**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**
**JUDGMENT**

**Not Reportable**
Case No: 1112/2021

In the matter between:

**PAULUS LEPEKOLA SAMUELS** **APPELLANT**

and

**SOUTH AFRICAN**
**LEGAL PRACTICE COUNCIL** **RESPONDENT**

**Neutral Citation:** *Samuels v South African Legal Practice Council (formerly Law Society of the Northern Provinces)* (1112/2021) [2022] ZASCA 175 (7 December 2022)

**Coram:** PETSE DP and MOTHLE JA and DAFFUE, WINDELL and SIWENDU AJJA

**Heard:** 19 August 2022

**Delivered:** 7 December 2022

**Summary:** Attorneys Act 53 of 1979 – striking from the roll of attorneys, notaries and conveyancers – whether the appellant should have been granted a postponement for the hearing – whether the appellant's fundamental right to a fair hearing was infringed – whether the sanction imposed, namely striking-off, was a justified sanction.

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**ORDER**

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**On appeal from**: Gauteng Division of the High Court, Pretoria (Phahlane AJ with Mokose J concurring, sitting as a court of first instance):

1. The appeal is upheld and the order of the high court is set aside.
2. The matter is referred back to the high court for determination by a differently constituted bench.
3. The appellant shall pay the respondent's costs of appeal.

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**JUDGMENT**

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**Mothle JA**

[1] This is an appeal against an order granted on 17 June 2020 in the Gauteng Division of the High Court, Pretoria (the high court), striking the name of Paulus Lepekola Samuels (the appellant) from the roll of attorneys. The order was granted following an application launched in the high court by the Law Society of the Northern Provinces[1] (the Law Society), cited as respondent in this appeal. The application in the high court was launched in terms of s 22(1)*(d)* of the then Attorneys Act 53 of 1979 (the Attorneys Act).[2]

[2] The following are background facts that triggered the application in the high court. The appellant was admitted as an attorney on 19 November 1991.

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[1] Currently constituted as the South African Legal Practice Council since the Legal Practice Act 28 of 2014 took effect on 1 November 2018.

[2] The Attorneys Act has since been repealed and replaced by the Legal Practice Act 28 of 2014. Section 22(1)*(d)* of the Attorneys Act provides:

'(1) Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he practises –

. . .

*(d)* If he, in the discretion of the court, is not a fit and proper person to continue practice as an attorney'.

Ms Lydia Mabaso (Ms Mabaso) of Johannesburg, had instructed the appellant to act as her attorney in prosecuting a claim for compensation against the Road Accident Fund (RAF). The claim was for damages arising out of injuries she sustained in a motor vehicle accident on 26 December 2007. The appellant and Ms Mabaso concluded a written contingency fee agreement, entitling the appellant to receive twenty five percent (25%) of the proceeds of the claim. The action against the RAF was set down twice for hearing in the high court. At the first hearing in February 2014, a settlement agreement was reached with the RAF for payment of the past medical expenses and general damages in the amount of R170 657.40. At the second hearing, a year later on 5 February 2015, the remaining part of the claim for the loss of earnings was also settled in the amount of R206 300.60.

[3] It transpired from the complaint filed with the Law Society that Ms Mabaso experienced difficulties in her attorney and client relationship with the appellant. During the period between the two settlement agreements in February 2014 and February 2015, and also after February 2015, Ms Mabaso made repeated inquiries from the appellant concerning the payment of the amounts settled at court with the RAF. In respect of both payments, the appellant failed to account to her, repeatedly informing her that his office had not received the payments due from the RAF. Dissatisfied with the appellant's response, Ms Mabaso, in both instances, inquired directly from the RAF, who confirmed that payment of the February 2014 settlement had been made to the appellant's trust account in July 2014. When she conveyed that information to the appellant, he informed her that he was not aware of the payments made into his trust account and that he would verify. Four months later, the appellant, in a letter dated 20 November 2014, confirmed to Ms Mabaso that the payment of R170 657.40 had been received from the RAF. He further informed Ms Mabaso that the amount 'has been appropriated to fees and disbursements and the balance of our fees and disbursements will be taken from the last settlement of loss of earnings'. Ms Mabaso received no compensation in respect of the first payment effected by the RAF.

[4] The payment in respect of the outstanding claim for loss of earnings settled in February 2015 followed the same pattern. Ms Mabaso unsuccessfully continued to make inquiries from the appellant about payment from the RAF. Again she made inquiries to the RAF concerning the payment of the February 2015 settlement. The RAF informed her, per email dated 1 July 2015, that the settled payment of R206 300.60 had been made to the appellant's trust account on 11 June 2015. When confronted again with this information, the appellant confirmed receipt of the payment, but indicated that 'the amount has not been cleared in our trust account as yet by the bank' and that he was waiting for the bill of costs from the cost consultants before scheduling a meeting with Ms Mabaso. This was almost a month after payment had been received. Ms Mabaso turned to Fluxmans Attorneys (Fluxmans), requesting their assistance in getting the appellant to account to her. From 10 July 2015, Fluxmans sent correspondence and reminder letters to the appellant, which went unanswered. On 7 October 2015, Ms Mabaso lodged a complaint with the Law Society against the appellant.

[5] The Investigating Committee of the Law Society (the Committee) sent a letter dated 2 November 2015 to the appellant, and a reminder letter dated 9 December 2015, informing him of the complaint and requesting a response. The appellant responded on 11 January 2016. On 29 June 2016, the Committee, having considered the complaint and the appellant's response, decided to charge the appellant with contravention of various rules governing the attorney's profession.[3] The Committee further recommended that the Law Society's Monitoring Unit must obtain consent from the then Council of the Law Society (the Council) to conduct an inspection of the appellant's accounting records. The appellant was informed of these charges on

[3]The specific rules the Committee referred to are Rule 89.23, failure to reply to correspondence from Fluxmans attorneys; Rule 68.8, the delayed payment of trust monies; Rule 68.7, failure to timeously account to Ms Mabaso; Rule 89.30 failure to tax his account timeously; and Rule 89.24 for overreaching Ms Mabaso. These Rules were made under the authority of section 74 of the Attorneys Act 53 of 1979 and promulgated in the Government Gazette 7164 of 1 August 1980, as amended. They are referred to as The Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal) Rules. Curiously, the appellant was not charged for misleading Ms Mabaso about the payment on two occasions.

8 July 2016. Instead, on 27 July 2016, the appellant issued summons against Ms Mabaso for an amount of one million rand (R1 000 000) for defamation, arising from the fact that she had lodged a complaint with the Law Society, as well as for allegedly having made disparaging statements against appellant in the media, attacking his character.

[6] On 23 February 2017, the Law Society launched an urgent application in the high court, for the appellant's name to be struck from the roll of attorneys, alternatively that he be suspended from practicing as an attorney. The application consisted of two parts, Part A and Part B. Part A of the application was placed on the roll of urgent applications (urgent court) and was heard on 23 March 2017. The judgment (per Tlhapi J) was delivered on 21 July 2017, granting an order suspending the appellant from practising as an attorney with ancillary relief, pending the hearing of Part B. The appellant, aggrieved by the outcome, successfully applied for leave to appeal the order of suspension by the urgent court and that order was granted on 12 March 2018. The appellant duly lodged the appeal on 16 April 2018 to the Full Court. As at the hearing of the appeal against the order in part B in this Court, the appeal against his suspension in the Full Court lodged in April 2018 was still pending.

[7] Two years after the appellant noted and failed to prosecute the suspension order on appeal, the Law Society placed Part B application, on the normal high court roll of opposed matters, initially on 7 May 2019, where it was postponed *sine die*. Thereafter on 15 October 2019 it was set down for hearing on 30 April 2020. The high court adjudicated the matter on the affidavits without hearing oral submissions, according to the Law Society's counsel, in terms of s 19*(a)* of the Superior Court Act 10 of 2013. The high court judgment (per Phahlane AJ with Mokose J concurring) was delivered on 17 June 2020. The high court ordered that the appellant's name be struck off the roll of attorneys. Almost a year later, on 27 May 2021, the appellant unsuccessfully applied to the high court for leave to appeal. He turned to this Court, which on 24 August 2021, granted him leave to appeal the high court order in Part B. It is thus with leave of this Court that the appeal came before us. I now turn to deal with the grounds of appeal in this Court.

[8] In the first ground of appeal, the appellant contended both in the notice of appeal and in his heads of argument that the high court refused to grant him a postponement of the proceedings. He contended further, invoking s 34 of the Constitution[4] that the refusal denied him his fundamental right to have his case presented and argued in court. For the reasons that follow hereunder, I am of the view that there is no evidence supporting this contention.

[9] First, the notice of motion for Part B, which was to be heard in due course on the normal or ordinary court roll, explicitly stated in paragraph 2 thereof, that if the appellant intends to oppose the application, he will be required to notify the Law Society's attorneys in writing thereof within 5 (five) days after service of the application; and within 15 (fifteen) days of delivery of the notice to oppose the application, to deliver his answering affidavit (if any) together with any relevant documents. The appellant failed to notify the Law Society of his intention to oppose Part B and failed to deliver an answering affidavit within the time frames stated in the notice of motion. As at the time the high court adjudicated the application some two and a half years later, and when this Court considered the appeal, the appellant had neither delivered any notice to oppose nor an answering affidavit in respect of Part B. He was thus not on record as opposing Part B of the application.

[10] Second, on 15 October 2019, almost two years after the suspension order under Part A, the Law Society delivered a notice of set down of Part B, scheduled for hearing the following year on 30 April 2020. Approaching the date of hearing for Part B, the lackadaisical conduct of the appellant became evident. Notwithstanding his career being at risk, and having been notified on 15 October 2019 of the date of hearing, six months in advance, the appellant only appointed his attorneys on 3 March 2020, barely a month before the

[4] Section 34 of the Constitution reads:
'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

hearing. He failed to take the high court and also this Court, into his confidence by providing reasons as to why he had delayed appointing an attorney. As a consequence of failing to appoint an attorney timeously, he failed to file his heads of argument on or before 14 April 2020 as was required of him. By his own conduct, he was not ready for the high court hearing. The appellant's only answering affidavit was that which had been considered by the urgent court in Part A.

[11] Third, by 15 April 2020 and due to the outbreak of the Covid-19 pandemic, the country had been under level 5 lockdown.[5] On 21 April 2020, nine days before the hearing, Mr John Njau (Mr Njau) of Röntgen and Röntgen Inc, the appellant's attorneys, addressed an email to the Law Society's attorneys, requesting their consent to a postponement of the hearing. The Law Society's attorneys informed him to deliver a substantive application for postponement, which the appellant's attorney failed to do. On 23 April 2020, Mr Njau wrote an email to the presiding Judge, Madam Justice Mokose (Mokose J), requesting a postponement of the hearing of Part B. Mokose J replied through her secretary that in the absence of a substantive application for a postponement, she was unable to accede to the request. The appellant failed to deliver a substantive application for postponement.

[12] Fourth, this Court in *Malan and Another v Law Society, Northern Provinces,*[6] held thus:

'A court of appeal has limited powers to interfere with a decision of the court of first instance. In relation to the first leg of the inquiry, which is factual, appeals are subject to the general limitation that courts of appeal defer to the factual findings of courts of first instance *(R v Dhlumayo and Another* 1948 (2) SA 677 (A). *This rule has limited, if any, application if the court of first instance decided the case on paper, i.e. in*

[5] The lockdown was effected under the Regulations promulgated in terms of the Disaster Management Act 57 of 2002. It restricted movement of persons in order to contain the spread of the Coronavirus disease 2019 (Covid-19) which is a contagious disease caused by the virus, the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

[6] *Malan and Another v Law Society, Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); (2009) 1 All SA 133 (SCA) para 12.

*application proceedings, because in such a case the court of appeal is in as good a position to judge the facts as was the court below…'* (My emphasis.)

Having alleged that the high court failed to give him an opportunity to present his case, this Court is in as good a position as the high court to afford the appellant a hearing. The appellant and his legal representatives are presumed to be aware of this legal principle. After this Court had granted him leave to appeal, the appellant failed to deliver, with leave of this Court, a detailed affidavit on a new matter in which he sets out the factual evidence of the high court's alleged refusal to grant him a postponement in order for him to be heard. He also failed to deliver an answering affidavit for Part B of the hearing, in light of the bald denials in his answering affidavit before the urgent court, to the serious charges levelled against him by the Law Society. He failed to present his defence to this Court.

[13] Fifth, the high court, in refusing the appellant's application for leave to appeal the order under Part B, expressed its view on the appellant's conduct concerning the pending appeal against the order of his suspension as follows:

'(3) It is common cause that the application for leave to appeal in that matter had lapsed *for more than two years and when it was revived, the matter was postponed for the applicant to file his papers and that was not done.* It is also common cause that at the time of obtaining the date of 1 December 2021 for the hearing of that matter, *the correct procedure had still not been followed in that the heads of argument and practice note had not been filed.*' (My emphasis.)

[14] The preceding paragraphs amply demonstrate that the appellant was set on delaying the expeditious conclusion of this matter for as long as it would take. First, he put his suspension on hold by lodging an appeal he was not prepared to prosecute for two years. Second, he lurched on the Covid-19 lockdown, in an attempt to secure a postponement of the Part B application, when in fact, even after two years, he was still not on record as intending to do so. The appellant tendered no explanation as to why he did not deliver a substantive application for postponement. It is thus reasonable to infer that the appellant failed to deliver a substantive application for postponement, because he had no valid reasons to place before the high court in support

thereof. The appellant was not honest with the high court and in particular with this Court. In this regard, I refer to the remarks of Malan JA in *Law Society, Northern Provinces v Sonntag (Sonntag),* where he wrote:

'The conduct of the respondent [the attorney] in defending the charges brought against her was wholly unsatisfactory . . . The various defences and the manner in which they were raised by the respondent cannot be said to evince complete honesty and integrity.'[7]

For the reasons aforesaid, the ground of appeal that the high court denied him an opportunity to present his defence, has no merit and it falls to be rejected.

[15] The appellant contended in the second ground of appeal that the high court application was launched contrary to an agreement he had with the legal officer of the Law Society. He stated that he had agreed with the Law Society that any matter concerning the complaint lodged by Ms Mabaso, including the decision by the Council to authorise an inspection of his accounting records, would be held in abeyance, pending the adjudication of a defamation action he had instituted against Ms Mabaso. Put differently, the appellant's argument was that the defamation matter rendered the entire investigation of the complaint by Ms Mabaso *sub judice*.

[16] The sequence of events shows that the Committee concluded its investigation and informed the appellant, on 8 July 2016, that it had recommended that he be charged with contravention of the various rules governing the profession. Further, that the matter be referred to the Monitoring Unit. In turn, the Monitoring Unit would obtain consent from the Council to inspect the appellants accounting records. On 11 July 2016, the appellant requested the Law Society to allow him to consult with Ms Mabaso as she had called 'to set up an appointment to resolve the matter amicably…'. The consultation never materialised. Instead, on 27 July 2016, the appellant issued defamation summons against Ms Mabaso. It appears from the

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[7] *Law Society, Northern Provinces v Sonntag* [2011] ZASCA 204; 2012 (1) SA 372 (SCA) para 18.

correspondence between the appellant and the Law Society that the parties agreed to hold the file of the complaint in abeyance; but the Law Society did not agree with appellant's view as regards the inspection of his accounting records.

[17] The Council, acting in terms of s 78(13) of the Attorneys Act,[8] obtained information from the bank that indicated that there was a deficit in the appellant's trust accounts. This is the kind of evidence which in the ordinary course enjoins the Council to intervene and perform its statutory functions to protect the public from the possible misappropriation of funds entrusted to an attorney. It concerned an inspection of the accounting records as a whole, and not only those relating to Ms Mabaso. The inspection of the appellant's accounting records is not remotely related to the defamation suit and would not be a matter that is germane to the defamation suit. It is thus not *sub judice* in the action for defamation pending against Ms Mabaso. The appellant persisted in his *sub judice* view, clearly as a ruse to obstruct any inspection of his accounting records. The appellant was steadfast in his refusal to co-operate and dared the Law Society to obtain a court order to inspect his accounting records, which he promised to oppose. Similarly, this ground of appeal is unmeritorious and should be rejected. I now turn to consider the merits of the charges denied by the appellant.

[18] It is trite that the nature of the applications to inquire into the conduct of an attorney amount to a disciplinary enquiry that is *sui generis*. It is a three-step process. In *Jasat v Natal Law Society*, this Court explained the three-step-process thus: 'First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. . . The second inquiry is whether, as stated in section 22 (1)*(d),* the person concerned "*in the discretion of the Court*" is not a fit and proper person to continue to

[8] Section 78(13) of the Attorneys Act provided: '(13) Any banking institution or building society at which a practitioner keeps his trust account or any separate account forming part of his trust account shall, if so directed by the council of the society of the province in which such practitioner is practicing, furnish the council with assigned certificate which indicates the balance of such account at the date or dates stated by the council.'

practice . . . It would seem clear, however, that in the context of the section, the exercise of the discretion referred to involves in reality a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment . . . The third inquiry is whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice.'[9]

[19] The following facts established, as the high court found, on a preponderance of probabilities, the appellant's serious acts of misconduct. In the first instance, the appellant failed to account fully to Ms Mabaso for the payment received in July 2014 from the RAF in the amount of R170 657.40. Further, and by his own admission, the appellant had appropriated that amount when the contingency fee agreement with Ms Mabaso was in place, and, in terms thereof, the appellant was only entitled to a fee of 25%, being R42 664.35. Almost a year after the receipt of that payment, Ms Mabaso received a letter from the attorneys of Bonitas Medical Fund, informing her that an amount of R19 444.01 was still due, being the costs of the past medical treatment after the accident. The appellant could not explain why that amount had not been paid, considering that the payment received from the RAF was in part, for past medical expenses and his earlier assertion that the money was appropriated towards fees and disbursements. Consequently, it can reasonably be inferred that the amount of R170 657.40 had been misappropriated.

[20] The appellant also failed to account to Ms Mabaso in regard to the second payment received from the RAF in 2015. He withheld this amount, informing Ms Mabaso that he would first submit for taxation the bill of costs that he had prepared. When Ms Mabaso insisted on payment, he relented and sent her a cheque by registered post in the amount of R123 800.33, at a time when it appeared there were no longer sufficient funds in Ms Mabaso's trust ledger account. The bill of costs had not been taxed and the fate of the

[9] *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); [2000] 2 All SA 310 (SCA) para 10.

balance of the amount paid by the RAF, including the costs of suit paid by the RAF, was not disclosed.

[21] The appellant also obstructed the Council from inspecting his practice account records. The view he held that such an inspection was *sub judice* because of the defamation action he had instituted was self-serving and dishonest. This Court in *Sonntag* held that conduct that amounts to obstructionism and dishonesty during a disciplinary process cannot be countenanced. An attorney who is a respondent in a disciplinary matter is expected, as an officer of the court, to put the facts fully and candidly before the court. Bald denials, evasions and obstructionism have no place in such matters. In *Sonntag* the Court set aside the high court's suspension order and instead ordered that the name of the respondent be struck from the roll of attorneys.

[22] The information obtained by the Council from the bank in terms of s 78(13) of the Attorneys Act, allegedly disclosed deficits in the daily bank balances of the appellant's practice trust accounts. That averment was made under oath by the Law Society. Serious as it is, it was met with a bare denial from the appellant. To assert as he did in his answering affidavit before the urgent court that the Law Society failed to attach a copy of the balances, does not assist his case. In addition, by stating that the bank refused to provide the Law Society or the Monitoring Unit the stated balances, without attaching a letter from the bank to that effect, does not assist his case. One would have expected the appellant, in support of his denial, to attach bank statements to the contrary.

[23] The appellant failed to point to any evidence in the record that contradicted the facts stated in the preceding paragraphs. The high court found, correctly so, that the appellant was guilty of contravening the provisions of the Attorneys Act and the Rules of the profession. No cogent or persuasive argument to the contrary, was submitted before this Court, that on

a preponderance of probabilities, the appellant's offending conduct had not been established.

[24] I have had the opportunity of reading the second judgment of my colleague Daffue AJA, concerning the alleged breach of appellant's right to be heard as provided in s 34 of the Constitution. For the reasons stated and those that follow hereunder, I respectfully disagree with the reasoning, the conclusion as well as the order proposed in the second judgment.

[25] In concluding that the high court denied the appellant the right to be heard, the second judgment refers to s 34 of the Constitution and relied extensively on case law on the subject. However, the case law authorities cited are not applicable in this instance, due to the absence of evidence, ie factual averments made on oath and presented as evidence in this Court.

[26] It is an incontrovertible fact that since the application was heard in the urgent court in 2017, none of the parties has delivered further affidavits or admissible statements on any factual allegation. The appellant merely relied on statements made in the appellant's notice of appeal, heads of argument and a collection of emails inserted in the appeal record. The emails are not marked as attachments to any affidavit deposed to either by the appellant, Mr Njau or any witness. The emails are neither verified as true copies of the originals, nor submitted as constituting proof of the entire communication between the appellant and Mokose J in the high court. In application proceedings, documentary evidence is submitted on affidavit, otherwise it remains inadmissible as evidence. This Court in *Minister of Land Affairs and Agriculture v D & F Wevell Trust*[10] stated at para 43 thus:

'… It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when conclusions sought to be drawn from such passages have not been canvassed in the affidavits.

[10] *Minister of Land Affairs and Agriculture and others v D & F Wevell Trust* [2007] SCA 153 (RSA); 2008 (2) SA 184 (SCA) para 43.

The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. *The position is worse where the arguments are advanced for the first time on appeal.* In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein*, and the issues and averments in support of the parties' cases should appear clearly therefrom.' (My emphasis.)

[27] Consequently, the entire narrative or version of the appellant on this ground of appeal, is inferred from emails improperly inserted in the record, in breach of an established authority of this Court in *Wevell Trust*. There is therefore no factual evidence on which this Court could apply the authorities on s 34 of the Constitution as they are cited in the second judgment. The appellant has failed to set out his case on affidavit, which would constitute both pleadings and evidence in support of this ground of appeal.

[28] In any event, even if the emails were admissible, they do not provide proof that the appellant was denied a right to be heard. There were about six emails included in the record, some of which are dealt with in paragraph 11 of this judgment. Of importance, is the second, fourth, fifth and sixth emails. In the second email, dated 23 April 2020 at 12:32, and sent to Mokose J, Mr Njau requested a postponement of the hearing scheduled for 30 April 2020. I will return to the content of this email later in this judgment. Mokose J's reply was in the third email dated 28 April 2020 at 13.35, sent by her secretary, Ms Shirley Ontong (Ms Ontong). Mokose J said that she is unable to accede to the request due to the absence of a substantive application for a postponement. The fourth email, initiated by Ms Ontong and dated 28 April 2020 at 00.56, was in reply to an email from Mr Njau, which is not attached and the content thereof is not known. In that email Ms Ontong mentions for the first time that according to Mokose J, the matter will proceed by 'zoom' (a virtual platform). She ended the email by indicating to Mr Njau that she will be in further contact with him. True to her word, the fifth email came on 29 April 2020 from Ms Ontong, wherein she requested Mr Njau to send her 'the contact detail for tomorrow's zoom meeting'. In the sixth and last

email on the same day, Mr Njau sent Mr Röntgen's *cellular phone number* to Ms Ontong. (My emphasis).

[29] As stated, I return to the second email sent by Mr Njau to Mokose J on 23 April 2020, seven days before the hearing. In that two-page email, Mr Njau, on behalf of the appellant, requested that the high court grant a postponement of the hearing. It should be recalled that as at that date, the appellant had neither delivered a notice to oppose Part B, an answering affidavit for Part B nor the heads of argument that were due on 14 April 2020. The second email states that the appellant's attorneys were appointed on 3 March 2020. Further, that Mr Röntgen, aged 85, and apparently the attorney dealing with the appellant's matter, was a high-risk person to contract the Covid-19 virus. In particular, the fourth paragraph on the second page of the email reads:

'As indicated above your Ladyship, Mr Röntgen Senior *has no access to email facility no computer infrastructure at his place of residence* hence unable to prepare and draw up a Substantive Application for Postponement and have same served and filled before your Ladyship for your Ladyship consideration as requested by the Rules of court. To this end, and with respect we plead therefore that your ladyship dispensed with the Rules of Court relative to service and process of the Application for Postponement *so that the Respondent' Application can be considered on the strength of this email'* (My emphasis).

[30] From the emails discussed above, I make the following observations. First, the proposal for the 'meeting via zoom' was an *initiative* of the high court, not of the appellant. Second, the proposed zoom meeting came after Mokose J had declined to *consider* the appellant's request for postponement in the form of an email. Third, in the second email, it is important to note that the appellant neither *requested audience* with the court in any manner or form nor *a case management* as an alternative, in terms of the Covid-19 Directives of the Judge President, Gauteng Division of the High Court. Fourth, when in the fifth email the Judge's secretary requested contact details necessary to establish a link for the zoom meeting, she was provided *with a cellular phone number of* Mr Röntgen*, and not an email*

*address*. According to the second email as quoted in the preceding paragraph, Mr Röntgen senior had no access to email and a computer, both necessary for a virtual hearing; therefore, the high court did not receive an email address for the link to be established. Fifth, the exigency of the application for postponement was contrived, as the pandemic restrictions at that time, had been in place for more than a month. Sixth, there is no evidence why Mr Njau's email address was not used. Seventhly, apart from the first and second emails; no other email, either from Mr Njau or the Judge's secretary, was copied to Rooth & Wessels for the Law Society as a party in the matter. Lastly, the last sentence of the quote in the preceding paragraph from the second email, amply demonstrates that Mr Njau did not expect to appear in court. He pleaded that the application for postponement be considered on the strength of that email.

[31] There is no mention in the emails or any affidavit as to why Mr Njau and/or the appellant did not attend court personally or request a teleconference with the judges, linking all participants on 30 April 2020, to plead for the postponement. It is a fact that the courts were open for litigants as per the Directives that had been issued by the Chief Justice on 19 March 2020.[11] In addition, the second judgment makes reference to the Judge President's Directives and correctly records that there were options available for a litigant to access the court. There is no factual allegation, less so on affidavit, as to which of these options were exercised by appellant and rejected by the high court. It must be emphasised that the high court neither granted nor dismissed or refused the request for postponement. The high court declined to consider an application for postponement lodged by email. There are no rules of court or directives that provided for this manner of lodging any application.

[32] In essence, my respectful disagreement with the second judgment stems from the following: first, the allegation by the appellant that he was

[11] See *GN* 187, *GG 43117*, 19 March 2020.

denied a postponement is false. The high court did not make a ruling to grant or deny the postponement. Mokose J took issue with the request being communicated by email. Second, the allegation that the appellant was denied a hearing, was made not on affidavit, but in the notice of appeal and heads of argument, both not constituting pleadings and evidence in motion proceedings. This ground of appeal was thus not pleaded in accordance with the established authority by this Court in *Wevell Trust*.[12]Third, the content of the emails, for reasons stated in paras 30 and 31 of this judgment, do not make out a case that the appellant was denied a hearing. The appellant, assisted by Mr Njau, was in communication with the Judge and also had the benefit of the Directives at his disposal, which he inexplicably failed to utilise.

[33] The high court found that the appellant's conduct raised a serious question about his fitness to continue practicing as an attorney. As counsel for the Law Society submitted, an attorney is expected to scrupulously observe and comply with the provisions of the Attorneys Act and Rules of the profession. In *Heppell v The Law Society of the Northern Provinces,*[13] this Court held that an attorney is a member of a learned, respected and honourable profession and by entering it, pledges himself with total and unquestionable integrity to society at large, to the courts and the profession. The law expects from an attorney *uberrima fides* – highest possible degree of good faith – in his dealings with his client, the public and the courts. This implies that an attorney's conduct, submissions and representations must at all times be accurate, honest and frank. The appellant's conduct fell short of the professional standards expected of an attorney. Considering the conspectus of the evidence, the appellant's conduct ineluctably impels a finding that he is not a fit and proper person to continue practicing as an attorney.

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[12] Para 26 of this judgment, Footnote 10.
[13] *Heppell v Law Society of the Northern Provinces* [2017] ZASCA 119 para 12.

[34] The charges against the appellant are serious in the extreme. Appropriating trust monies and being unable to account therefor could well be an offence of either theft or fraud. The public must have confidence that the monies entrusted to an attorney will be handled lawfully and in the interests of the attorney's clients. Consequently, the courts must protect the public from attorneys who are found to have misappropriated trust funds. After all it is the court's duty owed to the public to satisfy itself that an applicant for admission to the profession is a proper person to be allowed to practice and that admitting him or her to the profession (and allowing him or her to remain in the profession) does not pose any 'danger to the public and to the good name of the profession'.[14] For the reasons stated above, I am of the view that the order by the high court, to have the name of the appellant struck from the roll of attorneys, is appropriate. In my view, based on the reasons stated, the appeal must therefore fail.

[35] It is necessary briefly to say something about the costs. It is now well established that the Law Society is not an ordinary litigant because in bringing proceedings of the kind in issue here, it performs a public duty.[15] Therefore, it is not equitable that its members, who fund it, should have to pay for the costs incurred in litigation in the public interest especially where it is the successful party.

[36] In the result, I would have dismissed the appeal with costs on an attorney and client scale.

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SP MOTHLE

JUDGE OF APPEAL

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[14] *Ex parte Knox* 1962 (1) 778 (N) at 784.

[15] See, for example, *Incorporated Law Society v Taute* 1931 TPD 12 at 17; *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 408-409.

**Daffue AJA (Windell AJA concurring):**

[37] I have had the pleasure of reading the judgment of my colleague, Mothle JA (the first judgment). I have no quibble with the first judgment's exposition of the facts, nor the summary of the legal principles applicable. Unfortunately, for the reasons set out below, I am unable to agree with the decision regarding the outcome of the appeal. In my view, the appeal must succeed and the matter should be referred back to the high court insofar as the appellant's right to a fair public hearing before a court of law in terms of s 34 of the Constitution had been violated.

**Right to a fair trial**

[38] In the first judgment it was concluded that the appellant: (a) conflated Parts A and B of the notice of motion; (b) did not, as a matter of fact, oppose Part B; and (c) neglected to file an answering affidavit in that regard, and was 'thus not on record as opposing Part B of the application'. I respectfully disagree. Firstly, there was no need for the appellant to file a further answering affidavit. The full set of application papers (founding, answer and replying affidavits) were already before the high court when it dealt with Part B, as was the case in the Part A proceedings. The appellant would not have had the right to file a second answering affidavit, unless he asked for and obtained leave from the high court to file a supplementary affidavit. Secondly, it is clear from a reading of the answering affidavit that the appellant was opposing both Part A and Part B of the application. The Law Society filed one founding affidavit in support of both Part A and Part B and the appellant responded thereto. Thirdly, the high court should have been well aware of the fact that Part B of the application was opposed and that the appellant wanted the opportunity to be heard. I say so for the following reasons.

[39] A national lockdown was announced from 26 March 2020 to 16 April 2020. All non-essential activities were suspended and only essential services remained available. Legal services were not classified as essential services.

This initial period of 21 days was later extended to 30 April 2020, the date on which the opposed striking-off application was to be heard. Several problems were experienced by the appellant's new attorney, in particular, and that attorney's firm, in general. This led to a written request to the Law Society's attorneys for postponement of the application on 21 April 2020. The Law Society was not willing to accede to a postponement and insisted that a formal application be moved.

[40] As a result, on 23 April 2020, a week before the hearing, a member of the appellant's new firm of attorneys, sent an email to the senior presiding judge's secretary, seeking a postponement. It was explained that the attorney dealing with the matter did not have proper email facilities, nor did he have the necessary infrastructure at home to prepare and draft a substantive application for postponement. Full details were provided to the judge to explain why a postponement was sought. The appellant's application for a postponement was in line with the Practice Directive of the Gauteng Provincial Division dated 8 April 2020, which was issued during level 5 of the national lockdown. This Practice Directive stated that 'should parties be unable to reach an agreement (pertaining to postponements), either party may request that the matter be placed before a case management judicial officer in order to facilitate the expeditious re-enrolment of the matter'. In my view, such a directive is indicative of an intention not to subject litigants to substantive and formal applications for postponement during the lockdown period.

[41] In any event, the high court considered the correspondence between the parties and was therefore aware that the appellant was informally seeking a postponement of the striking-off application which was set down for hearing on 30 April 2020. The senior judge's secretary responded the next day by email, attaching the judge's note directing that a formal application for postponement was required. On 28 April 2020, the secretary informed the appellant's attorney in an email that the striking-off application was to be heard on 30 April 2020 by making use of the Zoom virtual conferencing platform. The next day, on 29 April 2020, the secretary requested the relevant

contact details of the appellant's attorney, and the attorney's cell phone number was provided to her. In the email the secretary also advised the attorney that she 'will keep in touch' with him the next day.

[42] Notwithstanding this communication, the appellant's attorney was never invited to a virtual hearing, nor was he contacted telephonically. As a result, the appellant was not allowed the opportunity to either formally ask for a postponement or present arguments in respect of the merits of the dispute. Moreover, no virtual hearing was conducted as anticipated. Mr Groome, counsel on behalf of the respondent, confirmed during oral argument before this Court that he also waited to be invited to the Zoom hearing, but that he never received a link nor was he called upon to address the court.

[43] On the appellant's version, no further correspondence was received from the court until 15 June 2020 (six weeks later), when the parties were requested to send a draft order to the judges. In its judgment delivered on 17 June 2020 the high court stated that the 'matter was decided on the papers after the parties were timeously informed by the court that the matter would be dealt with on the papers' and that the appellant 'had at the time, decided not to file any papers to oppose the application'. The high court held that it was satisfied:

'. . . that [the Law Society] has complied with the Practice Directives for setting down the *opposed matter*, and that despite this, *[Mr Samuels] chose not to appear and present his case before the court*. Accordingly, this Court was of the view that no substantive application for a postponement had been received and as such, proceeded with the application.' (Emphasis added.)

It further observed, with reference to the Practice Directive:

'The Practice Directive therefore makes it clear that [Mr Samuels] had an opportunity open to him to approach the court and have the matter placed before judicial case management *or present his arguments before court on 30 April 2020 through [virtual] platforms or other electronic means of hearing of matters*, as has been the practice of this Division since the beginning of the

lockdown period, to accommodate and entertain all the matters that have been placed on the roll for hearing.' (Emphasis added.)

[44] The high court's findings are clearly wrong for three reasons. One, although it acknowledged that the matter was opposed, it is not correct that the appellant 'chose not to appear and present his case before the court'. Neither the appellant nor the Law Society was informed that the application would be dealt with 'on the papers' and without the benefit of oral argument. In fact, the high court informed the appellant's attorney and the Law Society's counsel that the matter will be heard virtually on the Zoom platform. Two, the high court was not entitled to deal with the matter 'on paper' without hearing oral argument. It is only in terms of s 19*(a)* of the Superior Courts Act 10 of 2013 (Superior Courts Act) that a high court exercising appeal jurisdiction has the power to dispose of an appeal without hearing oral arguments. Then, in dealing with the matter 'on paper', the high court failed to consider the appellant's answering affidavit and erroneously found that the appellant 'failed to place any evidence' before it to challenge the Law Society's allegations 'which remained undisputed'. As set out above, the appellant filed an answering affidavit in opposition of Part A and Part B of the application. Three, the appellant was not given an opportunity to 'present his arguments before court on 30 April 2020 through [virtual] platforms or other electronic means of hearing of matters'. The matter was not heard in open court and it was impossible for the appellant or his legal representative to present a case to the high court when they were not invited to a virtual hearing.

[45] Section 34 of the Constitution provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. In addition, s 32 of the Superior Courts Act reads as follows:

'Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except insofar as any such court may in special cases otherwise direct, be carried on in open court.'

[46] The reference to 'all proceedings' includes argument by or on behalf of the litigants.[16] This is the default position. In *Esau and Others v Minister of Cooperative Governance and Traditional Affairs and Others*,[17] this Court confirmed that the rule of law, a founding value of our constitution, applies in times of national crisis as much as it does in more stable times.

[47] In *De Lange v Smuts N O and Others (De Lange)*,[18] Mokgoro J reiterated that everyone has the right to state his or her own case, 'not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance'.[19] In *Western Cape Education Department and Another v George*,[20] Howie JA emphasized that it is desirable that a judgment should be the product of thorough consideration of, inter alia, forensically tested argument from both sides on questions that are necessary for the decision of the case.[21] And in *Pepkor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd*

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[16] *Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd* [1973] 2 All SA 148 (A); 1973 (1) SA 627 (A) at 628E-H.

[17] *Esau and Others v Minister of Cooperative Governance and Traditional Affairs and Others* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) para 5.

[18] *De Lange v Smuts N O and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) para 131; *S v Mabena and Another* [2006] ZASCA 178; [2007] 2 All SA 137 (SCA); 2007 (1) SACR 482 (SCA) para 2.

[19] In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) para 39, Moseneke DCJ affirmed the principle of open justice as follows: 'There exists a cluster or, if you will, umbrella of related constitutional rights which include, in particular, freedom of expression and the right to a public trial, and which may be termed the right to open justice. . . Section 34 does not only protect the right of access to courts but also commands that courts deliberate in a public hearing. This guarantee of openness in judicial proceedings is again found in section 35(3)*(c)* which entitles every accused person to a public trial before an ordinary court'.

[20] *Western Cape Education Department and Another v George* [1998] ZASCA 26; 1998 (3) SA 77 (SCA) at 84E; [1998] 2 All SA 623 (A).

[21] See also *Public Servants Association obo Ubogu v Head, Department of Health, Gauteng and Others* [2017] ZACC 45; 2018 (2) BCLR 184 (CC); 2018 (2) SA 365 (CC). At para 62 the Constitutional Court confirmed that the right to a fair public hearing before a court not only guarantees everyone the right to have access to courts, but also constitutes public policy.

*and Others*,[22] this Court stated the following with reference to s 34 of the Constitution:

'. . . [T]he failure . . . to grant the appellants an opportunity to make written or oral submissions on the draft order . . . was inappropriate and likely to bring the administration of justice into disrepute. The submission has merit. It is axiomatic that a hearing should be fair. This lies at the heart of our system, is common sense and is enshrined in the Constitution. As the litigants, the appellants should have been given an opportunity to raise with the court, any concerns they might have had in relation to the draft order. Secondly, as part of the decision-making process, their legal representatives were entitled to make written or oral submissions regarding the draft order. This may well have obviated the need for an appeal. The issuance of the order in the circumstances is regrettable.'[23]

[48] Recently, in *Morudi and Others v NC Housing Services and Development Co Ltd and Others (Morudi)*,[24] the Constitutional Court held that it must follow that when the high court granted an order sought to be rescinded without being prepared to give audience to the applicants, it 'committed a procedural irregularity' which was 'no small matter'. It held that the court 'effectively gagged and prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings', which constituted a 'serious irregularity as it denied these applicants their right of access to court'.

[49] With these principles in mind the question to be considered is whether the appellant was denied the right to a fair public hearing as provided for in s 34 of the Constitution, and if so, what the consequences are. The fundamental principle that courts must be open and accessible, as provided for in s 34 of

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[22] *Pepkor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd and Others; Steinhoff International Holdings NV and Another v AJVH Holdings (Pty) Ltd and Others* [2020] ZASCA 134; [2021] 1 All SA 42 (SCA); 2021 (5) SA 115 (SCA).
[23] Ibid para 14.
[24] *Morudi and Others v NC Housing Services and Development Co Ltd and Others* [2018] ZACC 32; 2019 (2) BCLR 261 (CC) para 33.

the Constitution and s 32 of the Superior Courts Act, was severely challenged by the national lockdown as a result of the COVID-19 pandemic, especially during level 5, which led to a significant limitation to hearings in physical court rooms. The various divisions of the high court as well as this Court issued Practice Directives concerning the functioning of the courts, including virtual hearings through electronic teleconferencing platforms such as Zoom and Microsoft Teams. As indicated, the parties in this case accepted that the hearing of 30 April 2020 would not be in an open and physical courtroom, but conducted through Zoom. They were, however, never invited to any virtual hearing. In addition, the Practice Directive specifically stated, insofar as opposed applications were concerned, that 'the parties shall endeavour to reach an agreement dispensing with oral argument and shall to that end, inform the judicial officer presiding in the matter of their decision'. This is in line with clauses 14 and 15 of the directives issued by the Chief Justice on 17 April 2020, published in *Government Gazette* no 43241 of 21 April 2020. No such agreement was reached between the parties and they were never asked whether the judges to whom the matter was allocated could deal with it on the papers and without receiving oral arguments. It is impossible, and would be highly speculative, to anticipate what could have happened during a hearing attended to by the appellant, either personally or through his legal representative.

[50] The high court, for the reasons set out above, committed a serious procedural irregularity which resulted in a failure of justice. This is, as stated in *Morudi*, no small matter. In *De Lange*, Mokgoro J said that the 'interest implicated will determine the standard of procedural fairness'.[25] In that matter, the interest implicated was the right to personal liberty and it was held that the 'standard of procedural protection must be high'.[26] In the present matter, the order of the high court affects the status of the appellant, a professional person and attorney in practice for over 30 years. In my view, the standard of

[25] *De Lange* para 132.
[26] Ibid.

protection afforded to the appellant should similarly be high. The first judgment further remarked that the appellant could have applied for leave from this Court to file a supplementary affidavit. That may be so, but the failure to do so does not remedy the breach of the appellant's constitutional rights to a fair hearing. It would, therefore, be wrong to adjudicate the appeal on the basis of the facts before us.

**Costs**

[51] Pertaining to costs it is accepted that a Law Society is generally entitled to costs even if unsuccessful and usually on an attorney and client scale.[27] Bearing in mind the appellant's attitude towards the Law Society and his approach to the litigation in general, he should bear the costs of appeal. In order to ameliorate the appellant's position and pertinently based on the finding that he did not have a fair hearing, costs on a party and party scale should be ordered and not the usual attorney and client costs.

**Order**

[52] The following order is granted:

1 The appeal is upheld and the order of the high court dated 17 June 2020 is set aside.
2 The application is referred back to the high court for determination by a differently constituted bench.
3 The appellant to pay the respondent's costs of this appeal.

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J P DAFFUE

ACTING JUDGE OF APPEAL

[27] *Law Society of the Northern Provinces v Dube* [2012] ZASCA 137; [2012] 4 All SA 251 (SCA) para 33.

**Petse AP (Siwendu AJA concurring):**

[53] I have had the advantage of reading with interest the two judgments penned by my colleagues, Mothle JA (the first judgment) and Daffue AJA (the second judgment). Regrettably, I find myself in respectful disagreement with the first judgment and its proposed outcome.

[54] Whilst I am in agreement with the ultimate conclusion reached in the second judgment and the order it proposes, there are, however, aspects of the second judgment to which I cannot subscribe without qualification. Accordingly, I shall confine myself to what I consider to be at the core of this appeal.

[55] The factual matrix has been set out in the first judgment, and elaborated upon in the second judgment, in sufficient detail to conduce to a full appreciation of what lies at the heart of this case. Thus, there will be little virtue in rehashing the facts in this judgment. Bearing this in mind, I shall state the reasons for my disagreement with the first judgment and the uneasiness I have in relation to parts of the second judgment as briefly as possible.

[56] Insofar as the second judgment is concerned, it suffices to state that in the view I take of the matter, the fact that the appellant's fair hearing right under s 34[28] of the Constitution has been infringed puts paid to any contention sought to be advanced by the respondent that notwithstanding this infringement we ought to enter into the substantive merits of the appeal.

[28] Section 34 of the Constitution of the Republic of South Africa Act 108 of 1996 reads:
'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before court or, where appropriate, another independent and impartial tribunal or forum.'

[57] As the Constitutional Court made plain in *De Beer N O v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)*:
'This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order.'[29]

[58] The fundamental importance of the fair hearing right, entrenched in s 34 of the Constitution, was again underscored by the Constitutional Court in *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Bank of South Africa t/a The Land Bank and Another* [30] in which Brand AJ emphasised that '(t)he importance of the fundamental right which is guaranteed in section 34' was beyond question.

[59] After posing the pertinent question as to whether 'the appellant was denied the right to a fair public hearing as provided for in s 34 of the Constitution' the second judgment emphatically answers that question in the affirmative. In my respectful view, that should have been the end of the matter. This is particularly so when regard is had to the fact that the second judgment proposes to remit the case to the high court for the latter court to then hear the dispute between the disputants anew.

[60] For its part, the first judgment proposes to dismiss the appeal with costs. It does so, notwithstanding the fact that it accepts that the appellant was effectively denied a hearing because the high court failed to fulfil its undertaking, conveyed to the appellant a mere two days before the hearing, to provide the appellant with a link to enable him to take part in the hearing

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[29] *De Beer N O v North-Central Local Council and South-Central Council and others (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC) para 11.
[30] *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Bank of South Africa t/a The Land Bank and Another* [2011] ZACC 2; 2011 (3) SA 1 (CC) para 57.

virtually via electronic platforms like Zoom or Microsoft Teams, in line with the directives issued by the Chief Justice on 17 April 2020 following the national lockdown pursuant to the declaration of a national state of disaster under the Disaster Management Act 57 of 2022.

[61] The first judgment explains its decision to adopt this rigid approach on the basis that the appellant had not only been indolent but also lackadaisical, given the gravity of the matter, by studiously avoiding to answer serious allegations of impropriety levelled against him by the respondent. This, notwithstanding the fact that he had ample time within which to do so. Having elected to remain supine, the first judgment reasons, it can therefore hardly lie in the mouth of the appellant to cry foul when the inevitable, ie having his name removed from the attorneys roll, eventuated. Nor should he, so late in the day, be permitted to invoke his fair hearing rights under s 34 of the Constitution. Moreover, the common thread running through the first judgment is that the appellant elected to adopt an obstructionist approach calculated to delay the expeditious finalisation of the matter instead of pertinently responding to the serious allegations against him.

[62] It may well be that the manner in which the appellant conducted his case is deserving of the strictest censure. However, one thing is clear which is that the appellant was determined to resist the relief sought by the respondent to the hilt. Whether the defence that he mounted is good or bad does not matter for present purposes. Thus, the appellant's perceived dilatory conduct cannot excuse the high court's denial of the appellant's fair hearing right.

[63] The crucial question that confronts us in this case is therefore whether the high court violated the appellant's right entrenched in s 34 of the Constitution and thereby committed an irregularity of so serious a nature and far-reaching proportions so as to vitiate the hearing that took place in his absence. Whatever view one may have about the strength of the respondent's case and the weakness of the appellant's answer thereto is for now of no consequence. What is paramount for present purposes is that s 34 entrenches the right of everyone to, inter alia, have any dispute that can be

resolved by the application of the law decided in a fair public hearing before a court.

[64] As Mokgoro J explained in *De Lange v Smuts N O and Others*,[31] the right accorded by s 34 is important for its own sake 'not because [the person's] version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, . . . must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance.'[32]

[65] To my mind, when the high court failed to fulfil its undertaking to the appellant and afford him a hearing, it committed a serious procedural irregularity. As Madlanga J aptly put it in *Morudi and Others v NC Housing Services and Development Co Ltd* [33] the high court 'effectively gagged' the appellant and prevented him from participating in the proceedings. This was 'no small matter'. It was a serious irregularity that denied the appellant the full extent of his right of access to court.

[66] One should never lose sight of the fact that it is a requirement of the rule of law that when a person may be adversely affected by an exercise of public power, which is what the exercise of judicial power entails, such a person is entitled to be heard.[34] In *De Beer NO v North-Central Local* Yacoob J put it thus:

'This s 34 fair hearing right affirms the rule of law, which is a founding value of our constitution. The right to a fair hearing before a court lies at the heart of the rule of law . . . courts in our country are obliged to ensure that the proceedings before them are always fair . . . It is a crucial aspect of the rule of

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[31] *De Lange v Smuths N O and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC) para 131.
[32] See also: *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC) para 39.
[33] *Morudi and others v NC Housing Services and Development Co Ltd* [2018] ZACC 32; 2019 (2) BCLR 261 (CC) para 33.
[34] See in this regard: *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998(3) SA 785 (CC) paras 46 and 131.

law that court orders should not be made without affording the other side a reasonable opportunity to state their case.'[35]

[67] In the context of the facts of this case it must go without saying that since the appellant had unequivocally expressed a desire to be heard, the high court breached one of the most fundamental procedural elements of the rule of law. And as this Court observed in *Transvaal Industries Foods Ltd v B MM Process (Pty) Ltd* [36] almost five decades ago:
'. . . neither the court nor litigants should normally be deprived of the benefit of oral argument in which counsel can fully indulge their forensic ability and persuasive skill in the interests of justice and their client.'[37]

[68] Contrary to what the first judgment says, it is cold comfort to the appellant to hold, as the first judgment does, that 'this court was in as good a position as the high court to afford him a hearing.' If anything, to view the irregularity committed by the high court in this light would be to trivialise a serious irregularity that 'was no small matter.' In this regard, it bears mentioning that as between the protagonists themselves, it is common cause that both of them were not afforded the opportunity to be heard on 30 April 2022. Accordingly, the appellant was well within his rights to invoke s 34 of the Constitution, a complaint squarely raised both in his application for leave to appeal to this Court and heads of argument in this appeal.

[69] It remains to deal briefly with the question of costs. Although the appellant must succeed in this appeal, he should nevertheless bear the costs of the appeal. In *Incorporated Law Society v Taute*[38] the court there held that in instances where a law society fails to prove charges against an attorney and

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[35] *De Beer NO v North-Central Local Council and South-Central Council and Others (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (1) BCLR 1109 (CC) para 11; See also in this regard *Twee Jonge Gezellen (Pty) Ltd and Another v Land & Agricultural Development Bank of South Africa t/a the Land Bank and Another* 2011 (3) SA 1 (CC) para 56.
[36] *Transvaal Industries Foods Ltd v B M M Process (Pty) Ltd* 1973 (1) SA 627 (A)
[37] Idem at 628 G-H
[38] *Incorporated Law Society v Taute* 1931 TPD 12 at 17.

the society's conduct is free of blame, the correct order is that there be no order as to costs. Moreover, in view of the fact that the respondent is not an ordinary litigant because in embarking on this litigation it was performing a public duty, I consider it appropriate in the context of the peculiar facts of this case, not only to deprive the appellant of his costs – to which he would ordinarily be entitled – but also to direct that he pay the respondent's costs on appeal. However, in order to ameliorate the appellant's position and strike a fine balance between the parties' competing interest, I would order that such costs be on a party and party scale. Hence my concurrence, albeit for different reasons, in the order proposed in the second judgment.

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X M Petse

Acting President of the

Supreme Court of Appeal

**SIWENDU AJA:**

[70] I have read the judgments by Mothle JA, Daffue AJA and Petse AP. I concur in the judgment by Petse AP. However, I am duty bound to remark that it is an open secret that the courts below are often inundated with cases where litigants employ dilatory tactics with no genuine desire to bring their disputes to finality to avoid a certain outcome.

[71] The first judgment details a litany of facts which point to a carefully orchestrated strategy by the appellant to frustrate the final adjudication of the dispute with the Legal Practice Council (the Council). There is a duty on a legal practitioner to participate fully in any inquiry instituted by the Council as an expression of the legal practitioner's duty of loyalty to the Council and the

rule of law[39]. An inference is inescapable from the papers that over and above the delays, the defamation proceedings instituted by the appellant against Ms Mabaso which have not been finalised, are calculated to silence and discourage her from pursuing her complaint against him.

[72] As stated in the second and third judgments this appeal raises the spectre of a procedural irregularity by the court below and an apparent breach of s 34 of the Constitution. Even though nothing turns on this at this juncture, it merits emphasising that the subject and content of the right enshrined in s 34 is not one-sided but has a concomitant obligation and or duty on a claimant. It is not sufficient to merely claim an infringement of the right to be heard. A litigant in the position of the appellant, particularly an officer of the court has a corresponding duty to demonstrate and legitimately exercise the right conferred. An apparent failure to do so subverts and undermines the administration of justice and the rule of law.

[73] The first judgment considered the sui generis nature of the proceedings and states with reference to *Malan and Another v Law Society, Northern Provinces*[40] that a court of appeal is in as good a position to judge the facts as was the court below. Upon a careful consideration, the view in *Malan* upon which the judgment relies applies to factual findings and not to procedural irregularities. It is for this reason amongst others, that I respectfully differ with the first judgment.

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NTY SIWENDU

ACTING JUDGE OF APPEAL

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[39] *Hewetson v Law Society of the Free State* 2020 (5) SA86 (SCA) para 67; and *Mzayiya v Road Accident Fund* [2021] 1 All SA 517 (ECL) para 94.
[40] 2009 (1) SA 216 para 12.

**APPEARANCES**

| | |
|---|---|
| For the appellant: | F A Ras SC (with M Augoustinos) |
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