the Fund:

Pillay	R 268 800
Botha	R1 768 000
De Klerk	R 310 800
Leopeng	R1 323 000
Mogagabe	R1 916 800
Bezuidenhout	R5 992 400

[50] Section 7(1)(*d*) of the Admissions of Advocates Act 74 of 1964 allows a court to suspend any person from practise as an advocate or to order that his or her name be struck off the roll of advocates 'if the court is satisfied that he [or she] is not a fit and proper person to continue to practise as an advocate.' It is trite that there are three steps in the enquiry whether such action should be taken. In *Malan v Law Society, Northern Provinces*[12] this court said, in the context of the comparable provision of the Attorneys Act 53 of 1979, relying upon what had been said to similar effect in *Jasat v Natal Law Society*:[13]

[12] *Malan v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 4.
[13] *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) para 10.

'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 "in the discretion of the court" is not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment.
And third, the court must inquire 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.'

[51] The words 'in the discretion of the court' in the second stage of the enquiry appear in s 22 of the Attorneys Act and are absent from the Admission of Advocates Act but that is not significant for present purposes. The enquiry in each case necessarily calls for the conduct complained of to be weighed against the standards of the profession, which is partly value judgment and partly objective fact.[14]

[52] In view of their admissions of overreaching it is curious that at least some of them denied in their affidavits that they had been dishonest, because overreaching is, by definition, dishonest.

[53] The court below was alive to that contradiction, and queried whether the guilty pleas were admissions of dishonesty. The response of the advocates was that they were not admitting dishonesty but had intended in their pleas to admit only to overcharging – which is not necessarily dishonest – and not to overreaching. Accepting those explanations the court said that 'giving the respondents the benefit

[14] *Jasat v Natal Law Society* at 51E-F; *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 654 D-F.

of the doubt, in our view the plea should be read as guilty to overcharging as opposed to overreaching'. On that basis it said that 'the sole question that remains at this stage was whether they acted honestly'.

[54] I ought to make it clear what the court meant when it said that 'in our view the plea should be read as guilty to overcharging as opposed to overreaching'. When seen in its context, and in relation to the question that was then under consideration, the court meant only that it accepted that the pleas of guilty by the advocates concerned had been intended by them to be pleas of guilty to overcharging. The court did not mean that it accepted that they were guilty only of that offence. On the contrary, it is clear from the manner in which it then dealt with the issue, and the findings that it then made, that it concluded, in effect if not in words, that their offences were indeed overreaching and not merely overcharging. For it found in each case that the advocates were not entitled to charge fees at all, and that in every case they had done so they had acted dishonestly, and the court dealt with the matter of sanction accordingly.

[55] On the second stage of the enquiry the high court said that 'it must consider whether the person concerned 'in the discretion of the court' is not a fit and proper person to continue to practise'. Its expression of the test was drawn from cases dealing with attorneys and was not strictly correct. I have pointed out that the words 'in the discretion of the court' do not appear in the Admission of Advocates Act. Be that as it may, there was no dispute that they were not fit and proper to continue in practice.

[56] On appeal before us its findings on those two legs of the enquiry are not controversial. The controversy is confined to the third stage of the enquiry.

[57] At the third stage of the enquiry the sanction that should be imposed lies in the discretion of the court. Where a discretion is conferred it implies that the matter for decision has no single answer and calls for judgment, upon which reasonable people might disagree. That being so a court on appeal is restricted to determining whether the decision-maker has correctly gone about the enquiry. If he or she has correctly gone about the enquiry then a court on appeal may not interfere with the decision, albeit that it considers the decision to be wrong.

[58] That restriction upon the power of a court to interfere on appeal was expressed as follows in *Kekana v Society of Advocates of South Africa*:[15]

'[A]ppellate interference with the trial Court's discretion is permissible on restricted grounds only. In *Beyers v Pretoria Balieraad* 1966 (2) SA 593 (A) at 605F-H, *Olivier v Die Kaapse Balieraad* 1972 (3) SA 485 (A) at 495D-F and *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A) at 786H *ad fin* the grounds for interference are stated in slightly different terms, but the approach is essentially the one adopted in all other cases where a Court of Appeal is called upon to interfere with the exercise of a discretion, viz that interference is limited to cases in which it is found that the trial Court has exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reason. (See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I-782A and the cases referred to there.)'

[59] In *Fine v Society of Advocates of SA (Witwatersrand Division)*[16] it was expressed differently, but to the same effect, when the court said that

'the Appeal Court will only interfere with the exercise of this discretion on the grounds of material misdirection or irregularity, or because the decision is one no reasonable Court could make. (See *Nyembezi v Law Society, Natal* 1981 (2) SA 752 (A).)'

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[15] At 654E-H.
[16] 1983 (4) SA 488 (A) at 494H-495(A).

[60] There are two enquiries to be made when exercising a discretion. The first is to establish the material facts. The second is to evaluate those facts towards the correct objective. The various grounds for interference referred to in the cases merely identify the failures that might occur in that process. Where the conclusion arrived at has been actuated by bias, or is capricious, there has been no evaluation at all. Where the evaluation proceeds from incorrect facts, or from an incorrect appreciation of the law, or where a wrong principle is applied, the evaluation has gone in the wrong direction. As this court said *S v Pillay*,[17] which related to criminal sentencing in which the same principles apply, '"misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence'.

[61] Misdirection of the enquiry might be revealed by the express language of the reasoning, or by necessary inference from that expressed reasoning, or by an outrageous conclusion. For if the conclusion it came to is one that 'no reasonable court could make'[18] it can be inferred that somewhere along the line it must have misdirected its enquiry, or acted with bias or been capricious, or acted upon a wrong principle, notwithstanding the language in which it expresses its reasoning. But in reasoning along those last lines a court must be careful not to cast itself as the archetypal reasonable court, and reason from there that because its view of the matter differs from that of the court below, the decision of that court is one that could not reasonably have been made. The question is not whether a reasonable court could have reached a different conclusion, but instead whether a reasonable court could not have reached the conclusion that it did.

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[17] *S v Pillay* 1977 (4) SA 531 (A) at 535B.
[18] *Fine v Society of Advocates of SA* at 494A-495A.

[62] When analysing the language of the decision-maker it needs always to be kept in mind that a judgment is generally written to inform the parties why they have respectively won and lost and not only with an eye to an appeal. For that reason a court of appeal should not scrutinize the language as if it was construing a statute. In particular it must not be thought that a point was overlooked only because it was not expressly mentioned. As this court said in *Lepholletsa v S*,[19] which was an appeal against sentence, in which the same principles apply:

'Soos opgemerk in vorige uitsprake van hierdie Hof (wat ek nie nodig ag om aan te haal nie) dui die blote versuim om 'n besonderefeit of aspek van die saak pertinent in 'n uitspraak te opper, nie noodwendig daarop dat dit nie oorweeg is nie.'

[63] That is particularly relevant in the present case, in which the papers were voluminous and the case was argued over five days. To expect that everything that was taken into account by the court below would appear in its judgment would be unrealistic. Indeed, some matters might have been conceded, or argument on the matter might not have been advanced, in which case it can be expected that the court would not express itself on the issue, or at least not do so fully. I think it is also appropriate to bear in mind that in this case the judges who comprised the court below were themselves at one time senior advocates of long standing. That is no reason to defer to their conclusions but it is reason to expect that they would not always find it necessary to express themselves on matters that would be trite to those in the profession.

[64] I deal first with the GCB's appeal against the decision concerning the seven advocates who were not struck off, and later I deal with Bezuidenhout's appeal.

[19][1997] 3 All SA 113 (A) at 115F-G Also see *S v Pillay* at 533B.

The appeals of the remaining five advocates are dealt with in the judgment of Ponnan JA, and I agree with his conclusions, and also with his reasons for reaching them, supplemented by the views expressed in this judgment so far as they apply generally to all the advocates.

[65] There is no suggestion by the GCB that the high court proceeded from an incorrect appreciation of the facts. Nor, obviously, does it contest that the seven advocates were not fit and proper to practice. Perhaps I need to repeat that those two stages of the enquiry were not contentious before us and I do not find it necessary to deal with them. Leaving aside the allegations by two of the advocates that they perceived bias on the part of the one of the judges – with which the remaining advocates pertinently disassociated themselves, and which have been rightly rejected in the judgment of Ponnan JA – the appeals were directed solely to whether the court below properly exercised its discretion at the third stage of the enquiry.

[66] There has been no suggestion of bias, nor that the decision was capricious. The GCB submitted only that in various ways the court below misdirected its enquiry.

[67] The end to which the court below conducted its enquiry was that stated in *Van der Berg v General Council of the Bar*,[20] which was reiterated in *Malan*:

'The enquiry before a court that is called upon to exercise its disciplinary powers is not what constitutes an appropriate punishment for a past transgression but rather what is required for the protection of the public in the future. Some cases will require nothing less than the removal of the advocate from the roll forthwith. In other cases, where a court is satisfied that a period of

[20] *Van der Berg v General Council of the Bar* [2002] 2 All SA 499 (SCA) para 50.

suspension will be sufficiently corrective to avoid a recurrence, an order of suspension might suffice.'

[68] I ought to mention that the court below questioned whether that case held that the powers of a court in proceedings of this nature are confined to striking off or suspension, and rightly concluded that it had not done so. On a proper and careful reading I think it will emerge that the references to striking off and suspension were illustrative of what was being said. I deal further with that subject later in this judgment.

[69] It was said in *Malan* that 'if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal'. That does not purport to lay down a rule of law but expresses what follows naturally from a finding of dishonesty. Once an advocate has exhibited dishonesty it might be inferred that the dishonesty will recur and for that reason he or she should ordinarily be barred from practice. What was said in *Malan* means only that when the person concerned has been shown to have been dishonest a court will need to be satisfied that the circumstances of the case are such that that inference, exceptionally, need not be drawn, and thus that striking off need not follow. In *Law Society, Cape v Peter*[21] that exception was expressed by distinguishing a 'character defect' from a 'moral lapse'. It is clear that the court below was alive to that distinction and directed its enquiry to whether these cases were indeed the exception.

[70] Once having proceeded from a correct appreciation of the facts, and having directed its enquiry towards answering the correct question, it is difficult to see

[21] *Law Society, Cape v Peter* 2009 (2) SA 18 (SCA) para 16. See, too, *Malan's* case, para 28.

how it can be said that the court's enquiry in this case was misdirected. Upon proper analysis it seems to me that the complaints of the GCB and Bezuidenhout are no more than that the court ought to have evaluated the facts differently, which is not a ground upon which this court may interfere with its decision.

[71] In going about its evaluation the court below collected together various factors that it categorised collectively as 'exceptional circumstances', others that it called 'aggravating circumstances', and some that it said were 'mitigating'. I do not think that undue store should be placed upon that use of language, which is more appropriate to evaluating sentence in a criminal case. I think it is clear from a fair reading of the judgment as a whole that what it called 'exceptional' and 'mitigating' circumstances were simply those factors that the court considered, in different degrees, to militate against striking off, and those that it called 'aggravating circumstances' were factors that favoured striking off.[22]

[72] The approach of the GCB was to isolate some of those factors and take issue with their characterisation. Thus it submitted that it was not an 'exceptional circumstance' that the advocates had complied with the sanctions imposed by the Bar Council, nor was it an 'exceptional circumstance' that the judges calling the roll had 'shut their eyes to the insidious practice of double briefing' (the words used by the court below). Nor was it an 'exceptional circumstance' that members of the Pretoria bar, including members of the Bar Council, were aware of the practice of double briefing and had not acted to end it. It was also not an 'exceptional circumstance' that the advocates had practiced professionally from the time they had admitted their transgressions to the time of the hearing of the applications. In the same vein it was submitted that the court ought to have treated

[22] *Malan v Law Society Northern Provinces*, para 28.

the fact that the advocates had not disclosed details of transgressions committed outside the period for which they were charged as an 'aggravating circumstance'. (So far as that submission is concerned it is true that the duty of an advocate in a disciplinary enquiry is to be frank and co-operative, but I do not think that means that he must necessarily insist that the Bar Council receive information that it knows to exist but shows no interest in having. In this case the advocates readily admitted that they had transgressed outside the time period being investigated and neither the Society nor the GCB took the matter further. I cannot see how they can then be criticised for not pressing the matter themselves. That is also how the court below saw the matter and in my view it cannot be faulted.)

[73] I think I have already indicated that to ask whether a 'circumstance' of the case in isolation is 'exceptional' is not the proper approach to cases of this kind. The proper approach is instead to ask whether the circumstances as a whole reveal that the case the court has before it is an exception from those in which it can ordinarily be inferred that the dishonesty will recur and should thus be met with striking off. To debate whether a particular factor is a 'circumstance' that is 'exceptional' – or 'mitigating' or 'aggravating' – leads the enquiry astray. Going behind the inapt language used in the judgment and examining instead the line of reasoning that it reveals – which I think one must do where the judgment is no model of linguistic exactness or elegance, as in this case – I find the judgment to reveal clearly that that is indeed how the court dealt with the matter.

[74] The question that fell for decision was whether, upon an evaluation of all the material circumstances, which include 'the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession, the likelihood or

otherwise of a repetition of such conduct and the need to protect the public'[23], the advocate should be barred from continuing to practise. The manner in which the court applied the various factors reflects that it considered some to point in one direction and others to point in the other direction and it evaluated each case accordingly. That is precisely what a proper exercise of its discretion required. What each of those various factors was called seems to me to be neither here nor there.

[75] Stripped of terminological niceties the submissions advanced for the GCB amount to no more than a challenge to the weight, or lack of it, that the court below accorded to the various factors it placed in the scales. It was the prerogative of that court to determine what factors should weigh with it one way or another – and even whether no weight should be attached to any one of them at all – and how they should be weighed relative to one another. This court is not entitled to interfere only because it might have seen things differently.

[76] The GCB also placed in issue the approach that the court took to factors that were said in individual cases to have 'mitigated' the conduct of the advocate concerned. Thus the court considered it to be 'mitigating' that some had practised for many years with no blemish to their names, and that some were said not to have been motivated by 'greed'– a rather imprecise term in the context of the profession. Once again I think it is clear, when viewed in context, that what was meant was only that those factors, in varying degrees, indicated that the case was one in which it could be expected that the dishonesty would not recur, which it was the prerogative of that court to decide.

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[23] *Malan*'s case above, para 5, citing *Jasat*'s case'.

[77] There are two further matters that I find it necessary to deal with. The first concerns the orders that were made by the court for repayment of money to the Fund. The GCB submitted that those orders were not competent in relation to the advocates who were struck off the roll and I agree. Once the court struck them from the roll its disciplinary powers over them were exhausted. In relation to the other advocates it submitted that it was competent, and those advocates do not suggest the contrary, but I find it necessary to say something about those orders nonetheless.

[78] The Act is directed to regulating who may practise in the courts. In effect it provides that a court may permit a person to do so, and it may also withdraw that permission, whether permanently by striking off, or temporarily by suspension. It does not purport to say anything about the powers of a court to exercise discipline over practitioners while they enjoy the right to practise. I agree with the court below that a court has an inherent power to do so, as this court, and other courts, have said before.[24] That it has its roots in antiquity, and that we no longer employ the disciplinary remedies of earlier times, seem to me to be neither here nor there. I see no reason why that inherent power does not permit a court to order a practitioner to repay moneys as a condition for further practice.

[79] The second matter I find it necessary to deal with concerns only Geach SC. The Value Added Tax Act 89 of 1991 requires every person who carries on an enterprise to be registered as a vendor. In its affidavit the GCB said that in the course of the investigation into his affairs it had emerged that Geach SC had not registered as a vendor, although he had been obliged to do so, and that was

[24] *De Villiers v McIntyre, N.O.* 1921 AD 425 at 428 and 435; *Law Society of the Cape Hope* v C 1986 (1) SA 616 (A) 638C-E; *Society of Advocates of Natal v Knox* 1954 (2) SA 246 (N) 247 G-H.

admitted. Having said that, the GCB moved on, and said nothing further on the matter. The fact was mentioned, but not elaborated upon, by the court below. The GCB mentioned in its heads of argument before us as an act of misconduct, but made nothing more of it. The matter was raised from the bench.

[80] By failing to register Geach SC committed an offence. It can be expected also to have resulted in loss to the revenue authorities of VAT that he should have charged. The court below must have been aware of those ordinary consequences. I see no reason to infer, merely from the absence of elaboration, that it failed to take them into account, particularly if the GCB made no issue of it in argument, just as it made no issue of it in this court.

[81] Turning to the appeal of Bezuidenhout, unlike the seven advocates I have dealt with, he was un-cooperative, even obstructive in dealing with the allegations against him. He denied the evidence of Ellis SC that at first he 'flatly refused' to produce his records but that denial can be summarily dismissed. He was one of those who claimed their right to privacy when they became aware that the Bar Council was once more in search of their books, which is hardly consistent with an intention to disclose his books. Moreover, the court below recorded that he failed to comply with a request by the Bar Council to place certain of his records before the court. When he was compelled to do so by the court they reflected that his transgressions were continuing, obliging the court to order his suspension until the outcome of the application.

[82] No misdirection has been demonstrated so far as the striking off order is concerned, but on another issue the appeal has merit. I have already said the GCB conceded that the court below was not entitled to make an order for the payment of

money to the Fund in the case of those who were struck off, and I agree. That order must be set aside.

[83] One might pick away at this part of the judgment, and then at that part, but I think that, when looked at overall and from afar, it cannot be said that the court below misdirected its enquiry. It went about it on the correct facts, and on a correct construction of the law, and the rest fell within its discretion. Perhaps the acid test is whether its conclusions could not have been reached by a reasonable court. Whether or not I agree with them I don't think they can be said to be unreasonable.

[84] So far as the costs of the appeal of the GCB are concerned the seven advocates have succeeded in resisting it, and would ordinarily be entitled to their costs. On this occasion, however, I do not think that would be apposite. The GCB was justified in bringing the matters on appeal in protection of the standing of the profession. I think the advocates concerned should incur the costs they have brought upon the GCB and the Society. Bezuidenhout has failed in his appeal and there is no reason why he should not be liable for the costs occasioned by his appeal. Punitive costs were ordered in the court below. The manner in which the appeals were conducted does not further punitive costs. The same applies to the other appellants. As to the division of the costs between the appeals, that is a matter that can be left to the taxing master if it becomes necessary.

[85] Mr Epstein SC and Mr Bester have acted for the GCB at no charge, for which we commend them, and express our appreciation for their assistance, and the assistance of their two juniors. The two juniors, whose assistance was justified, cannot similarly be expected to have acted without remuneration. For that reason the costs should include the costs of two counsel.

[86] For the reasons given in this judgment and that of Ponnan JA the following orders are made:

1. The appeal of the General Council of the Bar is dismissed. The first to seventh respondents in that appeal are to pay the costs of the General Council of the Bar and those of the Pretoria Society of Advocates, jointly and severally, which are to include the costs of two counsel.

2. The orders for repayment of moneys made against the appellant advocates in appeals 273/12, 281/12, 280/12, 275/12, 274/12 and 278/12 are set aside. That apart, their appeals are dismissed, in each case with costs that include the costs of two counsel.

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R W NUGENT
JUDGE OF APPEAL

PONNAN JA (MPATI P and NUGENT JA CONCURRING):

[87] 'The first thing we do, let's kill all the lawyers' is Dick the Butcher's exhortation in Henry VI to Jack Cade - 'the head of an army of rabble and a demagogue pandering to the ignorant'. That oft misunderstood phrase was William Shakespeare's homage to lawyers as the primary defenders of democracy. Through it, The Bard recognised that for tyranny and anarchy to flourish, the law and all those who were sworn to uphold it had to first be eliminated. Lawyers, because of the adversarial nature of litigation in this country, will never be

universally loved by the public. That is not to suggest that as members of a distinguished and venerable profession they do not occupy a very important position in our society. After all they are the beneficiaries of a rich heritage and the mantle of responsibility that they bear as the protectors of our hard won freedoms is without parallel. As officers of our courts lawyers play a vital role in upholding the Constitution and ensuring that our system of justice is both efficient and effective. It therefore stands to reason that absolute personal integrity and scrupulous honesty are demanded of each of them.[25] It follows that generally a practitioner who is found to be dishonest should in the absence of exceptional circumstances expect to have his name struck from the roll.[26]

[88] As Nugent JA has intimated this judgment deals with the appeals of the five advocates[27] who contend that they ought not to have been struck from the roll. Each application, although part of the series of applications by the Pretoria Bar against various members, fell to be adjudicated upon its own facts. That the high court did. As is evident from the judgment of my learned Brother none of the five contest the factual findings of the court below or the finding that they are not fit and proper persons to continue to practise. Nor, it seems to me, could they have. Rather what they seek to achieve is to persuade us that they have been treated too harshly. I am by no means satisfied that such arguments as were advanced on behalf of each of the five brings the matter within the compass of any of the recognised grounds for interference.[28] On the contrary as I shall show with reference to each of the five a striking off was wholly justified. It is so that at first blush they appear to have been treated more harshly relative to their colleagues

[25] *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 656A.
[26] *Malan v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 10.
[27] Pillay, Botha, De Klerk, Leopeng and Mogagabe.
[28] See paras 58-61 of the judgment of Nugent JA.

who were suspended. But on closer examination that is not so. In my view the disparity in treatment between them and those who were suspended was plainly justified. The high court was alive to the task that confronted it. It appreciated that the enquiry with which it was engaged was 'what is required for the protection of the public in the future'.[29] And that in embarking upon that enquiry the various transgressions of the advocates were not to be viewed in isolation but that their conduct was to be viewed holistically. In that regard the high court explained why it plumped for a striking off as opposed to a suspension, thus:

'In the case of contraventions after the notice of 26 October 2009, unexplained fiddling with hours, mendacious explanations to the Court and exorbitant numbers of transgressions the scale swung to striking off.'

[89] Before turning to a consideration of the individual appeals of the five, it is necessary first to dispose of a contention advanced both before this court on appeal as also the high court at the application for leave to appeal stage of the proceedings, that Van Dijkhorst AJ ought not to have sat in the matter because the parties (or more accurately some of them) entertained a reasonable apprehension that he had not brought an impartial and unprejudiced mind to bear on the matter. According to Pillay, after judgment was handed down in the matter but prior to the application for leave to appeal being heard, a transcript of the minutes of the meeting of the Pretoria Bar Council held on 17 November 2009 came to hand. In it W Maritz SC, who was the pro forma prosecutor before the disciplinary enquiry, is recorded as having informed the meeting that Van Dijkhorst AJ had expressed the view that 'anyone who takes two briefs for the same day should be nailed'. Pillay alleges that that utterance, which only came to his attention after the matter had been heard, has led him to believe that the learned Judge had failed to bring an

[29] *Van der Berg v General Council of the Bar of SA* [2007] 2 All SA 499 (SCA) para 50.

open and impartial mind to the resolution of the question involved in the matter before the court and that he should accordingly have disqualified himself from sitting. His failure to recuse himself, so it was asserted, vitiated the entire proceedings. Whilst some of the other advocates specifically disavowed any suggestion of bias, there was as well an alternative argument advanced on behalf of Botha that did not conclude with a request that the entire proceedings before the Court *a quo* should be set aside. Instead it was submitted that inasmuch as Van Dijkhorst AJ had failed to bring an unbiased judgment to bear on the issue (*Malan* para 13), that part of the Court *a quo's* order, which required the exercise of a discretion, namely a striking off as opposed to a suspension, fell to be set aside. The consequence of that, so the argument went, is that this court would be at large to reconsider the issue, untrammelled by any constraint imposed by the exercise of a discretion by the Court *a quo*.

[90] Actual bias was not asserted, rather it is alleged that there is an appearance of bias. As it was put by Centlivres CJ in *R v Milne and Erleigh* (6)1951 (1) SA 1 (A) at 6H: ‘ . . . there can be no doubt that if a Judge, who ought not, because he is biased, to preside at a criminal trial, nevertheless does so he commits . . . an irregularity in the proceedings every minute he remains on the Bench during the trial of the accused.’ It matters not that here the complaint is levelled against just one of a panel of three judges. For, if a Judge incorrectly refuses to recuse himself the remaining members should not sit with that Judge as the proceeding would be irregular (*President of the RSA v South African Rugby Football Union* 1999 (4) SA 147 (CC) (*Sarfu)* para 32). In *Sarfu* para 48, the Constitutional Court formulated the proper approach to recusal as follows:

‘The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the

adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

[91] The test thus contains a two-fold objective element – the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case (*Sarfu* para 45). It follows that mere apprehensiveness on the part of a litigant – even a strongly and honestly held anxiety – would not be enough. The question to be answered is: 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude'.[30] Applying those principles to the facts here present I am by no means satisfied that the fairly high threshold set by the test has been surpassed. The gist of the complaint appears to be that the robust tone with which the learned Judge expressed himself would have instilled in a reasonable litigant in the position of Pillay a reasonable apprehension that he was biased against him. It is so that he appears to have expressed himself in a strong and perhaps even emphatic fashion. But had Van Dijkhorst AJ employed a less emotive word such as 'punished' instead of 'nailed' that could hardly have provoked any feelings of disquiet. Counsel was constrained to concede as much. After all it needs to be remembered that disqualification flows from a reasonable

[30]Per De Grandpré' J in *Committee for Justice and Liberty et al v National Energy Board* (1976) 68 DLR (3d) 716 at 735; *Sarfu* para 45.

apprehension that the judicial officer will not decide the case impartially and without prejudice, rather than that he will decide the case adversely to the one party.[31]

[92] It must be remembered as well that by the time the matter came to be heard in the court below the issues of fact, which were not in dispute since the transgressions had first surfaced, had long since crystallised. To that must be added a further important consideration: the reasonable litigant through whose eyes the appearance of bias must be assessed, is in this instance a trained lawyer, who no doubt must have a proper appreciation of what judicial impartiality truly entails. In *SA Commercial Catering & Allied workers Union v I & J Ltd* 2000 (3) SA 705 (CC) para 13, the Constitutional Court elaborated thus:

'The second in-built aspect of the test is that "absolute neutrality" is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality – a distinction the *Sarfu* decision itself vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion – without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views – that is the keystone of a civilised system of adjudication. Impartiality requires, in short, "a mind open to persuasion by the evidence and the submissions of counsel"; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding.

[93] A reasonable litigant in the position of Pillay is expected to be mindful that in applying the test Courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is because Judges on account of their

[31] In *Re JRL: Ex Parte CJL* (1986) 161 CLR 342 (HCA) at 352; *Sarfu* para 46.

training are assumed to be capable of judging fairly. The presumption carries considerable weight. Thus reviewing courts are generally hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a Judge, in the absence of convincing evidence to that effect. (See *Sarfu paras* 40-42.) It goes without saying that an unfounded or unreasonable apprehension is not a justifiable basis for recusal. The apprehension of the reasonable person must of necessity be assessed in the light of the true facts. One cannot ignore from the reckoning that prior to the commencement of the hearing of the matter, the learned Judge despatched a note to the parties, the relevant portion of which read:

'Die volgende inligting word bekend gemaak aangaande myself. Ek het begin om kennis te dra van die gevalle (sonder detail van afsonderlike sake) toe Quintus Pelser SC my geraadpleeg het oor die vraag of dubbelbrevettering in die sake van die Fonds op onprofessionele gedrag neerkom. My uitgesproke mening was dat dit is en dat dit homvrystaan om die inligting oor te dra aan die Balieraad. Ek het geen kennis gedra van die verdure verloop van sake nie en later verneem dat die sake afgehandel is en strawwe bepaal is en dat die geval van adv French Bezuidenhoutoorstaan. Ek het my nooit uitgelaat oor die gepastheid van die strawwe nie. Adv Quintus Pelser SC het my op 'n latere stadium gevra of dit gepas sou wees as die Balieraad die sake aan die Hof voorlê sonder 'n sanksie te bepleit. Ek het hom meegedeel dat dit kan.Dit is die omvang van my betrokkenheid na die beste van my herinnering.

Indien die vraag of die optrede op onprofessionele gedrag neerkom, tersprake is, kan ek nie sit nie. Waar die betrokkenesegterskuldigge pleit het en bloot die sanksie ter sprake is, is hierdie Bank van mening dat ek kan sit. U word versoek om binne 7 dae enige beswaar wat u mag hê, voor te lê vir oorweging'.

Van Dijkhorst AJ had thus disclosed of his own volition that he had engaged in discussions with members of the Pretoria Bar. The parties were invited to intimate whether any of them had any objections to him sitting in the matter. None of them did.

[94] Nor can one lose sight of the fact that when the allegation first surfaced at the application for leave to appeal stage, Van Dijkhorst AJ availed himself of the opportunity to place the following on record:

'The note refers to two discussions. In the first I was consulted about the question whether double briefing in the matters of the RAF constituted unprofessional conduct. I expressed the view that it was and that this could be conveyed to the Bar Council. From the context it is clear that this was before the disciplinary hearings of the Bar Council. I was not involved at all in the hearings or in Maritz SC's preparation, therefore, or Pelser SC's role therein, if any, and did not know what the outcome was till much later.

The second discussion was much later. After the hearings and when it was being considered by the Bar Council to bring an application to Court. The advice was that the Bar could put the matters before Court without pleading a specific sanction. The facts disclosed in the notes were communicated to all respondents. I stated that if the dispute was whether the actions of the respondents amounted to unprofessional conduct I could not sit as the respondents had pleaded guilty and it was merely a matter of sanction. The bench held the view that I could.'

[95] It follows that when assessed in the light of all the true facts, if Pillay indeed apprehended that Van Dijkhorst AJ would not bring an impartial and unprejudiced mind to the adjudication of the matter, that apprehension was unreasonable, and the submission that he ought to have recused himself is without merit.

[96] That clears the way for a consideration of whether the high court erred in the exercise of its discretion in respect of each of Pillay, Botha, De Klerk, Leopeng and Mogagabe.

Pillay

[97] The high court stated:

'The number of charges he faced and the amount he gained [R268 800.00] [out of the commission of the offences] is on the lower end of the scale compared to the other respondents.

Had it not been for two other matters we would have in all probability suspended him from practice'.

The two matters that the court had in mind were: first, that he had invoiced for work done for the same periods in respect of different briefs; and, second, that he had lied to a Judge.

[98] *As to the first*: An examination of Pillay's books revealed that on two occasions, in addition to marking a fee on trial, he charged for as many as 18 or 19 hours of consultations per day. On a third day he charged for a total of 20½ hours of consultations. In many instances the fee notes submitted by him reflected him to have consulted in more than one matter at the exact same time. His answer in a supplementary affidavit filed in reply to those allegations was:

'I confirm that the errors in respect of the overlapping hours are due to my inaccurate and deficient recordkeeping'.

[99] *As to the second*: The gist of the complaint may be gleaned from two letters. The first was written by Mojapelo DJP to the Pretoria Bar. It reads:

'On the day in question the matter of Mr Pillay was stood down at the first roll call at 09:30 in Johannesburg while he was as it was put to the court, delayed on the N1 motorway travelling from Pretoria.

When counsel finally appeared in the Johannesburg High Court at 12:00, the court was suspicious that he might have appeared first in the Pretoria High Court. In response to a direct enquiry from the court, Mr Pillay denied having appeared in the Pretoria High Court before coming to the Johannesburg High Court. As Mr Pillay's answer appeared somewhat muffled, the question was reiterated and Mr Pillay's response was an unequivocal denial. He unequivocally denied having appeared in the Pretoria High Court that morning.

Later that same day I phoned my colleague, the Honourable Mr Justice van der Merwe, who was by then the Acting Deputy Judge President in charge of the trial roll in Pretoria. And he confirmed that Mr Pillay had appeared in that court that very same morning.

It was in the wake of the developments sketched above that I confronted Mr Pillay and requested him to report his conduct to the Professional and Ethics Committee in Pretoria.'

In the second letter, which was written (as already alluded to) at the request of Mojapelo DJP, Pillay informed the Pretoria Bar:

'During the conversation between Justice Mojapelo and myself, I gained the impression that Justice Mojapelo had suggested that the reason that I was late was that Advocate Bezuidenhout and I may have had a case together in the Transvaal Provinical Division. This was not the case. I believe that Advocate Bezuidenhout from Pretoria may have been late as well. I believe that Mr Justice Mojapelo had also suggested that I may have appeared at the calling of the roll for a trial in Pretoria separately from Mr Bezuidenhout. I confirm that my answers to Mr Justice Mojapelo's questioning on my belatedness, was on the understanding that the presumption that he was and the presumption that he was suggesting that Mr Bezuidenhout and I had a case against each other in the Transvaal Provincial Division and that therefore we were both late for the calling of the roll in the WLD. I wish to place on record that I in no way sought to mislead the court or Justice Mojapelo.'

[100] Pillay was the only one of the advocates to testify before the high court. He was afforded an opportunity to deal with those two aspects. In respect of the first he told the court:

'My Lord I submit to you with respect that all the hours which I debited I worked. Those invoices are as a result of the fact that I tried to reconstruct these hours at a time much later than I worked. When I made those notes I didn't keep proper records of the time, the hours. I would write one hour or two hours for reading and then I would think okay I thought I read it on Sunday or Monday between this time and that time ... that is improper and it is a mistake ...'.

And in respect of the second his evidence went thus:

'This is then the correspondence which we have from the correspondence it appears that according to you, you denied having appeared against Mr Bezuidenhout in Pretoria and that is how you understand the question. Judge Mojapelo answers that by saying, I asked him directly whether he had appeared in the Pretoria High Court before coming to Johannesburg, he denied it, the question was reiterated and he responded with an unequivocal denial. He unequivocally

denied having appeared in the Pretoria High Court that morning. Now, do you admit or deny this statement by the Deputy Judge President Mojapelo? --- I do not deny it.

You do not deny it? --- No

So, what happened is, you were confronted by Judge Mojapelo because you did not attend the roll call. You were asked why you did not attend and you were asked why you had appeared or whether you had appeared in the Pretoria Court. You denied that you had appeared in the Pretoria Court, whereas you in fact had appeared in the Pretoria Court. So this is then the fact? --- What had happened was, at the time that Justice Mojapelo asked me why I was late, I started to explain the circumstances of the morning from the morning. He then started suggesting, because I told him that my daughter was sick and as a result of her being ill, I could not make it for 09:30 and then he suggested yes, that Mr Bezuidenhout, did you have a case against Mr Bezuidenhout and the conversation went along those lines. I did not pay proper attention to him and I did not and that is a grave mistake on my part. But I was, you now answered that question, I was under the impression that he was still referring to that Mr Bezuidenhout and I were in Pretoria and we had a case against each other, that is, I was completely flustered that morning because of the events of that morning. I had no reason to lie to him, I with hindsight, I should have clarified his question, I should have said to him, Judge, I was in Pretoria on my own, but I was not there with Mr Bezuidenhout, that is a mistake I made. It was a grave mistake.

Mr Pillay you were, if you were completely flustered on the 26 August, when this happened, you surely were not still completely flustered on 9 September when you wrote this letter? --- No.

Which is in conflict with what Judge Mojapelo says and you say that Judge Mojapelo is right, why then did you write a letter which is exculpatory and which is incorrect? --- M'Lord, the letter simply seeks to convey my state of mind at the time. All it seeks to convey is at that time when I made that answer, my state of mind. My state of mind was, I was completely under pressure because my daughter was sick, I was late for the calling of the roll, I was under tremendous pressure because there was a suggestion, I got the impression that Judge Mojapelo was suggesting that I was in court on a trial in Pretoria with Mr Bezuidenhout and that is why I was late and I only wanted to convey my state of mind and to convey to the judge that I did not do anything intentionally.

Mr Pillay, you are now under oath? --- Yes.

With hindsight, looking at your letter of 9 September which I read out in full, are those facts correct or are they incorrect? --- They are correct and I should have gone further to say that I should have paid proper attention to Judge Mojapelo's question, I should have answered, I should have enquired exactly what he wanted and I should not just have made the assumption.

Do you admit that your letter is in conflict with the letter of Judge Mojapelo? --- M'Lord, I do not know it is in conflict in so far as it, I only tried to tell my state of mind. I wanted to give the impression that this is what I was going through at the time.

Did you attend roll call in Pretoria? --- Yes, I did.

Did you deny when Judge Mojapelo asked you, whether you had appeared in the Pretoria High Court that morning, did you deny that you had appeared there? --- M'Lord, my recollection of the matter was, that question followed a suggestion that Mr Bezuidenhout and I appeared together on a trial and I said no. I remember saying no and I should have with hindsight, I should have said, M'Lord no, I did not appear with Mr Bezuidenhout in a trial but if Your Lordship, is asking me whether I appeared on my own, to confirm a cost order in a settled matter, I did appear according to the roll. It is a grave, grave error, I did not pay proper attention and it is a grave error.'

[101] The high court, quite correctly in my view, disbelieved Pillay. It concluded:

'It is overwhelmingly probable that Pillay did not work the hours which he recorded and that he falsely represented to the clients that he in fact did consult for the recorded number of hours. This is nothing less that fraud

. . .

'We have no hesitation in disbelieving Pillay and concluding that he deliberately lied to the judge.'

Botha

[102] By the time the application came to be heard in the high court an investigation had been conducted in respect of Botha's accounting records, which revealed that he had, inter alia, on diverse occasions charged for more hours than

there were in the day. By way of example on 11 August 2009 he charged for four court appearances, a settlement at the RAF tariff and seventeen hours of preparation. On 12 August 2009 he charged for two trials and 27 hours of preparation. On 26 August 2009 he charged for three court appearances and 33 hours of inspections in loco, consultations and preparation.

[103] In an affidavit filed in response to those allegations he states:

'3.4 My secretary, Mariëtte Munik, would, on receipt of each brief, automatically insert a worksheet. She would then contact the other side, establish precisely who was dealing with the matter on the other side (usually counsel; sometimes attorney), and insert his or her detail on the worksheet. I would then, as I prepared, consult etc, note my times on the worksheet. I unfortunately always noted times, but not dates, of my work. From leading other counsel and tallying times with them, I have come to see that this is a failing of many advocates. I am thus far from alone in this weakness.

3.5 On finalisation, I would hand the brief over to my secretary, who would make up the account on the strength of the worksheet. The computer programme which generates my invoices will not accept an amount in the horizontal column without a date having been inserted. My secretary as a matter of rote inserted dates prior to the trial date, to enable her to complete the invoice. In the nature of things, these dates might or might not be correct. I accept that the result could be a misleading invoice, but not materially so, because the important fact would be that the work was done, and not the exact date on which it was done.'

[104] The high court held:

'Botha's explanation is unconvincing. It amounts to this: though each invoice sets out a specific date or dates when work was done, these do not reflect the truth. One cannot determine what the truth is. There is no attempt to rearrange the information to prove that when all is properly set out, there has been no overcharging. One would have expected such an attempt to be made in view of the seriousness of the prima facie facts. To merely say that it is all due to erroneous bookkeeping is not in these circumstances an acceptable answer. It indicates that knowingly over

a long period he gave incorrect information to his attorneys. This detracts from his integrity. It is probable that Botha did not work the hours that he recorded and that he falsely represented to the attorneys that he did in fact consult or prepare for the recorded number of hours. This is nothing less than fraud.'

[105] What, moreover, weighed with the high court was the fact that even after the investigation into his conduct had commenced, Botha, as the high court put it 'brazenly continued with his contraventions'. He accordingly, so the high court stated 'displayed a persistent violation of the Bar Rules and a contemptuous attitude thereto', which it found to be 'seriously aggravating'.

De Klerk

[106] De Klerk took the view that his conduct was not proscribed by the Uniform Rules of Professional Ethics. Thus in his answering affidavit he stated:

'12.1 I deny that the logical correlative of the so-called "cab rank rule" is the rule which prevents counsel from taking on more than one trial brief per day. I am not aware that the alleged "logical correlative" has become known as the rule against "double briefing".

12.2 I have perused the whole of the Rule Book of the Pretoria Society of Advocates, the only reference to the words "double briefing" may be found in the Section B2 as a heading and the general circular of the Pretoria Society of Advocates dated 1 November 2006 in which certain "guidelines" were laid down.

The aforesaid general circular only became part of the "new" Rule Book distributed to members in the form of a clip file that allowed for the substitution of pages. The "new "Rule Book in this form was distributed to members during the course of June 2009.

12.3 I only became aware of the existence of the said general circular between 23 November 2009 and 26 November 2009.'

The high court found that it was 'most unlikely that De Klerk would not have known about [the circular] given that it would certainly have been a great talking point amongst advocates at the Pretoria Bar'. It expressed puzzlement at the

emphasis placed by De Klerk on receipt of the circular as in its view every advocate knows that there is a rule against double briefing. Accordingly, so it held, if De Klerk did not know that, he was not fit to be on the roll of advocates.

[107] A recurring theme throughout De Klerk's answering affidavit was a denial of any wrongdoing. He thus asserted:

'47.1 . . . I held the view at the investigation meeting/disciplinary proceedings that:

47.1.1 I never acted improper[ly] towards a client,

47.1.2 I never acted surreptitiously;

47.1.3 I had not overcharged my client or had charged improper fees for the work done by myself.'

. . .

'50.1 I deny that the misconduct of which I had been found guilty was motivated by greed.'

Continuing to protest his innocence was at odds though with him having pleaded guilty before the disciplinary committee. He, however, explained that he felt compelled to plead guilty before the disciplinary enquiry because of the interpretation placed by the Ellis circular on the rule. The high court held that it was evident from De Klerk's affidavit that he had shown no remorse or contrition as he did not genuinely believe that he had done wrong.

[108] Despite his plea of guilty to overreaching before the disciplinary committee, De Klerk subsequently sought to protest his innocence. The high court dealt with that contention thus:

'De Klerk's argument that he as a result did not overreach is wrong. The flaw in the argument is that De Klerk approaches the raising of fees on a holistic basis instead of a case by case basis. The fact that the RAF was in each instance his client, does not mean that when he raises a fee, that fee need not be appropriate with regard to the specific matter to which that fee pertains.

...

De Klerk's explanation rings especially hollow when one has regard to certain of the days in respect of which he confessed breaches of the rules. For instance, on 2 September 2009 he accepted and charged for seven matters on trial. It is simply impossible for one person to accept instructions in seven matters to take them to trial on the same day. Furthermore, had he (and this is not his version) accepted some of these instructions on settlement, he has dishonestly and fraudulently charged a trial fee instead of a fee on settlement.'

[109] The additional considerations that weighed with the high court were: First, De Klerk initially adopted the attitude that he would not submit his books of account to the scrutiny of the Professional and Ethics Committee of the Pretoria Bar. Second, when he appeared before the Vorster Disciplinary Committee, De Klerk requested that he be expelled from the Pretoria Bar so that he could set up practice as an independent advocate untrammelled by the Society's rules. Third, on 26 March 2012 and after being summoned to appear before the Vorster Committee, he tendered his resignation from the Pretoria Bar. The Bar Council declined to accept his resignation. Despite the fact that his resignation was not accepted, he vacated his chambers on Saturday 1 May 2010. Fourth, De Klerk had continued, as the high court put it, in contemptuous disregard of the Ellis circular, with his pattern of multiple briefing and did so on no less than 17 occasions on nine court days during November 2009.

Leopeng

[110] The high court took the view that Leopeng was one of the more serious offenders, with the number of charges that he faced being surpassed only by Mogagabe and Bezuidenhout. For the period February to October 2008 he had accepted in excess of 300 additional briefs. For the months of February, March, April and May 2009 and prior to the rolls having become congested, which only

occurred during July, Leopeng accepted 23, 25, 18 and 33 additional briefs per month, respectively.

[111] Despite having been made aware of the fact that the Professional and Ethics Committee was investigating him and had called for his books, his conduct continued unabated. An examination of his books revealed that on multiple occasions he had marked fees for consultations, perusal and preparation in excess of twenty four hours per day. Thus by way of example he had marked fees as follows: 1 April 2009 - 25.25 hours, 11 May 2009 - 27.5 hours, 7 August 2009 - 31 hours, 1 September 2009 - 35 hours. His response to these allegations was:

'This overlapping is mainly caused by my lack of keeping proper record of the exact dates and times spent on each matter. It is also as a result of the large number of these third party matters I am handling. This is however not intentional and is regretted.'

The high court was not persuaded by Leopeng's explanation, stating: '[i]t is simply not good enough to merely make the bald statement that it was due to the fact that proper records weren't kept'.

[112] The high court went on to record:

'We regard this explanation as totally inadequate and unconvincing. On one day, 11 May 2009 he debited for the following hours worked:

(a) Sekgobela v The Road Accident Fund - 5 hours of R1 000 an hour for perusal and preparation;

(b) Khumalo v The Road Accident Fund - 4 hours for perusal and preparation;

(c) Makua v The Road Accident Fund - 5 hours for perusal and preparation;

(d) van Schalkwyk v The Road Accident Fund - 4 hours for perusal and preparation;

(e) Maphitshi v The Road Accident Fund - 5 hours for perusal and preparation;

(f) Mosena v The Road Accident Fund – 4 hours for perusal and preparation and attending pre-trial conference - 30 minutes.'

In each of those matters the fee charged did not include consultations but was restricted to perusal and preparation and in one instance attending a pre-trial conference. Actual times were not furnished, instead globular amounts were charged. The high court concluded:

'[t]he irresistible inference is that he could not possibly have worked the hours that he has claimed. He represented to the attorney, the Fund, and the Taxing Master that he had done the work well-knowing that in fact he had not. He acted fraudulently and is not fit to be an officer of this Court'.

Mogagabe

[113] Mogagabe's transgressions ranked second only to Bezuidenhout. During February, March, April, May, August and October 2009 he held 33, 49, 54, 68, 78 and 84 additional briefs per month, respectively. An examination of his books revealed that during February to October 2009 he had debited fees for 18 hours or more per day on 73 occasions. On 40 occasions he debited fees for 24 hours or more per day. On 24 occasions he debited fees for 30 hours or more per day. And on what the high court described as the longest day of his life, namely 21 October 2009, he allegedly worked for a total of 49 hours.

[114] In response to the allegations Mogagabe stated in his affidavit:

' ... one gathers the impression that I dishonestly marked fees for preparation. The evaluation of my accounts apparently leads to the conclusion that I marked fees and charged for work that I did not in fact do. This is not correct, as appears from what is stated below. The above inference however hinges on the correctness of my accounts. My accounts according to me reflect the correct hours taking into account what is stated below. In certain instances the dates create the wrong impression as to when the work was actually done. In order to put this in perspective, I will deal with my routine and my administration.

...

The Honourable Court, will, with respect, realise that under the above circumstances office administration is prone to lack [lag] behind. I kept a timesheet in the front of each brief. I normally marked the time as and when I did the work. I wrote down the time spent, but I was not in the habit of writing down the specific day on which I did specific work. I did not always distinguish between the nature of my preparation (consultations; pre-trial conferences; inspections; perusal, etc). It from time to time happened that I was interrupted in my preparation to attend to other urgent matters. I would then record my preparation hours later that day, or later in the week whilst it was still easy to recollect the work done. In the unusual event that I could not recall the hour(s) spent later in the week, I would evaluate the brief and estimate the time spent on preparation and/.or perusal, taking into account the fee arrangement with the RAF.

...

I normally invoiced my attorneys on Fridays or every second Friday by sending the relevant worksheet to my typist after having recorded the hours spent on preparation and perusal. I added all the preparation and perusal times on the worksheet, but due to the fact that I had no record when the preparation was actually done, I normally recorded my total preparation on the brief a day or two before the trial date. In some cases I kept proper records and allocated the fees accordingly. In other words, in certain instances, the date reflects the actual day when the work was done and others the date on the invoice reflects work done previously.'

[115] The high court dealt with his explanation thus:

'This is a glib explanation. It amounts to this: though each invoice sets out a specific date or dates when work was done, they do not reflect the truth. The truth lies elsewhere, but where, one cannot say.

The hours complained of are a composite result of a number of invoices in different cases, in each case a few hours. There is no attempt to rearrange the information to prove that when all is properly set out, there was no overcharging. One would have expected such an attempt to have been made in view of the seriousness of the prima facie facts. But then, rearranging the deck chairs will probably not prevent the Titanic from sinking. To merely say, as Mogagabe in effect does, that it is all due to erroneous bookkeeping is not in these circumstances an acceptable answer. It indicates that knowingly over a long period he gave incorrect information to his attorneys. This detracts from his integrity.

It is probable that Mogagabe did not work the hours which he recorded and that he falsely represented to the clients that he in fact did consult or prepare for the recorded number of hours. This is nothing less than fraud.'

[116] Like Bezuidenhout, the high court ordered each of Pillay, Botha, Leopeng and Mogagabe to repay what may be described as the extent of their ill-gotten gains[32] to the Fund. As Nugent JA points out (para77) those orders were not competent and they accordingly fall to be set aside. For the rest the appeals are devoid of any merit. To be sure no court relishes having to impose the ultimate sanction upon an advocate. But here in respect of each there were 'aggravating circumstances' present that favoured striking off. The explanations advanced by each of the five under oath were generally unconvincing if not plain dishonest. And as it was put by Hefer JA in *Kekana* (at 655G):

'I share the view expressed in *Olivier's* case supra at 500H *ad fin* that, as a matter of principle, an advocate who lies under oath in defending himself in an application for the removal of his name from the roll, cannot complain if his perjury is held against him when the question arises whether he is a fit and proper person to continue practising.'

In *Malan* (para 10), Harms JA said '[o]bviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal'. Although not a rule of law, Nugent JA explains (para 69) why the logical corollary of a finding of dishonesty is that an advocate should generally be barred from practice.

[117] A person who practises as an advocate is expected to know what his duties are, including that he mark his brief with the work that has been done and the fee that is relevant to that work. In the ordinary course it would thereafter have fallen to the instructing attorney to hold an advocate to account for the fees that he has

[32]Those amounts are set out in paragraph 49 of Nugent JA's judgment.

charged, by properly scrutinising the accounts that have been submitted. That, as we well know, simply did not happen here. Thus when confronted with the allegation that excessive fees had been charged, the advocates in question were unable to furnish sufficient detail of the work done, but sought to explain in general terms only the nature of the work done in return for those fees. That was wholly unsatisfactory. For, as Nugent JA put it in *Van der Berg* (para 29): '[n]o doubt it is incumbent upon an advocate who is alleged to have charged excessive fees to provide sufficient detail of the work that has been performed to enable the fee to be assessed, and in appropriate cases cross-examination might be called for to establish the true facts . . .'

[118] Their transgressions paint a picture of advocates who appear to be quite indifferent to the demands of their profession. The sustained nature of their transgressions, unlikely excuses and exculpatory explanations 'manifest character defects, a lack of integrity, a lack of judgment and a lack of insight'.[33] None of them betray the slightest appreciation of where they may have fallen short or the enormity of their wrongdoing. Instead they responded with enmity and indignation that their conduct could have been called into question at all. In short having taken all of the relevant considerations into account the high court concluded that there were no exceptional circumstances present warranting the suspension of any of the five as opposed to their striking off. That, as already stated, was a matter for the discretion of the high court. Given that it is in the nature of a 'narrow' discretion[34] (and not having brought the matter within the compass of any of the recognised grounds for interference) this court is not simply at large to decide the matter afresh and to substitute its decision for that of that court. It follows that the appeals

[33] *Malan* para 28.
[34] *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) para 3.

of Pillay, Botha, De Klerk, Leopeng and Mogagabe, must – like the other appeals in this matter – also fail.

V M PONNAN
JUDGE OF APPEAL

WALLIS JA (LEACH JA CONCURRING)

[119] Having had the advantage of reading the judgments prepared by my brothers Nugent and Ponnan, I find myself in respectful disagreement with Nugent JA in regard to the determination of the appeals by the GCB in respect of Messrs Geach, Güldenpfennig and Van Onselen. I agree with him that the GCB's appeals in respect of Messrs Upton, Jordaan, Seima and Williams should fail and that the appeal by Mr Bezuidenhout must fail. I agree with Ponnan JA that the appeals of Messrs Pillay, Botha, De Klerk, Leopeng and Mogagabe against the orders that they be struck off the roll of advocates should be dismissed. The appeals by them against the orders by the court below that they repay certain amounts to the Road Accident Fund (the Fund) should, however, succeed.

[120] The broad grounds for my disagreement with my colleague are as follows. First, Mr Geach failed to register for, or to pay, VAT from its inception in 1992 until 2010. That was a sustained course of dishonesty for which he gave a dishonest explanation. The high court mentioned 'VAT' as further misconduct, but did not mention it again. Accordingly there are no factual findings in that regard in the judgment. In any event, in my opinion, it resulted in a clear misdirection in

regard to sanction, because the high court either failed to have regard to material misconduct or treated it as inconsequential. In regard to Mr van Onselen, the high court held that he, unlike some of his colleagues, had not engaged in improper duplication of hours charged for work done in chambers. In my opinion that factual finding was incorrect, and it resulted in a misdirection in regard to sanction. Second, I think that the high court misdirected itself in its approach to sanction, both at an individual level in relation to those who were not struck from the roll, and at a general level in failing to apply the principle of parity in assessing sanction and in regard to its orders for payment to the Fund. That conclusion necessitates a reconsideration of the sanctions imposed in relation to both those who were struck off the roll of advocates and those who were not. As will appear, in approaching that task, my approach differs in certain respects from that of my colleagues. The judgment of the high court is now reported as *Pretoria Society of Advocates & another v Geach & others*.[35] I shall refer to it as the reported judgment. I will refer to Nugent JA's judgment as the main judgment. A large part of the background emerges from the main judgment and I shall endeavour, so far as possible within a coherent narrative, to avoid repetition.

The Background

[121] The circumstances in which the conduct of these advocates attracted the scrutiny of the court can be summarised fairly shortly. In the North Gauteng High Court there was a considerable backlog of cases against the Road Accident Fund (the Fund). This was largely due to some misguided decisions by the Fund in an endeavour to address its chronic funding problems. The decisions aimed at avoiding incurring legal costs until a late stage of the actions against the Fund and

[35] *Pretoria Society of Advocates & another v Geach & others* 2011 (6) SA 441 (GNP).

postponing the settlement of cases until the very last minute. The consequence was that the Fund was rarely, if ever, properly prepared for trial. Pre-trial conferences were held late and were ineffectual because of a lack of instructions. Witnesses, both on the merits and in regard to quantum, were not consulted or available. Attorneys could not obtain instructions and briefed counsel at the very last minute. This meant that there was no advice on evidence. One of the advocates, who did a substantial amount of work for the Fund, estimated that his briefs on trial would arrive between three and seven days prior to the date of set down. The result was that when the day for trial arrived the Fund could not proceed in any sensible fashion. It was compelled to settle the majority of cases on the best terms it could obtain. Otherwise it would postpone them, or, in a few instances, try to defend them on the basis of the plaintiff's evidence. In virtually every instance an order would be made that the Fund pay the costs of the action or the postponement.

[122] In this situation these thirteen advocates took more than one brief a day for matters set down for trial before the North Gauteng High Court. The extent of the multiple briefing varied from one advocate to the next and from one day to another. Sometimes only a single extra brief would be taken. In one instance one of them took 21 briefs on a single day. Sometimes the multiple briefs came from the same attorney and sometimes not. Sometimes all the briefs would be to represent plaintiffs, or the Fund, but sometimes the advocate would hold briefs for both plaintiffs and the Fund on the same day. The disarray in the Fund's conduct of cases enabled them to do this. They could be reasonably certain that the cases would settle or be postponed and that, if any needed to proceed, they would be able to conduct those cases, whilst disposing of the balance of the matters in which they had been instructed. Experience no doubt taught them which cases stood a risk of proceeding and required rather more preparation, but the conduct of actions against

the Fund, at least on the merits, is rarely complex, involving as it does a description of how a particular motor accident occurred and an analysis of who was at fault and the degree of their fault. Consequently, if a case proceeded unexpectedly, this did not pose any great difficulty.

[123] Accepting multiple briefs to conduct trials in the same court on the same day in circumstances where, if one case ran the others could not, was a clear breach of the rules governing the professional conduct of advocates as contained in the Uniform Rules of Professional Conduct of the GCB as well as the domestic rules of the Pretoria Bar. However, matters did not rest there. The other aspect of the conduct of these thirteen advocates related to the fees they charged for these cases. In each instance identified by the Pretoria Bar in the course of its internal investigation, the advocates charged a full trial or day fee for the case irrespective of what work had been done on it or what effort or input it involved from the side of the advocate. This was so even though many of the briefs ultimately involved no more from them than to settle the cases, rather than conduct a trial. It appears that the advocates charged in accordance with the Fund's in-house tariff of fees for counsel, when they were briefed on behalf of the Fund,[36] and the fee that would be allowed on taxation by the taxing master where they appeared for the plaintiff.[37] The end result was that, by multiplying the number of briefs they took and charging a full trial fee in respect of each of them, they could earn far more than would otherwise have been the case. In every case the Fund bore the costs and the advocates appear to have set their fees with this in mind.

[36]These fees appear to have ranged from R4 000 per day in the case of more junior members up to R5 600 per day in the case of the more senior advocates.
[37]This seems to have been of the order of R12 000 to R15 000 per day.

[124] The history of the disciplinary proceedings and this litigation are set out in paras 29 to 49 of the main judgment. I add the following detail. Each advocate faced two general charges, one of 'double briefing' and one of over-reaching with the number of counts dependent on how often they had impermissibly taken an extra brief. In regard to double briefing they took multiple trial briefs on the same day, in circumstances where they could not have conducted trials in all cases, because that would have required them to be in more than one court at the same time. The charge specifically alleged that the additional briefs forming the subject of the charges were not briefs with 'a specific mandate to settle the matter.' The advocates accepted this as correct when they pleaded guilty to these charges. It is accordingly not open to them to contend, as some did, that these were not in reality trial briefs. They were trial briefs (albeit that it was not anticipated that many of them would result in trials being fought) and were treated as such by the advocates because they charged trial fees for them. This led directly to the second general charge, one of over-reaching. Here it was alleged that, in contravention of the Bar rules governing the charging of fees, they charged a full trial fee in every 'extra' case accepted under this practice of accepting multiple trial briefs on the same day. Each extra fee charged constituted a separate count of over-reaching. In substance the charges of double briefing and over-reaching constitute two sides of the same coin. Had the former not occurred, the latter would also not have occurred.

The Law

[125] In South Africa the advocates' profession is primarily under the control of voluntary professional organisations, situated in each centre where a high court is located. These organisations in turn are the constituent members of the GCB. On questions of admission to, and continued membership of, the profession the high court exercises control. It is the high court to which application must be made for

admission and the high court that has the power to remove practitioners from the roll of advocates or attorneys. It exercises these powers in terms of the Admission of Advocates Act, 74 of 1964 (the Act).

[126] A person can only be admitted to practise as an advocate if they satisfy the court that they are a fit and proper person to be admitted as such.[38] Central to the determination of that question, which is the same question that has to be answered in respect of attorneys, is whether the applicant for admission is a person of 'complete honesty, reliability and integrity'.[39] The court's duty is to satisfy itself that the applicant is a proper person to be allowed to practise and that admitting the applicant to the profession involves 'no danger to the public and no danger to the good name of the profession'.[40] In explaining the reasons for this I need go little further than the words of Hefer JA in *Kekana v Society of Advocates, of South Africa*,[41] when he said:

'Legal practitioners occupy a unique position. On the one hand they serve the interests of their clients, which require a case to be presented fearlessly and vigorously. On the other hand, as officers of the Court they serve the interests of justice itself by acting as a bulwark against the admission of fabricated evidence. Both professions have strict ethical rules aimed at preventing their members from becoming parties to the deception of the Court. Unfortunately the observance of the rules is not assured, because what happens between legal representatives and their clients or witnesses is not a matter for public scrutiny. The preservation of a high standard of professional ethics having thus been left almost entirely in the hands of individual practitioners, it stands to reason, firstly, that absolute personal integrity and scrupulous honesty are demanded of each of them and, secondly, that a practitioner who lacks these qualities cannot be expected to play his part.'

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[38]Section 3(1)(a) of the Act.
[39]*Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538G.
[40]*Ex parte Knox* 1962 (1) SA 778 (N) at 784.
[41]*Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 655I-656A.

The need for absolute honesty and integrity applies both in relation to advocates' duties to their clients and their duties to the courts.[42] In the past, applicants for admission as an advocate, who were unable to demonstrate those qualities of honesty and integrity, had their applications refused.[43]

[127] These qualities of honesty and integrity must continue to be displayed throughout an advocate's practice. That is apparent from the provisions of s 7(1) of the Act that reads as follows:

'Subject to the provisions of any other law, a court of any division may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates—

(a) – (c) …

(d) if the court is satisfied that he is not a fit and proper person to continue to practise as an advocate.'

Conduct by an advocate in the course of his or her practice that demonstrates a lack of honesty or integrity has repeatedly been held to lead to the conclusion that they are no longer a fit and proper person to continue to practise as an advocate.[44] Although in these cases the court is usually concerned with conduct in the course of the advocate's practice, that does not mean that conduct unconnected with practice may not be taken into account in assessing whether the advocate lacks the honesty and integrity to remain in practice as an advocate.[45]

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[42] *Hayes v The Bar Council* 1981 (3) SA 1070 (ZAD) at 1081H-1082D.

[43] *Ex parte Swain* 1973 (2) SA 427 (N) and on appeal *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A); *Hayes v The Bar Council* 1981 (3) SA 1070 (ZAD) and *Ex parte Ngwenya: In re Ngwenya v Society of Advocates, Pretoria, & another* 2006 (2) SA 88 (W).

[44] *Olivier v Die Kaapse Balieraad* 1972 (3) SA 485 (A); *General Council of the Bar of South Africa v Matthys* 2002 (5) SA 1 (E) paras 34 and 35. The same ethical standards are demanded of attorneys. *Society of Advocates of Natal & another v Merret* 1997 (4) SA 374 (N) at 383D-G.

[45] *Society of Advocates of Natal & another v Knox & others,* 1954 (2) SA 246 (N) at 249A-B. I am aware of a case where an advocate was struck off the roll for making a fraudulent insurance claim and a conviction of a serious criminal offence would ordinarily result in the advocate being struck from the roll.

[128] Hefer JA set out the proper approach to an application under s 7(1)(d) of the Act in *Kekana*,[46] where he said:

'In terms of s 7(1) of the Admission of Advocates Act 74 of 1964, as amended, the Court may suspend any person from practice, or order that the name of any person be struck off the roll, if it is satisfied that he is not a fit and proper person to continue to practise as an advocate. The way in which the Court had to deal with an application for the removal of an attorney's name from the roll under a similar provision in the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, as amended (before that Act was repealed), was considered in *Nyembezi v Law Society, Natal* 1981 (2) SA 752 (A) at 756H-758C. It emerges from the judgment that the Court first has to decide whether the alleged offending conduct has been established on a preponderance of probability and, if so, whether the person in question is a fit and proper person to practise as an attorney. Although the last finding to some extent involves a value judgment, it is in essence one of making an objective finding of fact and discretion does not enter the picture. But, once there is a finding that he is not a fit and proper person to practise, he may in the Court's discretion either be suspended or struck off the roll.'

[129] On the first two questions, namely what conduct has been proved and whether, in the light of that conduct, the advocate is a fit and proper person to remain on the roll of advocates, this court determines on appeal whether the high court was correct and interferes if it was not. It approaches the matter in the same way that it approaches any other appeal involving factual questions. Insofar as the second issue has elements of a value judgment, it is not discretionary in the sense of being open to a number of possible conclusions. It is a judgment by the court in the light of all relevant considerations and does not involve a choice between alternatives.[47] Where, as here, the decision is made in application proceedings

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[46] At 654C-D.

[47] *Media Workers Association of South Africa & others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800D-G. Para 46 of the main judgment notes the difference of language between the provisions of the Admission of Advocates Act and the corresponding provision in s 22 of the Attorneys Act. It is unnecessary to go into the effect of that difference as it does not arise in the present case.

without a reference to oral evidence, this court is in as good a position as the high court to assess the facts.[48] In regard to the third element of the enquiry – the issue of an appropriate sanction – Hefer JA, in *Kekana*, said that:

'All that need be added is that appellate interference with the trial Court's discretion is permissible on restricted grounds only. In *Beyers v Pretoria Balieraad* 1966 (2) SA 593 (A) at 605F--H, *Olivier v Die Kaapse Balieraad* 1972 (3) SA 485 (A) at 495D-F and *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A) at 786H *ad fin* the grounds for interference are stated in slightly different terms, but the approach is essentially the one adopted in all other cases where a Court of Appeal is called upon to interfere with the exercise of a discretion, *viz* that interference is limited to cases in which it is found that the trial Court has exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reason. (See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I-782A and the cases referred to there.)'[49]

In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others*[50] the Constitutional Court, in dealing with a similar kind of discretion, said the following about the powers of a court of appeal:

'(I)t may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'

It is not sufficient that the court made correct factual findings. It must also direct itself in accordance with those facts. Relevant factors must be considered and irrelevant ones ignored. If manifestly relevant facts do not feature in its evaluation, or irrelevant facts are taken into account, or facts are treated as pointing to one result, when they clearly point to the opposite result, the court misdirects itself and

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[48] *Malan & another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 12.
[49] At 645E-F.
[50] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 11.

the appeal court may interfere.[51] It is in terms of those principles that I approach this case. In doing so I am mindful that the best, indeed the only, evidence of what a court considers in arriving at its decision is the contents of its judgment and one can only consider the question of misdirection by looking at the contents of the judgment in the light of the evidence in the record. I start by addressing the factual findings of the high court under the general headings of 'The principal misconduct' and 'Additional misconduct' and conclude that, save in one respect in relation to Mr Geach and another in respect of Mr van Onselen, their factual findings were justified. I then consider the issue of whether the advocates were fit and proper persons to remain in practice as advocates and lastly deal with the issue of sanction.

The principal misconduct

[130] The high court held that the advocates were guilty of misconduct in accordance with their pleas. It then enquired into the question of dishonesty because all of them denied that their conduct was dishonest. It rejected a suggestion that the double briefing was merely technical and endorsed an opinion furnished to the Johannesburg Bar Council that:

[51]For an example see *Manong & Associates (Pty) Ltd v City of Cape Town* 2011 (2) SA 90 (SCA) para 94. In the context of review proceedings the same point was made in *Jacobs & ń ander v Waks & andere* 1992 (1) SA 521 (A) at 550D-551B where Botha JA pointed out that the limitation on the power of a court to interfere with a discretionary decision by a functionary means that the court does not substitute its view for that of the functionary but it also means 'dat die Hof wel sal ingryp op grond daarvan dat die funksionaris 'n relevante faktor oor die hoof gesien het (of te veel of te min gewig daaraan geheg het), wanneer die Hof oortuig is daarvan dat hy nie behoorlike aandag aan die saak bestee het nie. Die passasie beteken nie dat die Hof nie by magte is om in te gaan op die vraag of 'n relevante oorweging verontagsaam is (of verkeerd aangeslaan is) en, as dit bevind word die geval te wees, om op daardie grond die besluit tersyde te stel nie, op die grondslag dat die funksionaris in daardie opsig nie behoorlike aandag aan die saak bestee het nie.'

'It is not possible for one counsel to act in the best interests of clients in two or more trials set down for the same day, even if only one action is set down for trial and counsel is briefed on settling the other matters.'[52]

Insofar as the over-reaching charges were concerned, the high court held that the advocates had not been entitled to charge full trial fees for the additional briefs they had improperly taken and likened this to 'daylight robbery'. Its conclusion, apparent from the opening paragraph of its judgment, was that their conduct was due to greed.[53] The court accordingly concluded that their conduct was dishonest.

[131] I agree with these conclusions and in my judgment they justified the charge (and guilty pleas) of over-reaching. Advocates are only entitled to charge a reasonable fee, and if they charge an unreasonable fee they are guilty of over-charging. That may or may not involve dishonesty. A misjudged view of the advocate's worth or the value of the service rendered is not necessarily dishonest. Of course the excess may be such that it justifies an inference of dishonesty.[54] Over-reaching is something more and it may be of assistance to indicate why this is so.

[132] Over-reaching involves an abuse of the person's status as an advocate, to take advantage for personal gain of the person who is paying them. Advocates enjoy a considerable advantage in setting a fee. They know what standards are applicable to the charging of fees; they know what work has been done on the brief and what time and effort has gone into that work; they know in broad terms the

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[52]To this extent its findings appear to go further than the main judgment in paras 20 and 21, but little turns on this in the light of the conclusion of dishonesty in relation tot the fees they charged on the additional briefs.

[53]'Where counsel mount the steed of greed and attempt to clear the hurdle of their professional rules their fall inevitably dents the reputation of their profession.'

[54]*Algemene Balieraad van Suid-Afrika v Burger en 'n ander* 1993 (4) SA 510 (T) at 525I-526A.

fees charged by advocates of comparable seniority and ability for similar work. This creates what economists call information asymmetry between the advocate and the client and even the attorney, one of whose functions is to ensure that the advocate does not claim or be paid unreasonable fees.[55] Where the attorney is ignorant of what constitutes a reasonable fee, or is unable or has no incentive to act as a check on counsel, which was probably the situation here because all concerned anticipated that the fees were to come out of the Fund, the advocate's advantage is magnified as the check built into the system is absent. For the advocate to take advantage of that situation, by marking a fee knowing that it is not a proper fee, but one that is unreasonable and improperly marked under the rules, is an abuse of the advocate's position and amounts to over-reaching. It is innately dishonest behaviour.

[133] These advocates claimed to be entitled to charge a full first day fee on trial, not only on the one brief it was legitimate for them to accept each day, but on all the extra briefs as well. They thereby represented to their attorney, the lay client, and more importantly – since the costs were inevitably going to come out of the Fund – the representatives of the Fund, that it was legitimate for them to charge these fees. For the reasons that follow I am satisfied that they were not.

[134] Traditionally a first day fee on trial compensated the advocate for the work done in preparation for the trial, apart from work, such as drafting pleadings or conferences, that had been the subject of a separate specific brief. It thus covered all work, such as considering the available evidence; reading the documents; deciding which witnesses to call; preparing to lead witnesses; preparing cross-

[55]Ibid, 521I-522B.

examination of the opponent's witnesses; legal research and the general planning of the conduct of the case. It also compensated the advocate for the appearance on the first day of the case. Fees for the second and further days, known as refreshers, were significantly lower. In current practice, where many advocates charge separately for their preparation, a first day fee on trial should not be markedly different from the refresher because they are compensating for the same work – the day in court.[56]

[135] A misapprehension that infected some of the arguments before us was that, if a trial settles shortly before the date of set down, that entitles the advocate to a fee on brief equivalent to a first day fee on trial, irrespective of whether any work had been done on the brief and irrespective of whether the acceptance of the brief resulted in work being turned away to the advocate's detriment. That approach is incorrect. It would have the result that the mere fact of entering a trial date in the advocate's diary would give rise to an entitlement to charge a fee on brief. But that would breach the basic rule that an advocate is only entitled to charge a reasonable fee. The true position is expressed in rule 8(b)(i) of the rules of the Society of Advocates of KwaZulu-Natal (which has for many years been the ethics committee of the GCB), which reads as follows:

'A fee on brief is chargeable by counsel in order to compensate him for work done in preparation for the trial of a case and for the loss of opportunity to earn fees from other work suffered in consequence of his acceptance of a trial brief. Where neither of these factors is present counsel will not ordinarily be entitled to charge a fee on brief.'[57]

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[56]The two different approaches to charging fees are discussed in *City of Cape Town v Arun Property Development (Pty) Ltd & another* 2009 (5) SA 227 (C) paras 5-6 and 22-23.

[57]This is the point of the explanation for charging a fee on brief in *Pretorius v Santam Bpk* 2000 (2) SA 858 (T) at 867F-868A. It also illustrates why there cannot be a direct comparison between the fees charged by advocates and attorneys for trial work. *Road Accident Fund v Le Roux* 2002 (1) SA 751 (W) at 757B-D; *Aircraft Completion*

For that reason the rule goes on to provide that if a trial settles before the date of set down the advocate's fee should not be settled with the attorney or marked until the date of set down. This enables the advocate to assess the extent of any prejudice arising from the acceptance of the brief. Advocates who wish to claim payment of a fee on the footing that they have been prejudiced by accepting the brief should be able to demonstrate that they have had to turn other work away as a result.

[136] The twelve advocates engaged in double briefing because of the virtual certainty, as many of them explained, that the Fund would settle or require an adjournment. The amount of work involved in preparation must have been minimal, amounting largely to guiding the attorney in assessing a fair figure at which to settle and perhaps conducting all or part of the negotiations. Experienced attorneys specialising in personal injury cases would probably have done much of the groundwork and the advocates' own experience would have enabled them to make a reasonable assessment without undue effort. They were already being compensated for the day's appearance, so charging a day's fee in the extra cases they were taking as a result of their double briefing was clearly impermissible.

[137] In addition they cannot have failed to be aware of the cumulative effect on their earnings of charging multiple fees on the same day. I attach little weight to

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Centre (Pty) Ltd v Rossouw & others 2004 (1) SA 123 (W) para 154(5) and fn 11. The article in *De Rebus* (September 2012) 21 which seeks to equate the two, proceeds from the erroneous perspective that advocates are entitled (and therefore attorneys should likewise be entitled) to charge a fee for a day merely because they have set the day aside, even though they have been paid separately for their preparation and were not prejudiced by having to turn work away as a result of their reserving the day. That is incorrect. If the attorney wishes to claim a fee for the day then it is for the attorney to show that this is justified by work performed and not charged for separately and by prejudice in their practice as a result of agreeing to undertake the trial. This may be more difficult in the case of an attorney because of the differences between an attorney's and an advocate's practice.

the suggestion made by many of them that they kept their fees to the level of the Fund's tariff or the amount recoverable on taxation. It was obviously profitable – indeed extremely profitable – for them to do so.[58] In addition fixing their fees at that level was consistent with the entire system, which was that the fees would be paid out of the Fund. They must all have been aware that the fees they were charging in these cases were not reasonable fees assessed in accordance with the rules governing their profession. The rapidity with which, once the Pretoria Bar conducted its investigation, the majority of them admitted to over-reaching merely reinforces that.

[138] In regard to the counts of double briefing, the explanations proffered by the advocates all turned, to a greater or lesser extent, around the circumstances of the Fund and the backlog in Fund cases described in paras 8 to 13 of the main judgment. Some suggested, in exculpation of their conduct, that they assisted in ameliorating this situation. It is apparent from the record of the first ten disciplinary hearings conducted by the Pretoria Bar that it was treated as exculpatory by both the counsel acting as pro forma prosecutor and the members of the committee. In my view that was a mistake. The incompetence of the Fund created an opportunity that these advocates exploited to engage in double briefing on a relatively risk free basis. Like the high court and my colleague[59] I am unable to accept that their reason for doing this was altruism and not their own financial benefit. Had it been altruism they would not have charged the fees that they did, but would have undertaken the resolution of cases for nominal fees and possibly

[58]The high court calculated and the advocates accepted that the extent of their financial gain from these activities during the ten months of the bar's enquiry was R984 000 (Geach); R864 000 (both Williams and Güldenpfennig); R268 000 (Pillay); R166 400 (Upton); R1 768 000 (Botha); R141 900 (Seima); R310 800 (De Klerk); R94 000 (Jordaan); R967 800 (Van Onselen); R1 323 000 (Leopeng); and R1 916 800 (Mogagabe). It did not explain how it arrived at these figures.

[59]Main judgment para 18 and 22.

made helpful suggestions to the Judge President or his Deputy of ways in which the problems being experienced could be resolved. There is no indication that they did either of these. All that they did was exploit the situation and by doing so obtained significant financial benefits. As Nugent JA so aptly expresses it, they set about plundering the Fund.[60]

[139] The acknowledgements of misconduct by these twelve advocates in relation to double briefing were in my view entirely justified. I do not think it correct to say that they had perhaps been mistaken in accepting that they were guilty of double briefing. They could not have been certain in advance which cases would proceed and which not so all were potentially cases where trials could proceed. The fact that in the light of experience they could be fairly sure that almost all of them would settle or be postponed does not in my view affect matters. Every advocate has encountered cases that they thought would settle, but did not, in the same way as they encountered cases that they were convinced would proceed that settled. They were charged and admitted their guilt on the express basis that these were not briefs on settlement, but briefs on trial. As experienced advocates they presumably read the charge sheet and accepted that it was correct. However, in view of the linkage between double briefing and over-reaching there is no need to explore this any further.

[140] Overall their misconduct was deliberate, flagrant, serious and committed over a lengthy period of time. It was undertaken in the face of a specific warning from their professional body of the consequences of such conduct. To behave in that fashion shows a lack of integrity. Whilst the investigation by the Pretoria Bar

[60]Main judgment para 27.

only spanned a ten month period from February to November 2009 it is plain that some of the advocates had been guilty of the same conduct before. There was evidence that Messrs Geach, de Klerk and Pillay (as well as Mr Bezuidenhout) were engaged in this conduct in 2007 and Messrs Upton, Van Onselen and Seima acknowledged that they had double briefed prior to February 2009. The other advocates declined to deal with transgressions of the rules prior to February 2009 although they were specifically challenged by the GCB to do so. Instead they adopted the attitude that this was not within the scope of the enquiry. That was not a proper approach. It has frequently been pointed out that disciplinary proceedings against a legal practitioner are of a special kind[61] and that an advocate facing such proceedings should approach them with candour and not resort to a technical approach based on bland or evasive denials.[62]

Additional misconduct

[141] Certain further conduct was placed before the court in relation to those individuals in respect of whom striking off orders were made and one who was not. Five of them, Messrs Pillay, Botha, Van Onselen, Leopeng and Mogagabe, were found, on an inspection of their books of account by the Pretoria Bar, to have charged fees for preparation, conferences and the like at times when, according to their records, they were engaged in trials or other consultations or preparatory work. In effect fees were being raised in respect of different clients in respect of the same periods of time. The explanations of administrative inefficiency given for this were, save in the case of Mr van Onselen, rejected by the high court. I will

[61]The cases are collected in *Society of Advocates of South Africa (Witwatersrand Division) v Edeling* 1998 (2) SA 852 (W) at 859F-861E.
[62]*Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 853E-G; *Malan & another v Law Society, Northern Provinces*, supra, para 12.

revert to the finding in his case in due course. In the case of Mr de Klerk there was no evidence of any separate and additional misconduct, but it was pointed out that he had continued on his path of double briefing and over-reaching for nine days in November 2009 at a stage when he was aware of the Pretoria Bar's investigation into that topic.

[142] In respect of Mr Pillay, the high court considered a complaint that he had lied to Mojapelo DJP, when asked by the latter if the reason for his not being in court at the roll call in Johannesburg one day was that he was appearing in the roll call court in Pretoria. Not only did the high court accept that he had indeed lied to Mojapelo DJP, but it correctly held that Mr Pillay's evidence about this was untruthful. That conclusion reflects directly on his honesty and integrity. The courts have repeatedly (and rightly) said that a dishonest explanation by a legal practitioner of misconduct, and seeking to mislead the court that is considering charges of misconduct, can be taken into account in determining whether the practitioner is a fit and proper person to remain on the roll of advocates or attorneys as the case may be.[63] After all one of the cardinal duties owed by an officer of the court is not to mislead the court in any way.[64]

[143] That brings me to the matter of Mr Geach's failure to register for, and pay, VAT, where in my view the high court erred. When he was required to make his books of account available for inspection he disclosed what would have been apparent from them, namely that he had never registered as a vendor in terms of

[63]The authorities are collected in *General Council of the Bar of South Africa v Matthys*, supra, paras 34 and 35.
[64]See the passage from the judgment in *Rondel v W* [1966] 1 All ER (QB) at 479 cited in *Natal Law Society v N* 1985 (4) SA 115 (N) at 121I-122B.

the Value Added Tax Act,[65] notwithstanding the fact that he had for many years earned considerably more than the statutory threshold at which such registration is mandatory. Nor had he accounted for VAT on his fees. His non-compliance with s 23(1) of the VAT Act was an offence in terms of s 58*(c)* of the VAT Act and rendered him liable on conviction to a fine or a sentence of imprisonment of up to two years. In addition for the reasons explained in the following paragraphs his non-payment of VAT caused a loss to the fiscus and was potentially detrimental to his clients.

[144] Although not registered, Mr Geach was a 'vendor' as defined in s 1 of the VAT Act. As such, when he rendered services as an advocate, they were taxable supplies under the VAT Act. His non-registration does not mean that he did not have to charge VAT on his fees and pay it to SARS. It merely provided the occasion for his not doing so. Taxpayers may either charge VAT on an exclusive or an inclusive basis. It is usual for advocates to charge on an exclusive basis. Their accounts then reflect the VAT as an additional amount over and above the fee. This amount they are supposed to collect from the client and pay to SARS. If they do not do so then there is a loss to the revenue. The reason is that in terms of s 7(1)*(a)* of the VAT Act, VAT is only payable by a vendor on the supply of goods or services. Attorneys may be obliged to procure services for their clients, such as the services of the Sheriff, an advocate or an expert witness. However, those services are rendered to the client, not the attorney. That principle was established in this court in *Minister of Finance & another v Law Society, Transvaal*,[66] where Goldstone JA said:

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[65] Act 89 of 1991 (the VAT Act).
[66] *Minister of Finance & another v Law Society, Transvaal* 1991 (4) SA 544 (A) at 556H-557A.

'The moneys now in question are in nowise paid to the attorney, notary or conveyancer for a service rendered by him. They are paid in respect of the service rendered by counsel, correspondent attorney, notary or conveyancer, expert witness, deputy sheriff or messenger of the court, as the case may be, on behalf of the client. The moneys may not be claimed from the client by the instructing attorney, notary or conveyancer save in respect of the service performed by the third party. In no way does the fee or other amount accrue to and in no way is it received by the attorney, notary or conveyancer for a service rendered by him. The fact that because of a professional practice or a contract the attorney, notary or conveyancer may be personally liable to pay for the service performed by the third party in no way has as a consequence that the attorney, notary or conveyancer himself performs that service.'

[145] The fact that advocates look to their instructing attorney for payment of their fees does not affect this.[67] The payments the attorney makes for those services are disbursements and the attorney does not charge VAT on those disbursements. If the advocate does not charge VAT the attorney's account to the client does not include VAT in respect of that service. The same is true in relation to other disbursements. The attorney is not concerned with whether the person to whom disbursements are made is charging VAT. They may after all, like many advocates, have earnings that are below the threshold for registration and charging of VAT.[68] The attorney recovers whatever amount has been charged for the services in question whether or not the fee includes VAT and does not himself add VAT if none has been charged. In the result there is a clear loss to the revenue if the advocate is obliged to charge VAT and does not do so. In addition, in terms of s 61(1) of the VAT Act, the client may be required by SARS to pay the unpaid VAT once the failure to collect and pay it over is discovered. In common parlance this is described as a fraud on the revenue. It is probably a fraud in law as well, but

[67] *Serrurier & another v Korzia & another* 2010 (3) SA 166 (W).
[68] Currently R1 million.

that is irrelevant. What is important for present purposes is that it is fundamentally dishonest. [69]

[146] For the sake of completeness I deal also with the situation where the advocate, who is a VAT vendor, charges on an inclusive basis. VAT is then included in the fee. The default position where no election is made or where the vendor does not register is that the amount charged is deemed to be inclusive of VAT.[70] One does not avoid that by not registering to pay VAT. Mr Geach was liable to charge VAT. He did not claim VAT from his clients over and above his fees. His fees were accordingly VAT inclusive, a matter specifically drawn to the attention of his counsel. As a matter of law he collected VAT as part of his fees and should have accounted to SARS for that VAT. The effect of his non-registration was to avoid the payment of VAT to SARS. Whichever way one looks at Mr Geach's behaviour it was dishonest and involved a loss to the fiscus.

[147] Mr Geach does not say that he was unaware of his obligations in regard to registration, collection and payment of VAT, and no senior counsel could be heard to claim ignorance of these matters. His conduct was deliberate. Whichever way one looks at the matter he was obliged to collect and pay VAT to SARS and did not do so. That involved a loss to the fiscus over nearly 20 years. On the fees that he was earning the amounts must have been considerable. This is misconduct of the most serious kind and was dishonest.

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[69] *Estate Agency Affairs Board v McLaggan & another* 2005 (4) SA 531 (SCA) paras 21-24.
[70] Section 64(1) of the VAT Act.

[148] The dishonesty was compounded by Mr Geach's response to this charge. The founding affidavit on behalf of the Pretoria Bar recited his failure and said that his conduct must have been intentional and that he had no defence. His response to these serious allegations was to say that he disclosed his non-registration to the Bar and prior to that had made application for registration. He went on to say:

'I was lax and careless rather than intentional in this regard.'

Earlier in his response to the Pretoria Bar on this issue he said:

'My nalate om te registreer was eerder die gevolg van agterlosigheid aan my kant as 'n doelbewuste poging om belasting te ontduik.'[71]

That response displays breathtaking insouciance on his part in regard to a matter of this gravity. It cannot possibly be truthful. VAT was introduced in South Africa in September 1991. Mr Geach has been a successful advocate through most if not all of that period. He could not possibly claim to have been unaware of its existence or the fact that advocates are obliged, like other vendors, to register for VAT purposes and collect and pay over the tax collected.[72] A tax system dependent upon self-assessment and regular payment of the tax by vendors is undermined if vendors do not fulfil their obligations and, hence, a failure by them to do so is a serious offence. For an advocate to be guilty of not registering and failing to pay VAT for many years in substantial sums and then to dismiss his failure to do so as an act of administrative carelessness demonstrates a complete lack of probity. Taken on its own, in my view, it would probably justify the conclusion that he was not a fit and proper person to practise as an advocate. When taken together with his other

[71] 'My failure to register was the result of carelessness on my part rather than a deliberate attempt to avoid tax.' (My translation)

[72] The full scope of a vendor's obligations and the importance of complying with them is spelled out by Kriegler J in *Metcash Trading Ltd v Commissioner, South African Revenue Service & another* 2001 (1) SA 1109 (CC) paras 13-17.

misconduct it demonstrates a complete lack of the integrity demanded of an advocate.

[149] It is then relevant to consider how this was dealt with in the reported judgment. Regrettably the answer is that it was not. The issue of VAT is mentioned under the general heading of 'additional' in the schedule in para 4 of the reported judgment. It is not mentioned again, either in the general part of the judgment or in dealing with Mr Geach individually.

[150] The high court was aware of the VAT issue in relation to Mr Geach because it listed it as additional misconduct. It then did not revert to it. There are two possible explanations. The one is that it overlooked it. The other is that it did not regard it as particularly serious and accepted Mr Geach's explanation for it. Whichever of those is correct, it was an error in regard to the relevant facts. This was extremely serious misconduct and it should not have been overlooked or disregarded. Accordingly, insofar as he is concerned, the factual basis upon which the high court dealt with him was wrong. That requires the court to look afresh at the consequences of that misconduct.

Fit and proper persons to practice as advocates

[151] Although the high court did not deal expressly with this question (the second in the enquiry on which it was engaged) one infers from various passages in the reported judgment that they regarded these advocates as not being fit and proper

persons to continue in practice as advocates.[73] That conclusion must have been reached notwithstanding their protestations that as a result of the sanctions imposed by the Pretoria Bar they had learned their lesson and would never again contravene the rules regarding the charging of fees. By way of example, Mr Geach said:

'I have certainly learned my lesson and I will not double brief nor charge incorrectly in future.'

Mr Güldenpfennig said:

'I am remorseful of my actions and will ensure that I will not breach the Rules of the Applicant or the Advocates' Profession in the future.'

Similar expressions of remorse and contrition are to be found in the initial affidavits filed by each of the twelve advocates in response to the Pretoria Bar's applications against them.

[152] These statements were invoked before the high court in support of the contention that the advocates had reformed and would not be guilty of similar conduct in the future, so that no additional sanction should be imposed on them. That was a claim that they were, *at that stage*, fit and proper persons to be permitted to continue to practise as advocates. That pertinently raised an issue that does not appear to have been expressly dealt with in any previous case, namely, at what date the court, faced with an application in terms of s 7(1)(d) of the Act, must consider whether the advocate is a fit and proper person to continue practice as an advocate. Is it the date of the conduct that gives rise to the application, the date of

[73]In particular the fourth bullet point in para 59 of the reported judgment. I assume that the statement in regard to Mr Williams at 475G-H of the reported judgment that 'it cannot be said that he is not a fit and proper person to continue practising' and the similar statement in respect of Mr Seima at 483C-D were made in error. There was never a suggestion that this was a case such as *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 638I - 639E where the court exercised disciplinary powers of suspension from practice in the absence of a finding that the attorney was not a fit and proper person to continue to practice as such.

commencement of the proceedings or the date on which the court decides the application?

[153] In my view the answer is that the correct date is the date at which the court hears and decides the application. That is the construction of s 7(1)(d) that is most consistent with the language used, which is couched in the present tense and speaks to the immediate future, when it requires the court to satisfy itself whether the advocate 'is a fit and proper person to continue practice as an advocate'.[74] It is also the construction that best accords with the main function of the court in exercising the disciplinary power conferred by the section. Our courts have repeatedly said that the primary purpose of the provisions empowering courts to remove legal practitioners from the roll is not punitive, but the protection of the public.[75] If the advocate has reformed and remedied his or her failures and shortcomings before the application comes to court, there may be no further need for any disciplinary sanction to be imposed, because the advocate is, once again, a fit and proper person to continue to practise as such. I say 'may be' deliberately, because there are cases where the conduct is so serious that, by its very character, it renders the advocate unfit to remain in practice and may even exclude the prospect of rehabilitation.[76] The need to protect the good name of the profession, which is central to the enquiry whether a person is a fit and proper person to practise as an advocate, may sometimes lead to the conclusion that a person is not such, even though there is evidence indicating that it is unlikely that they will repeat their previous misconduct.

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[74]This appears to have been the approach in *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* 1976 (4) SA 350 (T) at 358D-G.
[75]*Van den Berg v General Council of the Bar of South Africa* [2007] 2 All SA 499 (SCA) para 50
[76]*Ex parte Knox* supra; *Algemene Balieraad van Suid-Afrika v Burger en 'n ander* 1993 (4) SA 510 (T) at 526H-527A.

[154] It follows from this that, in sitting on appeal from the high court, we are concerned with the situation that confronted the high court when it heard the case. Subsequent events and conduct, unless placed before this court by way of an application to lead further evidence on appeal, cannot be considered in determining the answer to the question of fitness and propriety to be an advocate or the appropriate sanction. If this court holds that the high court has erred in regard to sanction, its task is to impose the sanction that the high court should have imposed. That is pertinent to our weighing certain submissions about the conduct of the advocates after the high court's judgment.

[155] Reverting to the reported judgment the inference to be drawn from it is that the high court regarded the misconduct of the advocates, and the dishonesty that permeated that misconduct, justified the conclusion that they were none of them at that time fit and proper persons to remain in practise as advocates. The further necessary inference is that it did not regard the sanctions imposed by the Pretoria Bar as having sufficed to reform the character defect of dishonesty. No doubt it bore in mind that throughout the proceedings before it the advocates persisted in the stance that their conduct was not dishonest; that with one or two exceptions they denied having been motivated by greed; that they claimed that their misconduct was largely of a technical character; and that they blamed the RAF for creating the situation of which they had taken advantage. I agree that they were shown not to be fit and proper persons to remain on the roll of advocates and find it unnecessary in those circumstances to canvass the situation of each advocate personally. I turn then to deal with the issue of sanction, bearing in mind the constraints on an appeal court in addressing that issue.

Sanction

Background, Bezuidenhout and Pillay

[156] The high court approached the question of sanction on the footing that as it had found dishonesty on the part of the advocates it was necessary for exceptional circumstances to be present if they were to avoid removal from the roll.[77] It did so on the strength of a statement to that effect in *Malan*'s case.[78] That statement was made in the context of the conduct of an attorney's practice where the firm had engaged in widespread touting and virtually every rule governing the operation of attorney's books of account had been broken. In the context of an advocate who has been shown to be dishonest and lacking integrity, what is called for is evidence showing that the character flaw of dishonesty has been overcome, or will be overcome, if a sanction less than striking off, is imposed. As the character flaw in these cases was manifested by improper and dishonest charging of fees the court needed to be satisfied, if the advocates were to avoid striking off, that they would not be guilty of irregularities in charging fees in the future.

[157] The names of six advocates were struck from the roll of advocates and seven were suspended from practice for periods set out in the order and further suspended the operation of all or part of those suspensions on certain conditions. In the case of Mr Bezuidenhout his conduct was so egregious and his defence of it, even in this court, so misplaced, that his striking off was undoubtedly warranted. Similarly with Mr Pillay, albeit that his involvement in double briefing and over-reaching was at the bottom of the scale, his conduct giving rise to the complaint by

[77]Reported judgment para 12, item 1.
[78]Fn 14 supra.

Mojapelo DJP, and his dishonesty in dealing with that complaint, was such as inevitably to lead to an order for striking off the roll. I need say nothing more about these two.

Geach

[158] It is appropriate to deal next with Mr Geach. For the reasons set out in paras 145 to 153 of this judgment I am satisfied that this court must address the question of sanction in his case on a factual basis different from that of the high court. He was guilty of serious misconduct in regard to both his double briefing and over-reaching as well as in relation to his failure to register for and pay VAT collected on his fees. These offences were committed over a protracted period and involved dishonesty in relation to large sums of money. The principal targets of his misconduct were the Fund, which derives its revenues from road users and taxpayers, and SARS, which is responsible for collecting tax on behalf of the community to pay for public services. His motivation in over-reaching was clearly greed. In regard to the double briefing and over-reaching he denied dishonesty and in regard to VAT he tried to dismiss it as a trivial administrative oversight. Such conduct by an advocate must not only be deprecated, but also dealt with appropriately. The proper starting point is that, in the absence of some compelling or exceptional circumstance, because he has failed to display the honesty and integrity required of an advocate and brought the name of the profession into disrepute, he should be struck from the roll.

[159] Mr Geach's position was the following. He was the most senior advocate in terms of call, having been at the Bar for 33 years. He had held silk for five years.

He was in a position of leadership where he should have set an example for others. The example he set was a bad one. His misconduct was extensive and clearly comparable with that of those who were struck off. The statement by the high court that 'his offences were not on the scale of the majority of other respondents'[79] was factually incorrect. He had the sixth highest number of contraventions and was the fifth highest beneficiary in financial terms. There were 82 counts spread over 47 days (out of a possible 140 days). The High Court calculated his gain at R984 000. His earnings over and above this were substantial. That emerges from a set of 34 charges, not already discussed in this judgment, of reducing his fees without obtaining the consent of the Bar Council. In 34 cases between February and August 2009 he reduced his marked fees. Globally the reduction was from some R2.25 million to about R950 000. (There was a further breach of the Bar rules in that he reduced his fee to what was allowed on taxation, which is impermissible.)

[160] The high court held that there were certain exceptional circumstances present in relation to all of the advocates in regard to the double briefing and over-reaching. It said that these consisted in the fact that the sentences imposed by the Pretoria Bar had been served; in the fact that the practice was widespread and both judges and fellow advocates turned a blind eye to it; and that the advocates had practised after serving their suspensions in a professional fashion. It added to these in relation to Mr Geach that he had paid a hefty fine and been unable to practise for three months; that he was 59 years of age, married with a family that he supported, and had been in practise for 33 years without prior complaints of misconduct; that he appeared not to have been actuated by greed; that the chairman of the disciplinary committee concluded that there were 'extensive extenuating

[79]Reported judgment 464F-G item 9.

circumstances'; and that he claimed that no client had had to pay any part of the award from the Fund to him in respect of fees.

[161] There are difficulties with some of these findings. The court had already held that the advocates had been motivated by greed and no other plausible reason emerges for Geach to have behaved as he did. His maturity, experience at the Bar and the fact that he had held silk for five years were all factors that had been present when he engaged in this misconduct and had not deterred him. There is also nothing to indicate that he would have desisted from this misconduct or regularised his tax position had the Pretoria Bar not instituted its enquiries. The court had already correctly held that the approach of the De Vos committee to its task had been defective – a view shared in both the main judgment and here – and in those circumstances the view of the chair of the disciplinary committee as to the presence of extenuation was irrelevant.

[162] What weight should be given to the misconduct in regard to VAT? This is a novel issue in South Africa so far as professional misconduct is concerned. However, I have found helpful the approach to this question adopted in a number of decisions in Australia the effect of which is gathered together in the judgment of Mason P in *New South Wales Bar Association v Hamman*.[80] First it is important to note that the approach of those courts to professional misconduct is similar to our own. That much emerges from paras 73 to 79 of that judgment where the duty of the barrister and the role of the court in exercising its disciplinary functions are set

[80]*New South Wales Bar Association v Hamman* (1999) 217 ALR 553 (NSWCA); [1999] NSWCA 404. See also *Legal Services Commissioner v Hewlett* [2008] QLPT 3 and the cases cited in para 13.

out in language so similar to that used by our courts that it is unnecessary to quote it in full. One passage is however worth repeating. It reads:

'Giles AJA described the basis of the Court's jurisdiction … [and] referred to the protective function of general deterrence in the following terms (at 471):

But the object of protection of the public also includes deterring the legal practitioner in question from repeating the misconduct, and deterring others who might be tempted to fall short of the high standards required of them. And the public, and professional colleagues who practise in the public interest, must be able to repose confidence in legal practitioners, so an element in deterrence is an assurance to the public that serious lapses in the conduct of legal practitioners will not be passed over or lightly put aside, but will be appropriately dealt with.

These references to the public's perception of the Court's reaction to the professional misconduct do not make the Court hostage to the public's assumed sense of anger at the misconduct uncovered. The Court must be satisfied that its enunciated views give proper weight to widely and reasonably held public attitudes to practitioners in the context of the administration of justice generally and in the particular case.'

[163] Turning to the specific issue of failure to make returns of and to pay income tax Mason P held that this was clearly dishonest and went on as follows:

'85 I emphatically dispute the proposition that defrauding "*the Revenue*" for personal gain is of lesser seriousness than defrauding a client, a member of the public or a corporation. The demonstrated unfitness to be trusted in serious matters is identical. Each category of "*victim*" is a juristic person whose rights to receive property are protected by law, including the criminal law in the case of dishonest interception. "*The Revenue*" may not have a human face, but neither does a corporation. But behind each (in the final analysis) are human faces who are ultimately worse off in consequence of fraud. Dishonest non-disclosure of income also increases the burden on taxpayers generally because rates of tax inevitably reflect effective collection levels. That explains why there is no legal or moral distinction between defrauding an individual and

defrauding "*the Revenue*". Indeed, the latter involves an additional element indicative of unfitness to practise. As Sheller JA pointed out in the Court of Criminal Appeal (par 59 above):

... the Australian system of tax collection depends upon the honesty of taxpayers and, in particular, upon their fully declaring in each year of income what their gross income is. In a free society, such as Australia, the tax collector cannot check that every taxpayer has done so.

86 I agree with the following opinion of Justice Traynor, speaking for the Supreme Court of California in *In re Hallinan* 272 P 2d 768, 771 (1954):

The fraudulent acquisition of another's property is but another form of theft in this state. We see no moral distinction between defrauding an individual and defrauding the government, and an attorney, whose standard of conduct should be one of complete honesty, who is convicted of either offence is not worthy of the trust and confidence of his clients, the courts, or the public, and must be disbarred, since his conviction of such a crime would necessarily involve moral turpitude.'

[164] Those statements are apposite to the seriousness with which we should view Mr Geach's conduct in regard to VAT. That does not mean that his name must necessarily be struck from the roll of advocates for such conduct. As that case and many others from that jurisdiction[81] show, the seriousness of his conduct, the reasons for it and his response once it is discovered are all important features. In the present case these must be weighed together with the other misconduct he committed. What is highly relevant is that this was protracted conduct over many

[81]There is a compendious collection of cases in *Legal Services Commissioner v Stirling* [2012] VCAT 347 paras 85 to 140 that concludes with the following helpful summary:
'It is evident from the above cases that the failure to file income tax returns and pay tax for an extended period:
(a) demonstrates a lack of integrity that the public has a right to expect from a barrister;
(b) reflects hypocrisy and inconsistency in purporting to practice in and uphold the law, while at the same time committing serious breaches of the taxation law;
(c) constitutes complete defiance of his civic responsibilities, while taking advantage of the full range of public services made available by taxation, not least in the provision of the Court system in which he earned his income;
(d) places a taxation burden upon his fellow citizens while he earned a high income;
(e) must be evaluated in the context of the underlying reason or motivation for the offending conduct; and
(f) is more serious conduct than failing to pay tax when assessed.'

years (VAT was introduced in 1992) and caused substantial losses to the public purse. Although he said that he had now registered, there was no evidence that he has paid all the arrear taxes and any penalties or made any attempt to do so. (We were told from the Bar that with the agreement of SARS he had regularised his tax affairs from 2006 to the present.) He did not avoid paying VAT because he was under either personal or financial stress and the only possible explanation was personal financial advantage. His response to this, in attributing it to an administrative oversight, was dishonest. There was no recognition of the seriousness of his misconduct. At the least what was required was a full and frank disclosure to the court of his position with regard to the payment of VAT and the arrangements he made with SARS to remedy his position. That was not forthcoming. When that is taken together with his other misconduct and the absence of any exceptional circumstances either mitigating that misconduct or demonstrating reform, in my view the only possible sanction is that his name should be removed from the roll of advocates.

Upton, Jordaan and Seima

[165] I do not propose to deal with these three at length because, notwithstanding my view, set out below, that the general approach of the high court to sanction was flawed, I do not, after weighing the evidence, reach a different conclusion to the high court. They were all correctly viewed as minor participants in this conduct. That is evidenced by the limited number of counts of double briefing; the limited amount of their improper gains and the relatively few occasions (12, 20 and 27 respectively) when they had been guilty of misconduct. Each was a middle junior having been at the Bar for periods ranging between seven and thirteen years. Their offences lay in taking one or two extra briefs on a relatively sporadic basis, in

circumstances where other more senior colleagues were engaged in an ongoing practice of double briefing on a large scale. In those circumstances their explanations that they fell into the practice have some weight. In comparison with the others the extent of their enrichment was not great, between R90 000 and R160 000, and they have all repaid these amounts to the Fund, albeit in terms of orders that in my view should not have been made. That does at least demonstrate a willingness on their part to do what the high court regarded as necessary to demonstrate their remorse. In addition they paid the fines that the Bar Council imposed on them and also served brief periods of suspension. In Upton's case he reported himself, not having been part of the original enquiry. They have since practised without further complaint although one would expect nothing less if they wish to remain on the roll of advocates. The high court did not think it necessary to impose a further direct suspension, and they have not challenged the suspended suspension order imposed upon them.

[166] Against that, none of them can, or do, claim to be young and naïve. Nor did they claim that they were unaware of the Bar rules. Their offence, although limited in extent, was serious and dishonest. I do not think that there was sufficient material before the high court to satisfy it, in the face of such serious misconduct, that they were fit and proper persons to continue to practise as advocates at the time of the hearing below. However, there was in my opinion enough evidence to justify the conclusion that the imposition, of a further period of suspension, itself suspended,[82] when taken in conjunction with the indications of remorse that they

[82]I entertain doubts about the appropriateness of a suspended suspension for the reasons set out in Nugent JA's judgment in *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA) paras 28 to 34. See also *Algemene Balieraad van Suid-Afrika v Burger en 'n ander*, supra, at 527B-C; *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) para 7; *Botha & others v Law Society, Northern Provinces* 2009 (3) SA 329 (SCA) paras 21 to 23; *Malan & another v Law Society, Northern Provinces*, supra, para 2. However, this court has

had already given, rendered any further similar transgression after resuming practice improbable. In view of the more limited scope of their transgressions permitting them to remain on the roll of advocates would not cause harm to the reputation of the profession. I accordingly agree with the main judgment that the GCB's appeals against the orders suspending them from practice should be dismissed.

Williams, Güldenpfennig and Van Onselen

[167] That brings me to the three remaining advocates who were not struck from the roll. In dealing with their cases and indeed the question of sanction generally there is disagreement between my judgment and the main judgment. That disagreement revolves around three issues. Two are of a general nature that affect all the decisions in relation to sanction, and relate to the need for parity of treatment among all the advocates and the orders the high court made for repayment to the RAF. The third, which I will address first, relates to the approach of the high court to these three individuals specifically. I start by rehearsing the misconduct of which they and the four who were struck off were guilty. I do so because the approach of the high court to their cases is central to the general point regarding parity of treatment.

[168] The major charges of misconduct against all seven were in content and form the same. They all were guilty of the same dishonesty; they all pleaded guilty to

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on at least one occasion accepted such a suspension (*Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA)) and the majority in *Peter's* case attached a condition to a suspension from practice that effectively meant that the attorney's restoration to practice was not unqualified. See also *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA). The GCB submitted that such an order is illogical and impermissible but the propriety of such an order was not debated in detail before us and accordingly this is not the occasion to consider whether my reservations are justified.

the charges of double briefing and over-reaching; they all relied in defence of their conduct on the Fund's conduct of litigation and the state of the court rolls in North Gauteng; they all paid substantial fines and served periods of suspension from practice in terms of the Bar's decisions; they all returned to practice after their initial suspension without further complaints being made against them; they had varying but significant levels of seniority; they had not previously been found guilty of misconduct; and they all undertook to abide by the Bar rules in the future. When the GCB intervened and alleged dishonesty they all denied that allegation.

[169] Turning to the seriousness of their conduct, that must be judged against two criteria, namely the number of occasions on which they engaged in double briefing and over-reaching and the extent of their improper gains from this practice. If one does that their circumstances are largely indistinguishable. Mr de Klerk appears to have profited less from his transgressions than the others as his gains were assessed at R310 800, but that arose from 74 counts of double briefing on some 50 occasions, sometimes involving his taking multiple briefs. As for the remainder their gains ranged from a low of R864 000 (Messrs Williams and Güldenpfennig) to a high of R1 916 800 (Mr Mogagabe). The number of counts ranged from 60 (Mr Williams) to 461 (Mr Mogagabe). There is no significant difference between the different cases insofar as the nature or seriousness of the misconduct is concerned. They all involved the advocates enriching themselves with very large sums of public money. There is no convenient or appropriate line of demarcation between the lowest of these figures and the highest.

[170] The high court correctly started from the perspective that, in the light of the dishonesty of their conduct, an order for their removal from the roll of advocates

would be appropriate in the absence of exceptional circumstances justifying the lesser sanction of suspension from practice. I have inferred[83] that it did so on the basis that it was satisfied, at the time that these applications came before it, that these seven individuals were not fit and proper persons to be permitted to remain in practice as advocates. In considering a suspension in any particular case it must therefore have had in mind that, in the light of the exceptional circumstances relating to that individual, a further suspension from practice would have the effect of remedying the defect in character that had led to their misconduct and result in their being fit and proper persons to practise as advocates. It is rare that this will be the case. As Harms ADP said in *Malan*:[84]

'It is seldom, if ever, that a mere suspension from practice for a given period in itself will transform a person who is unfit to practise into one who is fit to practise. Accordingly, as was noted in *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 852E - G, it is implicit in the Act that any order of suspension must be conditional upon the cause of unfitness being removed. For example, if an attorney is found to be unfit of continuing to practise because of an inability to keep proper books, the conditions of suspension must be such as to deal with the inability. Otherwise the unfit person will return to practice after the period of suspension with the same inability or disability.'

[171] The GCB's argument was that the high court had not identified any circumstances in relation to Messrs Williams, Güldenpfennig and Van Onselen that could properly be regarded as of such an exceptional character that they warranted a suspension from practice rather than an order for their removal from the roll of advocates. I respectfully disagree with the main judgment's characterisation of its submissions as 'no more than a challenge to the weight (or lack of it) that the court

[83]Para 31 ante.
[84]Para 8. See also *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA) paras 21 and 34.

below accorded to the various factors it placed in the scale'.[85] The submissions were expressly made on the basis that the high court had misdirected itself. The GCB argued that the factors identified by the high court as exceptional could not properly be described as such, nor did they mitigate the seriousness of the misconduct, or justify an inference that there was no likelihood of a repetition of this misconduct in the future. It also submitted that the failure to treat the advocates' refusal to admit to having committed the same misconduct in the period prior to that under investigation, or the failure to give details of its extent where such prior misconduct was admitted, constituted a material misdirection, because it failed to give any weight to the advocates' failure to comply with their duty (referred to in the reported judgment) to co-operate fully with and make a full disclosure to the Bar Council and the court in the investigation of their misconduct.

[172] In order to advance these submissions the GCB needed to examine and make submissions on the reasons given by the high court for its conclusion. It could only do so by having regard to the terms in which the high court couched its judgment. The main judgment rightly says that one does not read a judgment as if it were a statute, nor does one harp upon the omission of reference to some or other factual detail of less importance. (A failure to mention and deal with a factor of great and obvious weight, such as Mr Geach's misconduct in regard to the payment of VAT, stands on a different footing.). However, as Corbett CJ pointed out in a much-cited address to judges published in the South African Law Journal,[86] not only do litigants want to know why they have won or lost but 'should the matter be taken on appeal, the Court of appeal has a similar interest in knowing why the Judge who

[85]Para 75 of the main judgment.
[86]MM Corbett 'Writing a Judgment' in (1998) 115 *SALJ* 116 at 117, echoing his judgment in this court in *Botes v Nedbank Ltd en 'n ander* 1983 (3) SA 27 (A) at 28A.

heard the matter made the order which he did'. In these appeals the GCB engaged with the judgment of the high court and submitted that it had erred in the exercise of its discretion. That it could only do by dealing with what the high court said in giving its reasons. Equally, in giving our judgment in this appeal we need to engage with those reasons. That task cannot be avoided.

[173] The language in which the high court expressed itself referred to 'aggravating' and 'mitigating' circumstances'. That language is more appropriate to a criminal court and its use in this context has been held by this court to amount to a misdirection.[87] However, like the main judgment,[88] I will approach the matter on the footing that this was merely an unfortunate choice of language that did not divert the court from considering the true issue, which was whether there were circumstances present that warranted the exceptional inference, when an advocate has behaved dishonestly, that, after serving a further period of suspension, this conduct would not recur.

[174] I turn then to consider what the high court said in regard to these three individuals. It said they had engaged in misconduct that demonstrated a lack of honesty and integrity that would ordinarily result in their names being removed from the roll of advocates. As a result of that misconduct they had enriched themselves out of public funds to the tune of R864 000 in the cases of Mr Williams and Mr Güldenpfennig and R967 800 in respect of Mr van Onselen. I am in no doubt that in the eyes of the public this would be regarded as entirely unworthy of those who have the privilege of appearing in our courts. The importance of that

[87] *Law Society of the Cape of Good Hope v Peter* supra para 29.
[88] Main judgment para 73, where the reported judgment is described as 'no model of linguistic exactness or elegance'.

right, and the responsibilities attaching to it, cannot be understated in our constitutional democracy. It has frequently been pointed out that courts cannot fulfil their important role in our society without a strong, independent and, I would add, entirely trustworthy legal profession. Accordingly in examining the high court's judgment I bear in mind the passage quoted in para 41 above, that:

'The Court must be satisfied that its enunciated views give proper weight to widely and reasonably held public attitudes to practitioners in the context of the administration of justice generally and in the particular case.'

[175] The high court identified four general factors that it regarded as exceptional.[89] These would, of course, being general, apply to all the advocates and are therefore equally applicable to the cases of those who were struck off. They were that the advocates had served the suspensions and paid the fines imposed by the Pretoria Bar; that the misconduct at least insofar as double briefing was concerned was apparent to the judges of the North Gauteng court and to other advocates yet nothing was done about it; that the advocates had all been practising for a substantial time since their suspension; and that their uncontradicted evidence was that they had done so professionally.

[176] I agree with the GCB's submission that the fact that the misconduct was blatant and public, and that judges and advocates who should have taken steps to put a stop to it did not do so, was incapable of making the misconduct less serious or indicate that it would not be repeated. The high court erred in treating this as an exceptional circumstance favouring a sanction other than removal from the roll of advocates. It did not explain why it thought this an exceptional circumstance and I

[89]Reported judgment para 54.

can discern no basis for that finding. It is therefore a misdirection. In regard to dishonesty, a matter that initially gave me pause was that, not only was there no intervention by the Bench and other advocates, but neither the senior counsel, who conducted the investigation on behalf of the Bar Council and acted as pro forma prosecutor, nor the initial disciplinary committee regarded this conduct as dishonest. The main judgment rightly expresses astonishment at this.[90] It details[91] the conclusions of the De Vos committee. One of the members of that committee said at the very first enquiry – that of Mr Williams – that he had been honest in difficult circumstances and that was a theme that recurred throughout the proceedings before that committee. There are a number of places in the records of these enquiries where a member of the committee expressed concern at the severity of the sanctions the committee would recommend; stated that there was no indication of dishonesty, and indicated that the advocates had been struggling manfully to deal with a difficult situation caused by the Fund. Indeed some of the advocates specifically relied upon these statements in rejecting the GCB's claim that they had been dishonest.

[177] On reflection, however, I have concluded that this did not affect or mitigate the finding of dishonesty because such dishonesty was obvious. The Vorster committee had no difficulty in seeing that this conduct was dishonest and it said so unequivocally. It also rejected the notion that the circumstances of the Fund and the congestion of the trial rolls constituted any excuse. As Mr Vorster SC said in the course of Mr Botha's disciplinary enquiry:

[90]Main judgment in paras 40.
[91]Main judgment para 39.

'But is the short point not this, that the system which you have now adequately described, at best gave rise to counsel doing things which they knew from the start were wrong, but still they did it, because the system was there and it was easy to exploit it.'

After the event the ranks of the Pretoria Bar were divided, but there was a body of opinion that regarded this conduct as warranting a striking off application. The GCB, which represents virtually all the practising advocates in South Africa, clearly and unequivocally recognised that this was dishonest and that the state of the court rolls and the behaviour of the Fund did not alter or mitigate their conduct. That view was unquestionably correct. The high court rejected a contention that because what occurred had taken place in the public eye this meant that it was not dishonest.[92] By parity of reasoning, inaction on the part of the Bench and other advocates did not create an exceptional circumstance in favour of the advocates. It should not have been taken as a factor counting in favour of a lesser sanction.

[178] As regards the other two factors the court found, as I have inferred, that the advocates remained not fit to remain on the roll of advocates after complying with the sanctions imposed by their professional body. That they did comply is some indication of a willingness to submit to its discipline, but they had little choice but to do so if they wished to continue to practise as members of the Pretoria Bar or any other constituent member of the GCB. As regards the second, two comments are apposite. The first is to heed what Hefer JA said in *Kekana* that 'what happens between legal representatives and their clients or witnesses is not a matter for public scrutiny'.[93] Accordingly misconduct is hard to detect so that the absence of any contradiction is understandable. The second is that, on the assumption that this

[92]In para 45 of the reported judgment it rejected this with the colourful metaphor: ' A daylight robber can hardly be called an honest person.'
[93]In the passage quoted in para 8 ante.

was so, there was little else that the advocates could do if they wished to resist the applications for their removal from the roll.

[179] Those two factors alone were clearly not sufficient for these three to avoid a striking off order. Had they been, the other four would not have been struck off. It is accordingly necessary to examine what factors it bore in mind in dealing with the individuals. The following are summaries of its findings in relation to each of these three advocates.

[180] In the case of Mr Williams the court noted his background and personal circumstances. He had been in practice for 22 years, a silk for seven and a half years and served on the Bar Council as an advocacy trainer and as an acting judge. In other words he had served his profession. Seven of his senior colleagues wrote letters in his support testifying to his work ethic, his contribution to the Pretoria Bar and the fact that they had never found him to act unethically. When the Bar's enquiry commenced he immediately made a full disclosure to the pro forma prosecutor of his conduct and before the disciplinary committee he freely accepted that greed had been a significant motivation for this misconduct. His affidavit in opposition to the GCB's application, whilst describing the charges of over-reaching as 'technical', made no attempt to excuse his conduct. He explained the context in which it had occurred but did not suggest that this made it right to exploit that situation. He expressed remorse for his conduct. Over and above this when the enquiry disclosed that he had also been guilty of a contravention of the Bar rules by not reporting to the Bar's office manager a number of cases in which he had charged a contingency fee, he repaid the whole of the fees so charged (R868 850) without being required to do so. That is at least some indication of a

wish to wipe the slate clean and start afresh, as it appears that in most of those cases if he had made the required report it would have been permissible for him to charge and recover a contingency fee.

[181] Against that the court placed the fact that the misconduct occurred whilst Mr Williams was a senior and experienced member of the Pretoria Bar and one to whom others could look for an example. His actions were entirely deliberate. In the telling expression he used to the disciplinary committee, 'As dit pap reën, moet jy skep.' (If it rains porridge, you must help yourself.). The high court took into account that the disciplinary committee held that there were 'very very extensive extenuating circumstances'. It expressed its conclusions as follows:

'We nevertheless feel that in the light of the special circumstances outlined in the main judgment (para [47][94]) together with the circumstances personal to Williams, particularly the fact that he for more than 20 years practised without transgressing, that it cannot be said that he is not a fit and proper person to continue practising. He has shown remorse and has furthermore undertaken to repay to the RAF the amount that he gained from his contravention of the rules (R864 000). In monetary terms his conduct has therefore cost him R1 732 825.To this must be added the loss of income suffered during his six months' suspension and the future loss he will suffer as a result of being suspended from practice.'[95]

[182] In the case of Mr Güldenpfennig, the high court took note of the fact that he had been at the Bar for 26 years and there had been no prior instances of misconduct. It accepted his claim that he had not been motivated by greed in the light of his statement that he had declined numerous other briefs where he judged that there was a possibility of prejudice to the client if he accepted them. He also

[94]This appears to be a reference to para 54 of the reported judgment.
[95]Reported judgment at 475G-I item 8.

said, and this was accepted, that he restricted his fees and limited the hours he charged for, as he was dealing with social legislation. In all cases he limited his fees to what was recoverable on taxation. The court said that his offences were not on the scale of the majority of other respondents and that he did not continue after his books were called for and did not charge for work not done. It concluded that he was a man of mature years with years of practice behind him and that it did not consider that there was any prospect of his again breaching the rules of the Bar. For those reasons it thought a suspension from practice appropriate.

[183] In regard to Mr van Onselen the high court took note that he had been at the Bar for 14 years without prior complaints of misconduct. He had on occasions assisted at court in settling cases without charging a fee and had co-operated with the enquiry and the pro forma prosecutor and apologised for his conduct. He said that he had just got caught up in the events and the pressures from attorneys. It was accepted that his actions had not prejudiced any litigant. The court concluded:

'Van Onselen will have learnt his lesson after the suspension which we impose, if he has not already done so. We do not consider that there is any prospect of him again breaching the Rules of the Bar. The public interest does not require that he be removed from practice permanently.'[96]

[184] In my judgment the high court misdirected itself in reaching its conclusions in respect of these three. Some of the factors were neither exculpatory, in the sense of reducing the seriousness of their conduct, nor any indication that the character flaws demonstrated by the misconduct would not manifest themselves again in the future. In other respects they were based upon factual statements that were

[96]Reported judgment at 494D-E item 11.

inconsistent with earlier findings or simply erroneous. I identify these in the following sub-paragraphs:

(a) First, it held that the fact that the judges and other advocates knew of double briefing and took no steps to report it or put a stop to it was an exceptional circumstance. I have explained why in my view it was not. It does not count in favour of the advocates that they could have been stopped earlier had other people intervened. The important point is that they exploited the situation for their own advantage. In addition it is clear that they would have continued to do so but for the belated intervention of the Bar council. That is what put an end to the exploitation of the Fund.

(b) Second, it took into account in favour of these three advocates their years of membership of the Bar and the absence of prior misconduct. However, when they committed their misconduct, they had nearly the same levels of seniority and clean disciplinary records, yet this did not serve to restrain them. In Mr Williams' case he was in silk and had standing as a member of the Bar Council. Like Caesar's wife, one would have expected his conduct to be beyond reproach. Yet none of this acted as a restraint to misconduct fuelled by greed. It is unclear then why it would make a difference in the future. In addition, in relation to colleagues with similar years of experience and equally unsullied disciplinary records, these factors were not taken into account in their favour.

(c) Third, in respect of both Mr Güldenpfennig and Mr van Onselen, it concluded that they were not motivated by greed. That was inconsistent with its own finding at the commencement of its judgment that counsel

had ‘mounted the steed of greed’. In fact Güldenpfennig’s explanation was that he could have been greedier if he had been willing to run greater risks. In addition, the finding in his favour, that his offences were not on the scale of the majority of the other respondents, does not stand up to scrutiny. He ranked sixth in number of counts and only five others had gains that markedly exceeded his.

(d) Fourth, in respect of Mr Williams the high court took into account in his favour the view of the De Vos committee that there were substantial extenuating circumstances. However, not only did that committee not explain what those circumstances were, but it is apparent from reading the transcript of the disciplinary proceedings that it was under the misconception that there was no dishonesty and that the advocates were assisting the court and endeavouring to resolve a difficult situation created by the Fund. That view was rightly rejected by the high court when it said that the De Vos committee had ‘closed its eyes to the obvious’.[97]

(e) Fifth, the high court held that Mr Williams would suffer monetary loss as a result of repaying the R864 000 he was held to have charged improperly. That is plainly wrong. One cannot suffer monetary loss by having to repay money improperly obtained.

(f) Sixth, in relation to Mr Güldenpfennig the high court held that it counted in his favour that he had confined his fees to those recoverable by his attorney on taxation and would, where necessary, reduce his fees to this level. Apart from the fact that this was also a breach of the Bar rules, all that this demonstrated was that his intention was to target the Fund, which would be responsible for his fees after taxation.

[97]Reported judgment para 45.

(g) Lastly, the inspection by the Bar Council of Mr van Onselen's books revealed four days on which there was a duplication of hours involving 21 different cases and claims to have worked for 16 and 17 hours in a day.[98] Thus on 2 February he charged the same periods of time (from 2pm to 4.30pm in one case and from 2 pm to 5pm in three cases) to four different clients. There were even more considerable duplications on three other days. His explanation was that this was due to administrative error rather than dishonesty on his part and that he had worked the hours in question. The high court simply said that this could not be refuted. In my view, it should not have been accepted, for the same reason that similar explanations were not accepted in relation to Messrs Leopeng, Botha and Mogagabe, whose books revealed similar practices. Like them there was no attempt by Van Onselen to show by reference to the actual cases, his diary and information obtained from his attorneys, that he had in truth done the work but made administrative errors. If, as he claims, his notes of time worked were deficient that does not explain how he could send out detailed fee notes, consecutively numbered, in different cases reflecting detailed hours worked. The sample invoice in the record shows that he set out the times spent on reading documents and other preparation quite specifically eg ; '08h00 – 08h45' on a specific day. If his notes were inadequate these times and dates were simply invented for the purposes of the fee note and bore no relation to reality. His bland explanation, like those of his colleagues, should not have been accepted.

[98]Reported judgment at 493I-494C item 9.

[185] I next deal with the general point of parity of treatment. It is a fundamental principle of justice, well established in a number of fields dealing with sanction, that in general like cases should be treated alike.[99] That principle was applicable here as *Kekana* demonstrates. As pointed out in paras 47 and 48 above, all of the advocates were guilty of the same conduct and there was no material difference between them in regard to the nature and extent of their transgressions or of their response to the charges being levelled against them; their approach to the sanctions imposed by the Bar or their attitude in the present proceedings. As all of them had been found guilty of substantially the same misconduct and had responded to it in substantially the same way an immediate question that arises is on what basis the high court differentiated between the two groups.

[186] The only passage in the reported judgment that deals with that issue is the following:

'In the case of contraventions after the notice of 26 October 2009, unexplained fiddling with hours, mendacious explanations to the court and exorbitant numbers of transgressions the scale swung to striking off.'[100]

As I understand it the high court viewed this additional misconduct as indicating that the advocates concerned had thereby placed themselves beyond the pale of rehabilitation, so that it was inappropriate to sanction them by way of an additional suspension from practice subject to conditions.

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[99]In criminal cases it applies to sentence. See *S v Giannoulis* 1975 (4) SA 867 (A) at 870H and 873E-H; *S v Marx* 1989 (1) SA 222 (A) at 225B-D. In labour matters it is a central principle of the assessment of sanctions for misconduct in the workplace. See the note by Brenda Grant and Asheelia Behari 'The application of consistency of treatment in dismissals for misconduct' (2012) 33 *Obiter* 145.

[100]Reported judgment para 59 at 462F-G.

[187] Mr de Klerk is the person whose additional misconduct involved him continuing to engage in double briefing and over-reaching after the Pretoria bar instituted its enquiry and informed him that he was under investigation. He did so for nine days. That was described by the high court as 'contemptuous'. Bearing in mind that he, like all the others at that stage, took the view that what he was doing was not a breach of the rules or improper, and that the letter did not instruct him to desist from any specific conduct, that was unjustified. The high court also said that the scale on which he contravened the rules, and the period of time over which he did so, was an aggravating factor. That was also unjustified. Even when the additional nine days were taken into account he had fewer contraventions than any of the other six,[101] save Mr Williams. More importantly the extent of his enrichment was considerably less at R310 800. The reported judgment sets out in some detail his response to the charges and his view that he had not been guilty of over-reaching, save in a technical sense, arising from the interpretation the Bar Council placed on the relevant rules. However, in saying that, denying dishonesty and averring that the Fund suffered no loss arising from his conduct, he did no more than those who were not subjected to the sanction of striking off. It will be recalled that all of them denied dishonesty, attributed their misconduct to the situation brought about by the Fund and said in their affidavits that the Fund had not suffered financially from their misconduct. He said that he accepted briefs conditionally on the basis that his attorneys knew that if one case had to be tried he would be unable to attend to the other matters in which he held briefs. But that was effectively the position of all of the advocates, as they all said that their attorneys and clients were well aware of their position. All in all his position was not significantly different from the three who were not struck off.

[101] And fewer than Mr Geach whose offences the high court described as 'not on the scale of the majority'.

[188] I agree with the high court that the conduct it described as 'unexplained fiddling with hours' involving Messrs Botha, Leopeng and Mogagabe, amounted to further misconduct that weighed against a conclusion that suspension from practice on terms would be an appropriate sanction.[102] As Mr van Onselen was guilty of the same misconduct the same should apply in his case. When an advocate does work in chambers unsupervised by the presence of client or attorney only their honesty and integrity prevents them from padding their hours of work and claiming additional fees. That is the dangerous aspect of charging fees on an hourly basis. Once an advocate has been found guilty of padding their hours of work they cannot be trusted to charge fees honestly in the future and must be removed from the roll. That was the high court's conclusion in respect of Messrs Botha, Leopeng and Mogagabe and had it not erroneously accepted Mr van Onselen's explanation, no doubt it would have been its conclusion in respect of him as well.

[189] The other factor that was held to have swung the balance in favour of striking off as opposed to suspension was described as exorbitant numbers of transgressions. However, it is difficult to discern where the line was drawn in this regard. Mr de Klerk was condemned for 74 contraventions involving R310 800, while Mr van Onselen's 133 contraventions involving R 967 800 escaped the same criticism. If one ignores Mr de Klerk, the line appears to run between those 133 cases and Mr Botha's 170 cases and between that sum of R967 800 and Mr Leopeng's R1 323 000. However, in the absence of any reasoned explanation for this distinction, I am unable to accept that it is justified. The heart of this case lies

[102]Similar misconduct occurred in *Algemene Balieraad van Suid-Afrika v Burger en 'n ander* supra 522g-525F.

with the charges of over-reaching and the enrichment of the advocates at the expense of the Fund. Whilst that was greater in the case of Messrs Botha, Leopeng and Mogagabe, than in the cases of Messrs Williams, Güldenpfennig and van Onselen, the fact remains that in the case of the latter their undue benefit was close to a million rand. To distinguish Messrs Botha, Leopeng and Mogagabe on the basis that they gained more than a million rand was not in my view justified. In addition if one bears in mind that the greater amounts in respect of the latter two arose from a far greater number of cases, then it is apparent that the extent to which they were over-reaching in each case was considerably less than the other four.[103]

[190] Apart from these matters there is an inconsistency in the high court's treatment of the same factor in respect of different individuals. I confine myself to mentioning the most significant of these. The court said that Mr Botha had been dishonest in saying that 'these were not really trial briefs at all'. This counted against him. However, Mr Geach had said the same thing,[104] yet it was not taken into account against him. The other advocates said that because cases were expected to settle there was little chance of clients being prejudiced. In effect they were saying that the briefs were not real trial briefs,[105] yet this was not held against them. Again in respect of Mr Botha it was said that 'his reluctance to furnish the details of his earlier transgressions negates any suggestion that he is contrite'. Yet the high court had said earlier in its judgment[106] that it would not hold this against the advocates 'in view of the limitation of the ambit of the enquiry'. Other than

[103]For Messrs Leopeng, Mogagabe and de Klerk they profited to the tune of about R4 000 per case. In the case of the others it was in round figures R7 000 (Mr van Onselen); R10 000 (Messrs Botha and Güldenpfennig); R12 000 (Mr Geach) and R14 000 (Mr Williams).
[104]'These were not real trial briefs at all. It was not necessary to proceed on the basis that they would proceed to trial if not settled. In truth, in my case, they were virtually all briefs purely on settlement …'
[105]That this was the situation appears to be accepted in the main judgment paras 20 and 21.
[106]Para 55 of the reported judgment.

Messrs Upton, van Onselen and Seima, the others likewise refused to deal with prior misconduct.

[191] Mr Botha was also condemned for not reporting his unprofessional conduct to the Bar Council,[107] something that only Mr Upton did. His protestations of remorse and contrition were rejected on the basis that he blamed his actions on how the Fund conducted litigation,[108] but that was the consistent refrain of the others. In addition it had formed the foundation for the De Vos committee saying that the advocates had acted honestly in trying circumstances and that there were considerable extenuating circumstances surrounding their behaviour. Those findings by the initial disciplinary committee were cited as favouring Messrs Geach, Upton, Williams and Seima. Yet the identical findings in respect of Messrs Leopeng and Mogagabe, were not mentioned. The latter two testified to being placed under considerable pressure to accept work from the Fund. That was entirely plausible in view of the Fund's practice of trying to brief counsel from previously disadvantaged backgrounds. Yet that pressure was not taken into account in their favour, whilst similar pressure on Mr Jordaan, a previous employee of the Fund, counted in his favour.[109]

[192] In my opinion the disparities of approach that emerge from the matters described in paras 188 to 194 justify the conclusion that the high court did not give appropriate consideration to the need for parity of treatment in determining the sanctions in these cases. It is not a factor that it mentioned as relevant to its

[107]Para 9(f) at 479 of the reported judgment.
[108]Para 9(g) at 479 of the reported judgment.
[109]Reported judgment at 491 item 6.

decision. In that respect also it misdirected itself and means that this court must consider that question afresh in relation to all of these seven advocates.

[193] For the sake of completeness, and lest silence on the topic were to be taken as assent, it is also my view that the high court erred in law in making orders for the repayment of amounts to the Fund. This clearly influenced its approach to sanction and it said as much[110] in setting out its general approach to sanction in the individual cases, where it said 'must include an order for restitution'. That too, in my opinion, amounted to a misdirection in regard to sanction.

[194] As noted in the main judgment[111] the GCB did not support these orders insofar as the struck off advocates were concerned.[112] That was wise. However, I think it necessary to explain in greater detail my reasons for that conclusion, as I do not share the view in the main judgment that this was because the disciplinary power was exhausted by the striking off orders. The GCB asked the court to exercise its powers under s 7(1)*(d)* of the Act to strike the names of the advocates from the roll of advocates. The only alternative under the statute would be an order suspending them from practice. The high court recognised this and turned to the common law and the inherent powers of the court to control and discipline legal practitioners as a source of its authority to make such orders.[113] That power is not excluded by the terms of the Act.[114] The high court gave four examples as illustrating this inherent power. The first, the power to make a declaratory order in

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[110]Reported judgment para 59.
[111]Para 98.
[112]The GCB did not ask that such orders be made and they were raised by the high court *mero motu*.
[113]*De Villiers & another v McIntyre NO* 1921 AD 425 at 428; *Society of Advocates of South Africa (Witwatersrand Division) v Edeling* 1998 (2) SA 852 (W) at 860B-G.
[114]*A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A).

regard to the conduct expected of a legal practitioner, is a corollary of the court's power to suspend a practitioner or strike them from the roll, and provides no support for the notion that the court may make compensatory orders. The second, the power to make an adverse order for costs against counsel, is no different in form from that often exercised in respect of attorneys or others responsible for wasteful expenditure or unnecessarily incurring costs in litigation. The third was that courts may find an advocate guilty of contempt. Whilst true that does not arise from the status of an advocate. Contempt is a common law crime that can be pursued against anyone. Finally the court referred to the fact that in Roman times, confiscation and perpetual exile were permissible, and in Roman Dutch times deportation for ten years could be meted out as punishment to legal practitioners. The court did not identify the conduct that would attract such condign punishments and I can only say that we no longer live in Roman or Roman Dutch times. Such punishments have no bearing on whether a South African court in the 21st century can grant orders that advocates, who it is going to strike from the roll of advocates, make financial amends for their wrongdoing.

[195] At the end of the day the high court concluded that 'there is no reason why this Court should not be empowered to order an advocate who has overreached to return the ill-gotten spoils' and that to hold otherwise 'would be laughable in the eyes of the public'. The true question was not whether there was no reason for the court not to have that power, but whether the court did indeed have the power to make that order. Courts as much as, if not more than, other constitutional institutions are bound by the principle of legality that requires that the exercise of public powers be authorised by law. The power in question is not authorised by law and does not arise from an inherent disciplinary power that courts may

exercise over legal practitioners. These orders should not have been made. As regards the concern that it would be laughable in the public eye for it to hold otherwise, the law provides appropriate and adequate remedies to a party that has been overreached to recover the extent of its losses from the party responsible and the Fund had already instructed attorneys to pursue its remedies in this regard.

[196] The high court thought that the orders for repayment that it made against those whom it suspended from practice fell in a different category, on the grounds that they could be made the subject of conditions of the order and, in that way, compliance could be secured. That approach is shared in the main judgment. The GCB's submission, while addressed to the appeals against these orders, was that such orders were in general impermissible. I agree. Either it was permissible for the court to make such orders or it was not. It could not remedy the absence of a power to order repayment to the Fund, by making payment in terms of such order a condition of a suspension from practice.[115] The practical problem with such an order is that it does not address, as these orders did not address, what is to happen if the advocate did not or could not pay or stopped paying when some, but not all of the amount had been paid. Execution could not be levied by the Fund against the assets of the advocate. Non-payment would not entitle the court to reconsider its order of suspension from practice. In essence the court took it upon itself in disciplinary proceedings concerning these advocates to enter upon and determine potential civil claims against them by the Fund. In my respectful opinion it was not

[115]The power to attach an order for compensation to a suspended sentence in criminal proceedings is a statutory power. See s 297(1)(b) of the Criminal Procedure Act 51 of 1977.

entitled to do so and it could not overcome its lack of a power to do so by attaching it as a condition to a suspension from practice.[116]

[197] For the reasons set out in para 67, in my judgment the high court misdirected itself in regard to sanction in respect of Messrs Williams, Güldenpfennig and van Onselen. For the reasons set out in paras 68 to 79 it also in my judgment misdirected itself on two general matters relevant to sanction that materially influenced its judgment. That requires us to reconsider the sanctions imposed in all seven cases.

Conclusion in regard to sanction

[198] The most significant factor in determining the appropriate sanction must be the nature and scale of the primary misconduct. It was dishonesty fuelled by greed. It involved very large amounts of public money plundered from the Fund, which exists to compensate the victims of road accidents for the damages they have suffered. There were clear and deliberate breaches of the bar rules that exist, in part, to prevent such misconduct and abuse. There was no question of ignorance. The circular issued in November 2006 made it plain that this was misconduct. The wrongdoing occurred over a lengthy period and on a substantial scale. In all cases save Mr de Klerk it involved amounts in the region of, or greater than, R1 million. All of the advocates were fairly senior, ranging from 13 to 32 years in practice. Mr Williams was in silk. None of the advocates accepted that they had been dishonest until the hearing in this court. All tried to mitigate what they had done by relying on the state of the court rolls and the Fund's deficient approach to litigation and its

[116]There may be circumstances in which a court could order an advocate to repay money in his or her possession, but that is not the situation in these cases.

responsibilities. Their conduct undoubtedly brought the profession into disrepute. There is a genuine public concern about legal costs and the level of legal fees, most recently expressed by the Constitutional Court in *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another*.[117] That concern is exacerbated when advocates seek to enrich themselves out of public funds.

[199] In regard to all of the advocates I would not attach weight to their failure when first brought before the De Vos committee to concede dishonesty, as it is clear that the members of the committee did not think that they were dishonest. Nor would I attach weight to their failure to recognise from the outset that the major problem lay not with the double briefing charges, but with their charging full trial fees in every case. Again that reflected the view of the members of the De Vos Committee. Those factors should not count against them. However, I would attach weight to their failure, once confronted with the Vorster committee report and the intervention of the GCB, with its clear allegations of dishonesty, not to reconsider their stance and recognise the error of their ways. Their protestations throughout the proceedings before the high court that they had not been dishonest showed a lack of recognition of the nature of their misconduct. It also undermined their contention that they had learned their lesson as a result of the sanctions imposed by the Pretoria bar.

[200] I do consider it to count in their favour that during lengthy careers at the Bar none of them had previously been guilty of misconduct. I also accept that their conduct does not appear to have prejudiced any plaintiff client. Had it done so one

[117] *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* [2012] ZACC 17 paras 10 and 11.

would have expected, given the time that has passed, that a complaint would have surfaced. I do not, however, accept the argument that there was no prejudice to the Fund, because if they had not engaged in double briefing other counsel would have had to be briefed in their stead and they would have been entitled to claim a full trial fee. I do not do so because it is not clear to me that counsel, behaving ethically, would not have accepted briefs on settlement only and charged appropriately. The argument presupposes that other counsel would have over-charged and I do not accept that.

[201] Two arguments were pressed upon us in relation to the GCB's appeal. They were that the advocates had, in compliance with the high court's orders, made the payments they had been directed to make to the Fund and served the suspensions where those had not been further suspended. I do not think that can affect matters. Insofar as the payments were made pursuant to the high court's orders they may well be recoverable under one of the condictiones.[118] That would follow from the fact that the payments were made in terms of court orders, and if those orders are set aside the basis on which they were made has fallen away, leading to a right to claim restitution. It would not appear to be an answer to such a claim for the Fund to say that the advocates overreached it and there is accordingly no enrichment. The defence of non-enrichment is not advanced on that basis. It exists where the recipient of the payment can show that if the payment had not taken place it would have been in no worse position than it was as a result of the payment.[119] However,

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[118] *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) paras 15 to 17 would suggest that the appropriate niche is either the *condictio ob causam finitam* or the *condictio causa data causa non secuta*. In *Besselaar v Registrar, Durban and Coast Local Division & others* 2002 (1) SA 191 (D) it was suggested that the *condictio indebiti* or the *condictio sine causa* is the appropriate remedy. In both cases it was said that the precise juristic niche was immaterial.

[119] *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713G-I where the test was set out as follows:

if that is not so, the advocates cannot complain about their having been deprived of amounts to which they were not entitled in the first place.

[202] As regards the fact that the advocates have served a period of suspension, if they had been struck from the roll, which is the issue in this appeal, they would not have been entitled to practise at all. Accordingly the fact that they have been permitted to do so, as a result of the high court erroneously failing to strike them from the roll, cannot redound to their advantage. To the extent that any who should have been removed from the roll have continued practising, that was a benefit to which they were not entitled arising from an erroneous judgment by the high court. In my opinion neither of these factors is relevant to the outcome of these appeals. I turn then to consider the individual cases

[203] In the cases of Messrs van Onselen, Leopeng, Mogagabe and Botha there was the seriously aggravating circumstance that they charged for hours that they could not have worked and gave a false explanation for doing so. That undermined their professions of contrition. In addition that type of over-reaching of clients is almost impossible to detect. The client is absolutely dependent on the advocate's honesty when saying that work was done at a particular time for a specified period. There is no explanation in any of these cases for the attorneys accepting these charges, some of which they must have known were unjustified, but that does not seem to me to be relevant. When advocates have been found to charge for work that could not have been performed at the time and for the period stated, an

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'Die las om 'n wegval of vermindering van verryking te bewys, rus op die verweerder. As die verweerder met inagneming van al die omstandighede, tog nie beter daaraan toe is as wat hy sou gewees het indien die ontvangs van die geld nie plaasgevind het nie, kan hy nie as verryk beskou word nie en is hy nie meer aanspreeklik nie. As hy slegs gedeeltelik beter daaraan toe is, is sy aanspreeklikheid dienooreenkomstig verminder.'

assurance from them that they will not do it again cannot be taken at face value. A denial that they did it and a false explanation compounds the dishonesty. For those reasons I agree that the decision to strike Messrs Botha, Leopeng and Mogagabe from the roll was correct. The same decision should have been made in respect of Mr van Onselen, whose misconduct was in every way on a par with theirs. As I regard this factor as decisive it is unnecessary to consider other factors counting against these four.

[204] In the case of Mr Williams I take into account to his credit that he has tried over the years to make a contribution to his profession by serving on professional bodies and assisting with the training of pupil advocates. It is also to his credit that a number of his senior colleagues, like him in silk, were prepared to speak on his behalf and to say that they had never encountered any hint of unprofessional behaviour on his part. He was described as being a scrupulously honest opponent. That counts strongly in his favour. Every experienced advocate knows which of their colleagues can be trusted to fulfil their undertakings meticulously; not to misrepresent their case; and to abide by the rules governing litigation. Equally, every experienced advocate knows which of their colleagues is likely, in the vernacular, to try to 'pull a fast one'; or seek to take unfair advantage of an opponent. It counts strongly in Mr Williams favour that a number of his senior colleagues speak so highly of him. It is also to his credit that he was the person who immediately and openly admitted that greed lay behind his behaviour; that he recognised that the double briefing in which he engaged involved some risk that clients might have been prejudiced, although he says none were; and that, of his own accord, he repaid the amounts paid to him in terms of contingency fee agreements that were not reported to the Pretoria Bar as required by its rules. His

professions of regret and remorse ring true. In addition three senior and experienced judges – all of them having held office in either their domestic bars or the GCB or both – believed that allowing him to remain in practice would not harm the good name of the profession or pose a risk to the public. My colleagues Nugent and Ponnan share that view. Although I am deeply concerned at the scale of his misconduct in the light of his seniority, after careful reflection, I have come to the conclusion that, although it is a borderline case, theirs is a view from which I should not differ.

[205] Can the same be said for Mr Güldenpfennig? In his case there is virtually none of the evidence that is available in respect of Mr Williams. There were however letters from four firms of attorneys who regularly briefed him in Fund matters and spoke highly of his skill and integrity. He had been in practice at the Bar for longer than Mr Williams, although he had not taken silk. He had a greater number of contraventions and the same financial benefit. He pleaded guilty to 90 counts of double briefing and 90 counts of over-reaching. In response to the GCB's application he denied dishonesty and denied that he had behaved disgracefully. He 'categorically' denied that he had been motivated by greed and said that if he had been he could have accepted far more briefs than he did. I am not impressed by this statement. It merely demonstrates that he knew what he was doing was wrong and limited his misconduct accordingly. He charged fees on the basis of what would be allowed on taxation and indicated to attorneys that if any amount was taxed off he would reduce his fees accordingly. These too involved a breach of the Bar rules. He accepted that he had contravened the rules in the period prior to that under enquiry but, save to say that the opportunity to do so was less at that time, he gave no details of the extent to which he did this.

[206] Before the high court Mr Güldenpfennig maintained his stance that he had not been dishonest and was one of those who contended that the Pretoria Bar's attitude was more stringent than that of the Johannesburg Bar Council. This argument was characterised by the high court as one of 'audacious ingenuity' to which the court listened 'with amazement'.[120] It concluded, correctly in my view, that this showed a lack of remorse.[121] In regard to dishonesty his counsel said in argument that he has accepted this without reservation 'since the judgment' in the high court. When all this is weighed the position seems to be that Mr Güldenpfennig accepted that he had been in breach of the Bar rules but did not accept at any stage that he had behaved disgracefully and dishonestly. The belated acceptance made on his behalf in argument in this court does not take the matter further. In those circumstances I do not think that there is evidence from which to draw the inference that he has insight into the true nature of what he did wrong. That being so one cannot draw the inference that he will not err again. In my judgment, taking into account the nature and seriousness of the misconduct and the terms of the response to it, the GCB's appeal in respect of Mr Güldenpfennig should succeed.

[207] That brings me finally to the appeal by Mr de Klerk. His misconduct was of the same character as that of the others, but the extent of it was less in terms of the gains he made from it. That was so even though he carried on accepting double briefs and engaging in concomitant over-reaching for nine days after learning of the Bar's investigation. That is not surprising as his attitude up until the

[120]Reported judgment paras 24 and 25.
[121]Reported judgment para 29.

disciplinary hearing before the Vorster committee was that he had not breached the rules at all. He made it clear in a letter addressed to the investigating committee that he could find no rule that precluded double briefing and that in his view he had never charged excessive fees and was not guilty. The only prohibition he had found on double briefing was in the form of the circular sent to members of the Pretoria Bar on 1 November 2006. He alleged, without any substantiation, that a number of other members of the Pretoria Bar should be investigated for the same offence and in a letter dated 26 March 2010 tendered his resignation from the Pretoria Bar and vacated his chambers. If that was not accepted then he asked for his disciplinary hearing to be expedited and that he be expelled from the Pretoria Bar. When a disciplinary hearing was initially convened he indicated that he would plead not guilty. That resulted in the Vorster committee being convened on 24 May 2010. He then sought a postponement on the basis of a lack of time to prepare. In the course of argument his counsel made it clear that he challenged the correctness of the Bar's rulings regarding double briefing and over-reaching. A postponement was granted to the following day. At the resumed hearing he pleaded guilty to 74 counts of double briefing and 74 counts of over-reaching. Having done so he asked that he be expelled from the Pretoria Bar. He indicated that he intended to try and build up a practice afresh outside the ambit of the Pretoria Bar.

[208] It is proper to draw the inference that Mr de Klerk at no stage accepted that he had been guilty of wrongdoing, but wished to end the disciplinary proceedings and then return to practice outside membership of the formal Bar. The Vorster committee recommended that an application be made for his name to be removed from the roll of advocates. Instead the Bar Council imposed a sanction formulated similarly to that of the other advocates and applied to the high court for the noting

of that sanction. De Klerk filed a detailed affidavit in response to this in which he in substance repeated his contentions that he had not been guilty of any misconduct, save technical breaches of the Bar rules arising from the interpretation given by the Pretoria Bar to those rules.

[209] When the GCB intervened in the proceedings De Klerk filed a further affidavit. It said little more than before. He denied dishonesty and relied on the circular from the Johannesburg Bar. He reiterated that he had undertaken this work for the Fund under pressure from claims handlers at the Fund's prescribed tariff and said that if he had charged his 'normal' fee in a single case that would have exceeded the total fees he was earning in a day as result of double briefing. However, there is a problem with this claim. At his disciplinary hearing his counsel placed on record that 'He only had an RAF practice for the defendant' and that since the commencement of the disciplinary proceedings he did not have a practice at all. There was accordingly no question of a 'normal' fee other than the tariff fees he was charging the Fund. He also refused to deal with any contraventions prior to the period of the Pretoria Bar's enquiry.

[210] What weighs in Mr de Klerk's favour is that his misconduct caused less harm to the Fund financially than that of most of his other colleagues. What counts against him is his persistent failure to accept that his misconduct involved dishonesty and was more serious than his characterisation of it as a technical breach of Bar rules based on the Pretoria Bar's interpretation of the rules, with which he did not agree. His desire to remove himself from disciplinary oversight and his reliance on the Johannesburg Bar circular compounded this. In argument in this court he persisted in his contention that his conduct in accepting multiple

briefs was permissible because he accepted them conditionally to the knowledge of his instructing attorney. His counsel was however hard-pressed to explain how that conditionality worked in practice. My conclusion is that he lacked, and continued throughout the proceedings to lack, any insight into the nature and seriousness of his misconduct. That being so it cannot be inferred that after a further suspension from practice he would not again stray from the path of rectitude. His appeal must therefore fail.

Disposition of the appeals

[211] In my judgment the GCB's appeals in respect of Messrs Geach, Güldenpfennig and van Onselen should succeed. The orders made by the high court should be set aside and replaced by orders striking their names from the roll of advocates. The GCB's appeals in relation to Messrs Upton, Jordaan, Seima and Williams should be dismissed. The appeals by Messrs Bezuidenhout, Pillay, Botha, De Klerk, Leopeng and Mogagabe should succeed to the extent that the orders that they repay amounts to the Fund are set aside, but their appeals should otherwise be dismissed.

[212] That leaves the question of costs. In my view there is no reason to burden Messrs Upton, Jordaan and Seima with further adverse orders for costs. The GCB appeals in relation to them should be dismissed with each party to pay his or its own costs. Mr Williams tendered to pay the GCB's costs on the attorney and client scale and effect should be given to that tender. As the appellants and respondents in the other cases have failed in their opposition to the GCB's contentions, they should be ordered to pay the GCB's costs on the scale as between attorney and

client, such costs to include the costs of two junior counsel and the out of pocket expenses of Mr Epstein SC and Mr Bester, who appeared without charging fees in accordance with the best traditions of the Bar.

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M J D WALLIS
JUDGE OF APPEAL

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