THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 795/2023

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL **APPELLANT**

and

KGETSEPE REVENGE KGAPHOLA **FIRST RESPONDENT**

KGAPHOLA INCORPORATED ATTORNEYS **SECOND RESPONDENT**

Neutral citation: *South African Legal Practice Council v Kgaphola and Another* (795/2023) [2025] ZASCA 66 (23 May 2025).

Coram: MAKGOKA, MOTHLE and MABINDLA-BOQWANA JJA and HENDRICKS and BAARTMAN AJJA

Heard: 12 September 2024

Delivered: 23 May 2025

Summary: Legal Practice – Legal Practice Act 28 of 2014 – whether high court exercised its discretion judicially – Professional misconduct – non-compliance with the rules.

Professional misconduct – Unjustifiably impugning the integrity of a regulatory legal body without basis – in itself a professional misconduct.

Procedure – application for postponement – whether satisfactory explanation furnished for postponement.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mngqibisa-Thusi J and Nqumse AJ, sitting as court of first instance):

1 The application for postponement is refused with costs, to be paid by the first respondent on an attorney and client scale.

2 The appeal is upheld with costs on attorney and client scale.

3 The order of the Gauteng Division of the High Court, Pretoria is set aside and replaced with the following:

'1 The first respondent, Mr Kgetsepe Revenge Kgaphola, is suspended from practice as a legal practitioner for 12 months;

2 The period of suspension referred to above is wholly suspended on condition that the first respondent:

2.1 complies with rule 54.34 and rule 54.16 of the Legal Practice Council within 30 days of this order;

2.2 does not contravene section 84(1) of the Legal Practice Act 28 of 2014 during the period of suspension;

2.3 is not found guilty of a contravention of rule 3.1 of the Legal Practice Council's Code of Conduct during the period of suspension;

3 The first respondent is ordered to pay the costs of this application on an attorney and client scale.'

JUDGMENT

Makgoka JA (Mothle and Mabindla-Boqwana JJA and Hendricks and Baartman AJJA concurring):

[1] The appellant, the South African Legal Practice Council (the LPC), is a national statutory body, established in terms of s 4 of the Legal Practice Act (the LPA),[1] which, among other things, regulates the conduct of all legal practitioners and candidate legal practitioners in South Africa. It appeals against an order of the Gauteng Division of the High Court, Pretoria (the high court).

[2] The high court dismissed the LPC's application to remove the first respondent, Mr Kgetsepe Revenge Kgaphola, from the roll of attorneys, alternatively to suspend him from practice. The high court ordered each party to pay their own costs. It subsequently granted the LPC leave to appeal to this Court. Mr Kgaphola conducts practice under the name Kgaphola Incorporated Attorneys, the second respondent (the firm). For convenience, I refer to Mr Kgaphola as 'the respondent'.

Application for postponement

[3] At the hearing of the appeal, the respondent sought the postponement of the appeal, which the LPC opposed. We dismissed that application with costs on an attorney and client scale and undertook to furnish the reasons for that order in this judgment. Below are the reasons.

[4] The respondent failed to file his heads of argument in this Court. At the hearing of the matter, counsel appeared on behalf of the respondent and applied

[1] Legal Practice Act 28 of 2014 (the LPA).

for a postponement. The application for postponement was made orally from the bar without a substantive application. The basis for the application was that the respondent wished to obtain the transcribed record of oral submissions in the high court.

[5] Ordinarily, the transcript of motion proceedings in the high court does not form part of the record submitted to this Court. This is stated in rule 8(6)*(j)*(i) of the Rules of this Court, which provides that unless it is essential for the determination of the appeal, and the parties agree thereto in writing, the record shall not contain argument and opening address. Counsel submitted that it would be apparent from the transcript that the LPC had conceded that when the application was launched, the respondent had complied with the relevant LPC rules he is accused of breaching.

[6] It is necessary for an applicant for a postponement to give a full and satisfactory explanation of the circumstances that necessitate a postponement.[2] An application for postponement should be sought as soon as a litigant realises the need for it. It is self-explanatory that the closer to the hearing the application for postponement is made, the greater the risk of prejudice to the other litigants involved in the matter and inconvenience to the court.

[7] As this Court emphasised in *McCarthy Retail Ltd v Shortdistance Carriers CC*:[3]

[2] *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd* [2022] ZASCA 143; 2022 JDR 3071 (SCA) para 6, with reference to *Myburgh Transport v Botha t/a S A Truck Bodies* [1991] 4 All SA 574 (NmS); 1991 (3) SA 310 (NmS) at 576-578.
[3] *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] ZASCA 14; [2001] 3 All SA 236 (A); 2001 (3) SA 482 (SCA).

'[A] party opposing an application to postpone an appeal has a procedural right that the appeal should proceed on the appointed day. . . Accordingly . . . an applicant for a postponement . . . must show a ''good and strong reason'' for the grant of such relief'.[4]

In *Lekolwane and Another v Minister of Justice*,[5] the Constitutional Court explained:

'The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement . . .'[6]

[8] In the present case, there is no explanation why the respondent did not: (a) avail himself of the provisions of rule 8(6)*(j)*(i) by engaging with the LPC to obtain agreement in respect of the extent of the record to be filed; (b) take steps to obtain the transcript. The LPC filed the appeal record on 25 October 2023 and its heads of argument on 23 November 2023, with no objection from the respondent. As mentioned, the respondent did not file heads of argument.

[9] Even after all these events, there is no explanation why the respondent took no steps to obtain the transcribed record between December 2023 and when this appeal was heard in September 2024. Apart from the fact that the application for postponement lacked merit, the respondent also showed flagrant disregard for the rules of this Court, as explained above. For these reasons, we marked our displeasure by dismissing the application with a punitive costs order on an attorney and client scale. As counsel for the respondent had no mandate to argue the merits of the appeal, he was excused and the appeal proceeded unopposed.

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[4] Ibid para 28.
[5] *Lekolwane and Another v Minister of Justice* [2006] ZACC 19; 2007 (3) BCLR 280 (CC).
[6] Ibid para 17. See also *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) SA 173 (C) at 181D; 1999 (3) BCLR 280 (C) at 287E; *The National Police Service Union and Others v The Minister of Safety and Security and Others* [2000] ZACC 15; 2000 (4) SA 1110 (CC); 2001 (8) BCLR 775 (CC) paras 4-5.

The merits of the appeal

Factual background

[10] The respondent was admitted as an attorney on 28 August 2020. In October 2020, he opened a legal practice for his own account under the firm's name and informed the LPC accordingly. On 8 October 2020, the LPC confirmed the registration of the firm. It also requested the respondent to pay his membership fees; and furnish it with certain information relating to the firm, including the firm's trust banking details. The LPC informed the respondent that a fidelity fund certificate would only be issued upon receipt of the requested information.[7] The respondent neither responded to the LPC's letter, nor furnished the LPC with the requested information. As a result, no fidelity fund certificate was issued to him.

The application in the high court

[11] On 10 March 2021, the LPC launched an application in the high court for removal of the respondent's name from the roll of attorneys, alternatively, for his suspension. On 16 March 2021, the respondent applied for, and was issued, a fidelity fund certificate. However, this certificate was withdrawn by the LPC on 30 April 2021, as a result of the respondent's failure to submit the firm's opening auditor's report to the LPC before 30 April 2021, as required by the rules of the LPC. Despite this, the respondent continued practising as an attorney.

[12] In its application, the LPC raised seven complaints against the respondent. First, that he had practised as an attorney for the periods 9 October 2020 to 31 December 2020 and 1 January 2021 to 15 March 2021, without being in possession of a fidelity fund certificate. Second, that he failed to notify the LPC of the firm's trust banking details. Third, that in contravention of rule 54.34, the respondent had opened the firm's trust bank account in a province where his main

[7] In terms of s 84(1) of the LPA, all legal practitioners must at all times be in possession of a valid fidelity fund certificate, which certificate is valid until 31 December of the year in which it has been issued.

office is not based.[8] Fourth, that he had failed to pay his annual membership fees for the 2020 financial year, due on 31 October 2020.

[13] Fifth, that he had failed to register the firm with the Financial Intelligence Centre, as required by s 43B of the Financial Intelligence Centre Act (FICA).[9] Sixth, that he had failed to reply to correspondence. Seventh, that he failed to register for a legal practice management course approved by the LPC's council within the prescribed period.[10] The completion of the course is a prerequisite for the issuing of a fidelity fund certificate.[11] The last complaint was not persisted with in this Court and will therefore not be considered.

[14] In response, the respondent denied that he had practised without a fidelity fund certificate. Instead, he averred that the application had been served on him while he was attending to the requirements necessary for him to be issued with a fidelity fund certificate. As regards the complaint that he had failed to furnish the LPC with his trust banking details, the respondent denied the allegations and stated that '[the LPC] was furnished with all the required documents'.

[15] Regarding the alleged non-compliance with rule 53.54 in respect of the firm's banking account, he contended that the LPC had 'never queried or noted that I did not open my Business and my Trust accounts within the jurisdiction of my main office'. The respondent admitted that he had not paid the outstanding membership fee because 'I did not have it'. As regards the complaint that he had

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[8] Rule 54.34 of the LPC rules provides:
'54.34 An office opened by a firm, which for the first time opens a practice within the jurisdiction of a Provincial Council, shall be designated as a main office of the firm in that jurisdiction, and the firm shall ensure that:
54.34.1 banking accounts for the firm are opened in that jurisdiction.
54.34.2 a separate set of accounting records is kept for each office.
. . . .'
[9] Financial Intelligence Centre Act 38 of 2001 (FICA).
[10] Section 85(1)*(b)* of the LPA, read with LPC rule 27.1.
[11] Section 85(1)*(a)*, read with sub-secs (5) and (6) of the LPA.

failed to comply with the FICA provisions, the respondent stated that he had registered and provided a FICA number to the LPC.

The high court's judgment

[16] The application came before the high court on 18 January 2022. The high court delivered its judgment on 22 July 2022, concluding that the LPC had failed to establish the complaints that the respondent had practised without a fidelity fund certificate, and disrespected the LPC in his response. It further held that the respondent's 'infractions were not that serious to warrant a declaration that he is not fit and proper to practise as an attorney and his removal from the roll of practising attorneys'.

[17] The high court said that the respondent: (a) did not exhibit any dishonesty; (b) was young and lacked experience; (c) was not inherently a dishonest person; (d) failed to pay his membership fees because he was indigent; and (e) was not provided with guidance by the LPC. The high court concluded that attendance of a Practice Management Course would serve as a corrective measure for the respondent. For these reasons, the high court dismissed the application and directed each party to pay its own costs.

In this Court

[18] The LPC is aggrieved by the order of the high court. It contended in this Court that the high court misdirected itself in considering the complaints against the respondent. The LPC submitted that the high court erred: (a) by not conducting a complete factual enquiry to determine whether the alleged misconduct had been established; (b) in respect of those portions of the factual enquiry that it conducted; and (c) by failing to consider, cumulatively, the respondent's conduct.

The enquiry

[19] The proper approach to misconduct complaints against legal practitioners is well-established and has been applied in many cases.[12] It is a three-stage enquiry. First, a court determines whether the complaint has been established on a balance of probabilities. This is a factual enquiry. If established, the court enquires whether the practitioner is fit to remain on the roll of legal practitioners. If he or she is not, the court must, in the third stage, determine a sanction: whether the legal practitioner's name should be removed from the roll or merely be suspended from practice for a determinate period. In the second and third stages, a court exercises discretion.

[20] The discretion exercised in the second and third legs of the enquiry is a strict one.[13] Thus, a court of appeal may only interfere if the discretion was not exercised judicially.[14] This means that a court of appeal is not entitled to interfere with the exercise by the lower court of its discretion unless it failed to bring an unbiased judgment to bear on the issue; did not act for substantial reasons; exercised its discretion capriciously, or exercised its discretion upon a wrong principle or as a result of a material misdirection.[15]

The high court's treatment of the enquiry

[21] After setting out the contentions of the parties, the high court made the following conclusions:

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[12] *General Council of the Bar of South Africa v Geach and Others, Pillay and Others v Pretoria Society of Advocates and Another, Bezuidenthout v Pretoria Society of Advocates* [2012] ZASCA 175; [2013] 1 All SA 393 (SCA); 2013 (2) SA 52 (SCA) para 50; *Malan* para 4; *Jasat v Natal Law Society* [2000] ZASCA 14; 2000 (3) SA 44 (SCA); [2000] 2 All SA 310 (A) para 10.

[13] *Kekana v Society of Advocates of SA* [1998] ZASCA 54; 1998 (4) SA 649 at 654D-E; [1998] 3 All SA 577 (SCA) at 581.

[14] *Vassen v Law Society of the Cape of Good Hope* [1998] ZASCA 47; 1998 (4) SA 532 (SCA) at 537D-F; [1998] 3 All SA 358 (A) at 361-362.

[15] Ibid. See also *Mabaso v Law Society of the Northern Provinces and Another* [2004] ZACC 8; 2005 2 SA 117 (CC); 2005 (2) BCLR 129 para 20; *Giddey NO v JC Barnard & Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) paras 20 and 21.

'Taking into account the evidence before me, as correctly submitted by counsel for the first respondent, I am not convinced that the applicant has proven on a balance of probabilities that during 2020 the first respondent practiced as an attorney before he was issued with a Fidelity Fund Certificate. I am further not convinced that in defending himself against the allegations made by the applicant that the first respondent had shown disrespect towards the applicant in his response to the applicant's allegations. The first respondent might have been tardy in his responses to the applicant and/or might have used inelegant language. However, the first respondent's conduct is not indicative of any intentional disrespect towards the applicant.

I am satisfied that the first respondent's infractions were not that serious to warrant a declaration that he is not fit and proper to practise as an attorney and his removal from the roll of practising attorneys.'

[22] It is clear from the above passage that the high court misapplied the three-stage enquiry by not properly conducting the first stage, ie a factual enquiry to determine whether the complaints against the respondent had been established. Earlier, we set out the seven complaints that the LPC placed before the court. None of them, except that of practising without a fidelity fund certificate, was investigated by the high court. It merely mentioned the complaints and the respondent's response to them, without deciding whether, in respect of each, misconduct had been established on a balance of probabilities.

[23] It is indeed not clear from the high court's judgment whether it was satisfied that any of the complaints had been established. This is because, while it did not expressly make the necessary factual findings, the high court mentioned the respondent's 'infractions', without indicating what those were. Regarding the complaint about the fidelity fund certificate, the high court found that it had not been established on a balance of probabilities. It reached this conclusion without any meaningful discussion. As I indicate later, this conclusion is not borne out by the common cause facts.

[24] Furthermore, the high court considered irrelevant issues in arriving at its conclusions. It said that: (a) the respondent was 'young and inexperienced'; (b) the LPC did not 'proffer him any guidance'; and (c) his failure to pay his membership fees was because he was indigent. These were not issues relied on by the respondent in his answering affidavit. It was therefore not open to the high court to factor them in as part of its reasoning. Both this Court and the Constitutional Court have repeatedly warned against determining matters on issues that do not arise from the papers.[16]

[25] The upshot of the above is that the high court materially misdirected itself in the first stage of the enquiry. It follows that the high court based its conclusions in the second and third stages of the enquiry on a flawed premise. In the result, this Court is at large to set aside the high court's factual findings and consider the enquiry afresh.[17] I do so next, considering in turn, the LPC's complaints against the respondent.

Whether the complaints against the respondent were established: the first enquiry

Practising without a valid fidelity fund certificate

[26] It is undisputed that between 9 October 2020 and 16 March 2021, the respondent did not have a valid fidelity fund certificate. His answer to this complaint is that he only commenced practice after being issued with the fidelity

[16] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) paras 13 and 14; *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) para 210; *Molusi & Others v Voges NO & Others* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) para 28; *Four Wheel Drive Accessory Distributors CC v Rattan NO* ZASCA 124; 2019 (3) SA 451 (SCA) para 23; *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) para 234; *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others*; *Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) para 58.

[17] *Malan* paras 12 and 13.

fund certificate. The respondent misses the point. In terms of s 84(1) of the LPA, every attorney and trust account advocate who practises or is deemed to practise for his or her own account is required to have a fidelity fund certificate.

[27] The fact is that the respondent opened the firm and a trust banking account and informed the LPC accordingly. Once this occurred, all the consequences of an operative practice ensued. At the very least, he was deemed to have been in practice, irrespective of whether or not he had clients during that period. He was only issued with a fidelity fund certificate on 16 March 2021. That certificate was withdrawn on 30 April 2021. Even though he was made aware of this withdrawal, the respondent continued practising. The high court should therefore have found that the respondent had practised without a fidelity fund certificate for the period 9 October 2020 to 16 March 2021, and after 30 April 2021 when the certificate was withdrawn. This complaint had thus been established.

FICA

[28] In terms of s 43B of FICA, read with regulation 27A(3), the firm was obliged to register with the Financial Intelligence Centre (FIC) within 90 days from the opening of the firm on 9 October 2020. Thus, the respondent had until 7 January 2021 to register the firm. Despite being advised to do so by the LPC in October 2020, he failed to do so. This is a contravention of rule 18.17 of the LPC's Code of Conduct.[18]

Failure to immediately notify the LPC of Trust banking accounts

[29] Section 86(1) of the LPA requires every attorney who practises for own account to open and operate a trust banking account. Rule 54.16 of the LPC rules

[18] Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities. Published in General Notice 168, Government *Gazette* 42337 of 29 March 2019 (The LPC Code of Conduct). The LPC Code of Conduct provides that '[a]n attorney shall . . . take all such steps as may be necessary from time to time to ensure compliance at all times as an accountable institution with the requirements of [FICA]'.

requires every firm to immediately notify the LPC in writing of the name and address of the bank at which its trust banking account is kept. The respondent opened the firm's trust bank account on 4 November 2020, but failed to immediately notify the LPC. His first attempt to do so was on 4 February 2021. But he sent it to an incorrect email address. He rectified this on 12 February 2021, when he used the LPC's correct email address. There is no explanation for the failure to inform the LPC of the trust account details immediately after the account was opened on 4 November 2020. This complaint was thus established.

Non-compliant Trust bank account

[30] Rule 54.34 of the LPC rules requires that a legal practice's trust account should be opened in the area of the Provincial Council within whose jurisdiction the firm's main office is situated. The firm's main office is in Gauteng, under the jurisdiction of the Gauteng Provincial Council of the LPC. It is common cause that the firm's Trust bank account was opened in Polokwane, Limpopo Province, and not in Gauteng Province. This is in contravention of rule 54.34. The respondent's answer to this complaint is that the LPC had not previously queried this.

Membership fees

[31] Rule 4 of the LPC rules prescribes the payment of annual membership fees by legal practitioners to the LPC. The fees are payable on or before 31 October annually. The respondent failed to pay his membership fees for the year 2020 on or before the due date, but only did so on 5 April 2021, after the application by the LPC was launched. The respondent glibly stated that the reason he did not pay the membership fee on time was that he 'did not have it'. There is no further elaboration for this assertion.

Failure to reply to correspondence

[32] It is common cause that the respondent failed to respond to the letter addressed to him by the LPC on 8 October 2020. This contravenes rule 16.1, 16.2, 16.3 and 16.4 of the LPC Code of Conduct.[19]

Whether the respondent is fit and proper to continue practice: the second enquiry

[33] The sum total of the above is that the complaints against the respondent have been established on a balance of probabilities. This leads me to the second enquiry. A value judgment has to be made whether the respondent is a fit and proper person to remain on the roll of attorneys. While some of the offences relate to inattentiveness and lack of application, two are regarded as serious, ie practising without a fidelity fund certificate and failure to respond to correspondence.

[34] As stated by this Court in *Law Society of the Northern Provinces v Mamatho*,[20] practising without a fidelity fund certificate is a serious breach of an attorney's duty and a criminal offence. Regarding failure to respond to correspondence, this Court, in *Hewetson v Law Society of the Free State*,[21] pointed out that this is a serious offence for which attorneys have been struck off the roll, as it 'not only speaks of a lack of courtesy, but constitutes a breach of professional integrity'.[22]

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[19] Rule 16 of the LPC Code of Conduct provides:
'16. **Replying to communications**
An attorney -
16.1 shall within a reasonable time reply to all communications which require an answer unless there is good cause for refusing an answer;
16.2 shall respond timeously and fully to requests from the Council for information and/or documentation which he or she is able to provide;
16.3 shall comply timeously with directions from the Council; and
16.4 shall refrain from doing anything that may hamper the ability of the Council to carry out its functions.'

[20] *Law Society of the Northern Provinces v Mamatho* [2003] ZASCA 82; 2003 (6) SA 467 (SCA) para 1.

[21] *Hewetson v Law Society of the Free State* [2020] ZASCA 49; [2020] 3 All SA 15 (SCA); 2020 (5) SA 86 (SCA).

[22] Ibid para 50.

[35] At the time of launching the application in the high court, the respondent had still not: (a) been issued with a fidelity fund certificate; (b) paid his annual fees; and (c) rectified his banking account by opening it in Gauteng in terms of rule 54.34. When the appeal was heard in this Court, all the issues had been resolved, except compliance with rule 54.34.

[36] I also consider the respondent's conduct in the proceedings before the high court. In his answer to the LPC's application, instead of addressing the complaints against him, the respondent resorted to impugning the integrity of the LPC. For example, he stated that the LPC: (a) brought the application well knowing that its allegations were baseless; (b) was 'clutching at straws' to build a 'non-existent case'; and (c) twisted the facts.

[37] As a result, said the respondent, he was perplexed about the motive behind the application. As stated, all the complaints by the LPC had been established. The respondent's allegations were clearly intended to convey that the LPC had sinister motives against him. These are serious insinuations against a professional regulatory body whose function is, among others, to maintain ethical standards. They should not be lightly made. In *Law Society of the Northern Provinces v Mogami* (*Mogami*),[23] this Court warned against such conduct and pointed out that this, in itself, constitutes unprofessional conduct and a strategy that the courts cannot countenance.

[38] It behoves us to repeat that warning here. A time will soon arrive when legal practitioners who make themselves guilty of this unprofessional conduct risk being suspended from practice or struck off the roll, solely based on this, as

[23] *Law Society of the Northern Provinces v Mogami and Others* [2009] ZASCA 107; 2010 (1) SA 186 (SCA); [2010] 1 All SA 315 (SCA) (*Mogami*) para 26.

this may be indicative of, or border on, lack of fitness to practise as a legal practitioner.

[39] The respondent's attitude is troubling, particularly because he is a new entrant into the profession. His real first encounter with the LPC has been characterised by his failure to comply with his professional obligations. What is more, the respondent has adopted an unjustifiably combative and hostile attitude against the LPC. His answering affidavit exhibits a worrisome lack of candour.

[40] The respondent's conduct necessitates that the following trite principles be restated. Proceedings such as the present are of their own kind and of a disciplinary nature. They are neither criminal nor civil proceedings between the LPC and a respondent legal practitioner. The LPC, as a repository of professional norms, places facts before the court for consideration for it to exercise its discretion upon those facts.[24] It is, therefore, expected of legal practitioners against whom allegations of impropriety are made, to co-operate and provide the necessary information, and to place the full facts before the Court to enable it to make a correct decision. Broad denials and obstructionism, as we have seen in the present case, have no place in these proceedings.[25]

[41] As mentioned, the respondent has made himself guilty by practising without a fidelity fund certificate and failing to respond to the LPC's correspondence – two serious offences. Each one on its own attracts suspension or striking off. He, however, rectified the situation in respect of the fidelity fund certificate, and had been issued with one when the application was heard in the high court. Regard being had to a conspectus of the facts, I conclude that although

[24] *Hassim* v *Incorporated Law Society of Natal* 1977 (2) SA 757 (A) at 767C-G; *Law Society, Transvaal* v *Matthews* 1989 (4) SA 389 (T) at 393E; *Cirota & Another* v *Law Society, Transvaal* 1979 (1) SA 172 (A) at 187H; *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) (*Kleynhans*) at 851E-F.
[25] *Kleynhans* above.

the respondent is guilty of unprofessional conduct, that does not render him unfit to continue to practise as an attorney.

The sanction: the third enquiry

[42] The finding that the respondent is not unfit to continue to practice is not the end of the enquiry. As this Court explained in *Malan v Law Society of the Northern Provinces* (*Malan*):[26]

'As far as the second leg of the inquiry is concerned, it is well to remember that the Act contemplates that where an attorney is guilty of unprofessional or dishonourable or unworthy conduct different consequences may follow. The nature of the conduct may be such that it establishes that the person is not a fit and proper person to continue to practise. In other instances, the conduct may not be that serious and a law society may exercise its disciplinary powers, particularly by imposing a fine or reprimanding the attorney (s 72(2)*(a)*). *This does not, however, mean that a court is powerless if it finds the attorney guilty of unprofessional conduct where such conduct does not make him unfit to continue to practise as an attorney. In such an event the court may discipline the attorney by suspending him from practice with or without conditions or by reprimanding him . . .* '[27] (Emphasis added.)

[43] This Court is therefore entitled to discipline the respondent for his misconduct, despite finding that he is not unfit to continue practice. The sanction imposed for his unprofessional conduct should reflect the seriousness of his conduct, and address the outstanding issue to ensure compliance. I consider that a suspension for a period, which is wholly suspended on certain conditions, would be an appropriate sanction. The LPC has suggested a period of suspension for 18 months. In the circumstances of the case, I deem 12 months to be appropriate.

[26] *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); [2009] 1 All SA 133 (SCA).
[27] Ibid para 5.

Costs

[44] The LPC had a statutory duty to approach the court. As stated, when the application was launched, all the complaints against the respondent were live issues, including the serious one of practising without a fidelity fund certificate. The LPC was therefore entitled to approach the court to protect the public. It did not do so as an ordinary litigant. Although the high court found that the respondent had transgressed professional rules, it ordered each party to pay its own costs. This is an unusual order in matters of this nature, as this Court remarked in *Mogami*.[28]

[45] The general rule is that the LPC is entitled to its costs on an attorney and client scale, even if unsuccessful.[29] The high court paid no regard to these principles. To that extent, it did not exercise its discretion judicially. The respondent should have been ordered to pay the costs on an attorney and client scale. A similar order should follow in this Court.

[46] In the result, the following order is made:

1 The application for postponement is refused with costs, to be paid by the first respondent on an attorney and scale.

2 The appeal is upheld with costs on attorney and client scale.

3 The order of the Gauteng Division of the High Court, Pretoria is set aside and replaced with the following:

‘1 The first respondent, Mr Kgetsepe Revenge Kgaphola, is suspended from practice as a legal practitioner for 12 months;

2 The period of suspension referred to above is wholly suspended on condition that the first respondent:

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[28] *Mogami* para 31.

[29] See, for example, *Law Society of the Northern Provinces v Sonntag* [2011] ZASCA 204; 2012 (1) SA 372 (SCA) para 20.

2.1 complies with rule 54.34 and rule 54.16 of Legal Practice Council within 30 days of this order;

2.2 does not contravene section 84(1) of the Legal Practice Act 28 of 2014 during the period of suspension;

2.3 is not found guilty of a contravention of rule 3.1 of the Legal Practice Council's Code of Conduct during the period of suspension;

3 The first respondent is ordered to pay the costs of this application on an attorney and client scale.'

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T M MAKGOKA

JUDGE OF APPEAL

Appearances

For appellant:	R M Stocker
Instructed by:	Rooth & Wessels Inc., Pretoria
	Pieter Skein Attorneys, Bloemfontein
For respondents:	S C Bereng (only for the postponement application)
Instructed by:	Maladzhi & Sibuyi Attorneys Inc., Pretoria
	Masia Attorneys Inc., Bloemfontein.