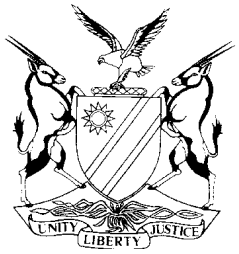

CASE NO.: A 211/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DISCIPLINARY COMMITTEE FOR LEGAL PRACTITIONERS **Applicant**

and

LUCIUS MURORUA **First Respondent**

LAW SOCIETY OF NAMIBIA **Second Respondent**

CORAM: **VAN NIEKERK, J** *et* **PARKER, J** *et* **SIBOLEKA, J**

Heard on: 2010 November 25 – 26

Delivered on: 2012 June 25

JUDGMENT

PARKER J: [1] This application has been brought by the applicant (the Disciplinary Committee) ('DC') in terms of Part IV of the Legal Practitioners Act, 1995 (Act No. 15 of 1995) ('LPA'), particularly s. 35(9) thereof. The founding affidavit is deposed to by the chairperson of the applicant at all material times, Mr Theo Jooste Frank SC. The applicant, represented by Mr Smuts SC, prays for an order in the following terms according to the notice of motion:

'(1) That first respondent be struck from the roll of legal practitioners;

alternatively

that first respondent be suspended from the practice of legal practitioner for a period of 2 years or such other period as the Court deems appropriate.

(2) That first respondent immediately surrender and deliver to the Registrar of this Honourable Court his certificate of enrolment as legal practitioner of this Honourable Court.

The further relief sought in prayers 2–8 flow consequentially from the primary relief in prayer 1.'

[2] The first respondent, represented by Mr Soni SC, has moved to reject the application and the respondent does so on two primary grounds, namely, (1) there is no proper application before the Court, 'and for that', says Mr Soni, 'we rely on what is contained in the Supplementary Affidavit'; and (2) the first respondent 'disputes that he was rightly convicted of any of the offences'. That is to say, the first respondent disputes his being found guilty of the charge in consequence of which the applicant has made application in terms of Part IV of the LPA in which it has prayed for the relief set out in the notice of motion.

[3] When I come to deal with the aforementioned two grounds, I shall also treat Mr Soni's submission and prayer that there are disputes of fact relating thereto and so the matter should be referred to oral evidence.

[4] I proceed to consider the first respondent's contention that there is no application properly before the Court in terms of Part IV of the LPA. This issue concerns proceedings of the applicant respecting the respondent's disciplinary hearing. In this regard, it is also Mr Soni's submission and prayer, as I have intimated previously, that a determination of the matter calls for referring it to oral evidence because the issue involved concerns the basic point as to whether there was a meeting properly so called of the applicant at which a decision also properly so called was taken by the applicant that would make the bringing of the application conform with the relevant provisions of Part IV of the LPA.

[5] I shall now proceed to treat the first ground first on account of Mr Soni's submission that if the Court found that there was no proper application before the Court; then that would be the end of the matter.

[6] As respects the first ground, Mr Soni relies on two items. The first is a supplementary affidavit by the first respondent. Although there were initial objections to the filing of this affidavit without the leave of the Court, the applicant did file answering affidavits to the issues raised in the supplementary affidavit. At the hearing Mr Smuts for the applicant informed the Court that he was no longer objecting to the reception of the supplementary affidavit only because he wanted the application to proceed without undue delay. In this spirit the affidavit is allowed.

[7] The annexures to this affidavit are important for Mr Soni's argument. These are, *inter alia*, the minutes of the applicant's meeting on 4 February 2008 during which the complaint against the first respondent was heard (Annexure "SLHM2"); the minutes of the applicant's meeting on 27 and 28 May 2008 when a decision regarding the sanction to be imposed was taken (Annexure "SLHM5"); and a letter by a member of the applicant, Mrs A Van der Merwe (Annexure "SLHM7") (the "Van der Merwe letter"). In this letter addressed to the first respondent, Mrs Van der Merwe gives certain explanations regarding errors and omissions in the minutes and clarifying certain matters. In the supplementary affidavit the first respondent takes issue with the composition of the applicant on the dates of the meetings mentioned above to provide a basis for the submission made by Mr Soni.

[8] The second item on which Mr Soni relies is a letter under the hand of the first respondent in which he records what, according to the respondent, arose out of a conversation he had with Mr Dyakugha, the secretary of the applicant at all material times ("the Murorua letter").

[9] Mr Smuts strenuously objected to the letter being admitted as part of the papers as it was only presented the day the hearing of the application commenced and was not properly supported by a written application. Argument was heard on the issue but a ruling was held over for decision along with the merits of the main application. The letter was handed up as its contents assisted in an understanding of the argument.

[10] As I have said, the gist of the letter is that the first respondent records the contents of a conversation he had with Mr Dyakugha, in which the latter had allegedly indicated that he had no recollection that the decision regarding the sanction was taken at a meeting and that it was taken by telephone. This conversation allegedly took place long after the supplementary affidavit referred to above and the applicant's answer thereto had been filed. The effect of the alleged statement by Mr Dyakugha is that, in spite of his affidavit (filed as part of the applicant's answer to the supplementary affidavit) confirming that there had indeed been a meeting at which the sanction was discussed, he indicated to the first respondent that he had no recollection of such a meeting taking place. From the Murorua letter it is also clear that he was not willing to depose to an affidavit to this effect.

[11] As respects the first ground, Mr Soni submitted that 'there is no proper application before this Court 'and for that we rely on what is contained in the (first respondent's) supplementary affidavit ...;' in particular what the respondent 'understands happened at the disciplinary hearing (conducted by the applicant) relating to the sanction ...' imposed by the applicant on the first respondent. As I understand the tenor of the first respondent's supplementary affidavit; the first respondent questions the correctness of the minutes of the meeting in question, and also questions what transpired at the meeting. The first respondent wrote a letter to Mrs Van der Merwe (a member of the applicant at the material time) and Ms Van der Merwe responded that the minutes in question were not accurate, and she explained why, in her opinion, the minutes were not accurate (in 'the Van der Merwe letter'). Thus, for the first respondent, in virtue of the inaccuracies in the minutes, there have been irregularities in the decision-making process in relation to the disciplinary hearing of the first respondent. Indeed, in fairness to the first respondent, this called for an explanation; and Mr Frank did just that in an affidavit filed with the Court on 3 March 2010. In that affidavit Mr Frank confirmed what Ms Van der Merwe had stated in her letter and he goes on to explain extensively and clearly the inaccuracies.

[12] In his affidavit, Mr Frank states further categorically thus:

> 'I could not however be present for the entire meeting held over two days. As is apparent from the minutes at page 3 thereof, it is stated

> that my apologies were noted at the resumption of the meeting at 10h30 on 28 May 2008 (the second day). I wish to make it clear however that during the deliberations concerning the sanction in respect of the first respondent, I was present and chaired. So too were Ms van der Merwe and Mr Dyakugha present. Mr Angula recused himself. We reached the decision as is set out in my founding affidavit and which is also confirmed in the minutes. This item in the minutes at page 4 should however have appeared prior to the adjournment on 27 May 2008. To that extent, the sequence of items is incorrect. It was incorrect to include this item after I had apologised as this would indicate that I was absent. The sequence of this item in the minutes is thus incorrect.
>
> 26.2. Ms van der Merwe is entirely correct in her letter annexed as "SLMH7" in stating that this item would have been discussed and decided on 27 May 2008 and not on 28 May 2008 in confirming her presence and that Mr Angula had excluded himself from those deliberations. Her explanation for the item being reflected as having taken place on 28 May 2008 may have been the fact that she had then formally asked Mr Dyakugha as Secretary on 28 May 2008 to inform the first respondent of the applicant's decision on sanction. The contentions advanced in paragraph 27 that the decision on sanction was taken by two persons are not correct. The incorrect basis for the submissions had in any event already been conveyed by Ms van der Merwe in her letter. I further refer to her confirmatory affidavit and to that of Mr Dyakugha.'

[13] In dealing with the point presently under consideration, I express the following views and make the following factual findings. The first respondent was not at the meeting where sanctions were discussed and a decision thereon taken. He relies solely on what is contained in the Van der Merwe letter; but Mr Frank has given a full explanation thereanent – replete with frankness (pardon the pun) and honesty. Indeed, as Mr Smuts submitted, it is not out of the ordinary in human experience that minutes of a meeting that stretches over two or more days may mix up certain aspects relating to a particular day's business and incidental matters. Be that as it may, what is more, Ms Van der Merwe has in a confirmatory affidavit confirmed what Mr Frank states, also on oath, that relates to her.

[14] It follows that, in my opinion, what is sufficient evidence that I accept is Ms Van der Merwe's affidavit which confirms in material respects what Mr Frank states in his affidavit, in particular, the following relevant statements:

> 'I wish to make it clear however that during the deliberations concerning the sanction in respect of the first respondent, I was present and I chaired. So too were Ms Van der Merwe and Mr Dyakugha present.'

[15] Mr Soni submitted that the alleged indication by Mr Dyakugha is suggestive thereof that everything is not in order with the procedure followed by the applicant and the manner in which the meetings had been constituted and conducted and that this provides support for the allegations to this effect in the first respondent's supplementary affidavit. He submitted that this issue should be referred to oral evidence. In my judgment, I do not, in virtue of the aforegoing analysis and conclusions, see any reason why the matter of the said meeting and the said decision on sanction in the light of Mr Frank's affidavit and the Van der Merwe letter should be referred to oral evidence, seeing that I have been able to decide on the papers that there was such a meeting and such decision properly so called in terms of Part IV of the LPA.

[16] But that is not the end of the matter. As I indicated previously, as respect the first ground for opposing the application, Mr Soni hangs the respondent's case also on the Murorua letter, too; and so, it is the Murorua letter that I now direct the enquiry. As I have said previously the Murorua letter, according to Mr Murorua (the first respondent), records a conversation he had had with Mr Dyakugha who, as I have stated supra, was at all material times the secretary of the applicant. And, as the reason for so saying will become apparent shortly, the secretary of the applicant is a member of the applicant in terms of s. 34 of the LPA; and so, I do not, with respect, see what legal point the first respondent hopes to score by stating in his supplementary affidavit that 'the decision on sanction was taken by only two persons, only one of whom was a legal practitioner, Ms Van der Merwe: Mr Dyakugha is a secretary of the Disciplinary Committee'.

[17] With the greatest deference to Mr Soni, I do not think the Murorua letter has any probative value: it is not relevant. The placing of the Murorua letter before the

Court cannot therefore, take the first respondent case any further than where it is: the letter cannot alter or replace Mr Dyakugha's confirmatory affidavit, confirming the above-quoted statements by Mr Frank on oath. In this regard, it is worth noting that the Murorua letter is, as I have intimated previously, not under the hand of Mr Dyakugha, nor are the statements contained therein that are attributed to Mr Dyakugha made on oath. Thus, what stands as sufficient evidence, as respects Mr Dyakugha, is Mr Dyakugha's affidavit, which significantly, has to date not been withdrawn or altered, confirming Mr Frank's statement, also under oath, concerning the meeting of the applicant and the applicant's decision on the sanction meted out against the first respondent in terms of s. 35 of the LPA. And what is more, the contents of Mr Dyakugha's confirmatory affidavit are clear, unambiguous and straight to the point.

[18] To argue – as Mr Soni appears to do – that the Murorua letter in relation to Mr Frank's statements on oath has created a dispute of fact and so the matter should be referred to oral evidence is to elevate, without justification, the contents of the Murorua letter to the same level as statements given on oath by Mr Dyakugha, confirming the statements given on oath by Mr Frank. That, with respect, I cannot accept: it will be wrong and unjudicial to accept such argument and refer the matter to oral evidence.

[19] From what I found above, I accept Mr Smuts's submission that what is important for this Court in these proceedings is for the Court to be satisfied as to what was resolved by the applicant's meeting held over a two-day consecutive period, being 27–28 May 2008. I, therefore, on the papers, hold that the decision on sanction was taken by three members of the applicant at its aforementioned meeting, that is, Mr Frank, Mrs Van der Merwe and Mr Dyakugha. It is worth noting that according to s. 34(6) of the LPA, three members of the applicant form a quorum at a meeting of the applicant. Accordingly, I find that the applicant took the decision to bring the application to the Court in terms of Part IV of the LPA; the majority of 2:1 in favour of the application praying for an order to strike the first respondent's name off the roll, and the minority in favour of an order to suspend the first respondent from practice for a period of two years. Having so decided, I do not see any good reason in terms of rule 6(5)(g) of the Rules to refer the matter to oral evidence. It is with firm confidence that I respectfully reject Mr Soni's application in that regard.

[20] For aforegoing reasoning and conclusions, I have not one iota of hesitation in holding that the present application is properly before the Court in terms of Part IV of the LPA. Having so found, it is my view that it is otiose to consider the point that came up in oral submissions, which, as I understand it, is whether the present application is in terms of the Court's inherent power of supervision of the legal profession or the Court's statutory power of supervision of the legal profession in terms of the LPA.

[21] I now proceed to treat the other ground which concerns the applicant finding the respondent guilty of two of the charges he faced at the applicant's disciplinary hearing. The first respondent was charged with three charges at the said disciplinary hearing conducted by the applicant and he pleaded not guilty to all three charges. After the hearing, the applicant acquitted the first respondent on the second charge but convicted him of the first charge and the third charge, being charging a contingency fee, and imposed a penalty of a fine, wholly suspended on certain conditions. These two charges do not warrant any further treatment in these proceedings. Only the first charge is relevant to the present proceedings.

[22] The basis of the present proceedings is the applicant finding the first respondent guilty of the first charge and the applicant's opinion that 'the unprofessional or dishonourable or unworthy conduct' (within the meaning of s. 33 of the LPA) of which the first respondent is guilty justifies an application to the Court for an order to strike the legal practitioner's name from the Roll in terms of s. 35(9) of the LPA. Thus, in my view, in these proceedings what this Court must set its eyes on is the interpretation and application of the relevant provisions of Part IV of the LPA; and that is what I now proceed to do.

[23] Filed of record in the present proceedings is a judgment given in 'the *de bonis propriis* proceedings' by the Court (*per* Manyarara AJ) in *Aune Ndapewa Abiator v Willem Willy Abiatar* Case No. I 945/2002 (judgment ('the Manyarara judgment') delivered on 29 September 2004). The *de bonis propriis* proceedings arose from a matrimonial matter ('the matrimonial proceedings'), with the same citation and the same Case Number, where the first respondent was the legal representative of the respondent and Ms Angula the legal representative of the applicant.

[24] In the *de bonis propriis* proceedings, after summarizing the facts of the case which he found to be 'common cause' between the parties, Manyarara AJ came to the following pithy and damning conclusion at p. 4 of the Manyarara judgment:

> 'There can be no doubt that Mr Murorua not only lied to the applicant's legal representatives but he also misled the Court in the manner disclosed by the transcript of the proceedings. Indeed, this Court considered this matter to be so serious that the Court took the unusual step of referring the matter to the Law Society (of Namibia). The Court also requested the Registrar to investigate the filing of a false return of service of the restitution order in this matter.'

[25] Indeed, the present application arose from a chain of events having their source in the Court which initiated an application, consequent upon the *de bonis propriis* proceedings, to the Council of the second respondent in terms of s. 35(1) of the LPA. That is what Mr Smuts referred to in his submissions in such graphic terms:

> 'Indeed this Court considered the matter to be so serious that the Court took the [un] usual step of referring the matter to the Law Society (the second respondent). That is the origin of this complaint. It is not being driven by some (legal) practitioners or members of the Committee (the first applicant). It comes from this Court.'

[26] Thus, as far as the Court (per Manyarara AJ) is concerned, the conduct of the first respondent in the *Abiatar and Abiatar* case (the matrimonial proceedings) amounted to the first respondent not only lying to the applicant's legal representative, Ms Angula, but it also amounted to misleading the Court based on – significantly – the transcript of proceedings in the matrimonial proceedings which Manyarara AJ set out at pp. 3–4 of the Manyarara judgment. Manyarara AJ set out the aforementioned transcript to show that the first respondent was not telling the truth in what he had stated in his opposing affidavit in the *de bonis propriis* proceedings. The transcript reads:

> 'Mr Murorua: May I please you My Lord. I appear for the Plaintiff in this matter. The papers are in order My Lord and I move for a final order.

Court: Has a return of service been filed?

Mr Murorua: Yes that is correct, My Lord. I've personally inspected the file on Thursday My Lord there was (intervention).

Court: When did you inspect the file?

Mr Murorua: Thursday.

Court: Thursday.

Mr Murorua: Yes and there was an original return of service filed.

Court: That's when you filed the original?

Mr Murorua: Yes because that was the problem the previous week. And then did personally inspect the file.

Court: Yes, I wouldn't know what transpired in the previous week. I take your word for it. Order as prayed.'

[27] As I see it, since, as I have said previously, the Manyarara judgment initiated the Part IV (of the LPA) process in terms of s. 35(1) of the LPA, the applicant framed the first charge against the first respondent along the tenor of the Manyarara judgment, taking into account s. 33 of the LPA which – significantly – is entitled 'Unprofessional or dishonourable or unworthy conduct'. And I have no good reason to fault the applicant for so doing. The charge reads:

'FIRST CHARGE

The respondent is guilty of the contravention of Section 33 of the Legal Practitioners Act, 1995 (Act 15 of 1995), and is guilty of unprofessional or dishonourable or unworthy conduct. In that during the period 22 July 2002 to 29 August 2002, in the matter of *Abiatar v Abiatar*, he contrary to an agreement with Ms Angula not to seek a final order pending a application to rescind the restitution order, secured a final order of divorce and in doing so;

(a) Misled the Court by:

(i) failing to disclose the existence of the rescission application – to the Court;

(ii) Failing to disclose the agreement between him and Ms Angula to the Court;

(b) (i) lied to Ms Viljoen, Ms Angula's Secretary;

(ii) feigned ignorance as to what happened in Court by telling Ms Angula that he was not aware that a final order had been granted, as he had instructed Adv Pickering, whilst in fact he personally appeared in Court on two occasions and personally obtained the final divorce order, and

(iii) requested his Secretary to perpetuate his lies to Ms Viljoen and Ms Angula.'

And the chapeau of s. 33 reads:

'(1) For the purposes of this Act, unprofessional or dishonourable or unworthy conduct on the part of a legal practitioner includes–'

I shall return to the formulation of s. 33 in due course.

[28] Mr Soni appears to hang the fate of the first respondent (as far as the second ground of opposition is concerned) on the following thread, which he was so much enamoured with. According to Mr Soni the instances of conduct which the Legislature says constitute unprofessional or dishonourable or unworthy conduct are adumbrated in s. 33(1). In para (h) of s. 33(1) the Legislature says, 'wilfully misleading' a court or a tribunal or allowing it to be misled constitutes unprofessional or dishonourable or unworthy conduct. And so, counsel concluded, 'It is insufficient to say that simply a misleading would in itself constitute an unprofessional, unworthy or dishonourable conduct merely because the South African Courts have said so'.

[29] The pith and marrow of Mr Soni's argument, as I understand it, is briefly as follows: According to s. 33(1)(h), what the LPA outlaws is 'wilfully misleading a court or tribunal, or allowing it to be misled'; and not merely misleading a court or tribunal. The first respondent was charged with having 'misled the Court'; and that is the offence which he faced at the disciplinary hearing and found guilty of. But it cannot be said, counsel argues, that 'wilfully misleading' a court or tribunal means the same as having 'misled' a court or tribunal. The first respondent was not found guilty of 'wilfully misleading' the Court but was found guilty of having 'mislead the Court' as the charge-sheet reads, and so, therefore, the conviction cannot stand, Mr Soni concluded.

[30] It seems to me superficially attractive as counsel's forceful argument may be in regard to the fact that 'wilfully misleading' does not mean the same as having 'misled'. But the weakness and lack of merit of counsel's argument is, with respect, laid bare by the interpretation and application of s. 33(1) and (2), read with s. 32, of the LPA. Section 32 in material part provides:

> '(1) The Court may, on application made to it in accordance with subsection (2), order that the name of a legal practitioner be struck off the Roll or that a legal practitioner be suspended from practice –
>
> (a) if he or she no longer conforms to any of the requirements of section 4(1)(c); or
>
> (b) if he or she is guilty of unprofessional or dishonourable or unworthy conduct of a nature or under circumstances which, in the opinion of the Court, show that he or she is not a fit and proper person to continue to be a legal practitioner.'

[31] Section 32(1)(b) is unquestionably the first indispensable provision that must be read with s. 33 in the interpretation and application of s. 33; for without s. 32, s. 33 is naked and hollow. Section 32, particularly para (b) of subsection (1) thereof is, in the present proceedings, the first signpost to look at in the interpretation and application of s. 33. Mr Soni missed that critical signpost; hence his journey towards his misreading of s. 33(1)(h). Indeed, counsel did not refer to subsection (1)(b) of s.

32 at all in his forceful argument. The chapeau of s. 32(1) gives the Court the discretion, on an application made to it in terms of subsection (2), to make an order to strike off from the roll the name of a legal practitioner or to suspend a legal practitioner from practice. This is not an absolute discretion, it is a guided discretion; that is, guided by paras (a) and (b) of s. 32(1); that is to say, the Court may only exercise the discretion if either para (a) or para (b) exists: those paragraphs are conditions precedent. Paragraph (a) of subsection 1 is not relevant in these proceedings. And so, as far as these proceedings are concerned, the Court may only exercise the discretion under para (b) of subsection (1) of s. 32 if the Court found the legal practitioner guilty of unprofessional or dishonourable or unworthy conduct or if – and this is significant – in the opinion of the Court the conduct is 'of a nature or under circumstance' that goes to show to the Court that the legal practitioner in question 'is not a fit and proper person to continue to be a legal practitioner'.

[32] Thus, as far as these proceedings are concerned, the fulfilment (or realization) of the definition of the proscription of misconduct (or offence) (see Snyman, *Criminal Law*, 3rd edn. 1995: pp 60-61), in terms of s. 32(1)(b) is attained if a legal practitioner does anything stipulated in 33(1); but the list therein is not exhaustive; otherwise the word 'means' should have been used; *a priori*, since the word 'includes' is used the expression of the acts stipulated in the list that amount to unprofessional or dishonourable or unworthy conduct on the part of a legal practitioner are incomplete and a part only of such acts is expressed. (See G C Thornton, *Legislative Drafting*, 1987: p 174-175). *A fortiori*, the LPA provides in s. 33 that – and this is critical –

> '(2) The provisions of subsection (1) *shall not restrict* the power of the Court or the Disciplinary Committee to determine that an act or omission not specified in subsection (1) *or any other law*, constitutes unprofessional or dishonourable or unworthy conduct on the part of a legal practitioner.'
>
> (Italicized for emphasis)

It is worth noting, as Mr Smuts submitted, that Mr Soni did not even refer to this crucial provision in his submission. Mr Soni missed this critical signpost, too, leading him yet again to take a route towards his misreading s. 33(1).

[33] Having read s. 32(1)(b), s. 33(1) and s. 33(2) intertextually, as I should perforce do, I am confident in my view that Mr Soni's argument that because the first respondent was charged with, and found guilty of, having misled the Court the conviction cannot stand is, with respect, without merit. In my opinion misleading the Court by a legal practitioner is an unprofessional conduct on the part of that legal practitioner within the meaning of s. 33(1) of the LPA; so also is a legal practitioner lying to another legal practitioner an unprofessional conduct on the part of the first mentioned legal practitioner, so long as the mendacity concerns ongoing proceedings before a court and the untruthfulness is of such a nature that but for the untruthfulness the decision of the court or tribunal might have gone a different way.

[34] Accordingly, in my opinion, the misleading of a court or tribunal by a legal practitioner or one legal practitioner lying to another legal practitioner in ongoing proceedings where but for the lie the decision of the court or tribunal might have gone a different way is an unprofessional conduct within the meaning of subsection (1), read with subsection (2), of s. 31 of the LPA, albeit a legal practitioner misleading a court or tribunal and a legal practitioner lying to another legal practitioner in ongoing proceedings is not expressly stipulated in subsection (1) of s. 31 of the LPA. The conclusion I have reached is supported by the literal meaning in context of the adjective 'unprofessional'. (See *H N v Government of the Republic of Namibia* 2009 (2) NR 75 at 758I-759A). And the literal meaning of 'unprofessional' is 'below or contrary to the standards expected in a particular profession' (Concise Oxford Dictionary, 11 edn).

[35] The authorities also support the conclusion I have reached. The standard of conduct expected of a legal practitioner in his dealings with the Court is spelt out succinctly in *Toto v Special Investigating Unit and Others* 2001 (1) SA 637 (E) at 683A-F as follows:

> 'It is trite that it is the duty of a litigating party's legal representative to inform the court of any matter which is material to the issues before court and of which he is aware – see, for example, *Schoeman v*

> *Thompson* 1927 WLD 282 at 283. This Court should always be able to accept and act on the assurance of a legal representative in any matter it hears and, in order to deserve this trust, legal representatives must act with the utmost good faith towards the Court. A legal representative who appears in court is not a mere agent for his client, but has a duty towards the Judiciary to ensure the efficient and fair administration of justice – see the remarks of De Villiers JP in *Cape Law Society v Vorster* 1949 (3) SA 421 (C) at 425. As was observed by James JP in *Swain's* case *supra* in a passage since followed, *inter alia* in *Society of Advocates of Natal and Another v Merret* 1997 (4) SA 374 (N) at 383 and *Pienaar v Pienaar en Andere* 2000 (1) SA 231 (O) at 237, the proper administration of justice could not easily survive if the professions were not scrupulous of their dealings with the Court.'

It is also spelt out concisely in *State v Baleka and Others (4)* 1988 (4) SA 688 (T) at 705E-F thus:

> 'The administration of justice is founded upon the preservation of the dignity of the Courts. It is the duty of counsel and attorneys to assist in upholding it. They are not mere agents of the clients; their duty to the Court overrides their obligations to their clients (subject to their duty not to disclose the confidences of their clients). The conduct of the defence team, when measured against the high standards set for the professions, falls far short thereof.'

[36] Additionally, in England a solicitor who failed to inform the court of all material matters within his knowledge and about which the court should have been informed is guilty of professional misconduct; so, too, is a solicitor who failed to implement an undertaking given to another solicitor and a solicitor who gave false information to another solicitor guilty of professional misconduct. (*Halsbury's Law of England*, Fourth edn: paras 299, 304). I do not see any good reason why such acts of misconduct should not in terms of Part IV of the LPA, be judged to be unprofessional conduct in Namibia (with its unified legal profession) considering the interpretation and application of s. 31, read with s. 32(1)(b), of the LPA which I discussed previously. Furthermore, it is my view that the conduct of a legal practitioner that is found to be unprofessional may also be dishonourable or unworthy conduct.

[37] *In casu*, the summary of substantial facts explaining the first charge has it that the first respondent misled the Court by –

> ‘(1) (i) failing to disclose to the Court the existence of the rescission application.
>
> (ii) failing to disclose to the Court the agreement between him and Ms Angula.
>
> (2) (i) lying to Ms Viljoen, Ms Angula’s Secretary;
>
> (ii) feigning ignorance as to what happened in Court by telling Ms Angula that he was not aware that a final order had been granted, as he had instructed Adv. Pickering, whilst in fact he personally appeared in Court on two occasions and personally obtained the final divorce order; and
>
> (iii) by requesting his Secretary to perpetuate his lies to Ms Viljoen and Ms Angula.’

[38] Keeping in my mental spectacle the aforegoing reasoning and conclusions respecting conduct on the part of a legal practitioner that may be judged to be unprofessional, or dishonourable or unworthy conduct in terms of the LPA, I have not one grain of difficulty in holding that the series of conduct described in the first charge, if proven, indubitably amounts to unprofessional or dishonourable or unworthy conduct on the part of the first respondent. Thus, the question that arises for determination is indubitably this: was the evidence before the applicant sufficient to satisfy the applicant that ‘the legal practitioner is guilty of unprofessional or dishonourable or unworthy conduct in the application (submitted by the second respondent to the first applicant) or in respects other than those so alleged’ in terms of s. 35(7)(b) of the LPA. In other words, is the evidence sufficient upon which this Court should find that the legal practitioner to whom the applicant’s application relates (i.e. the first respondent) is guilty of unprofessional or dishonourable or unworthy conduct in terms of s. 37 of the LPA?

[39] In determining this question, I find it important to note that the first respondent’s counsel agreed that the disciplinary hearing by the applicant could be

conducted and concluded on the basis of the affidavits contained in the application made in terms of s. 35(1) of LPA, (as aforementioned) by the Council of the second respondent and the first respondent's answers thereto (set out in the affidavits) without the need to call any witnesses. The disciplinary hearing was accordingly conducted and concluded upon that agreement, and the first respondent was found guilty of the first charge (inter alia) without referring any such matter to oral evidence – as agreed.

[40] Now, before this Court, Mr Soni makes an application that certain matters (responding the first respondent's second ground for opposing the present application) should be referred to oral evidence; and yet, the first respondent's counsel – counsel of standing, as Mr Smuts reminded the Court – agreed at the disciplinary hearing that the applicant could conduct and conclude the hearing without referring any matters to oral evidence. The matters concern the alleged agreement between the first respondent and Ms Angula, the first respondent lying to Ms Viljoen, (Ms Angula's Secretary) and the first respondent suborning his own Secretary to perpetuate the first respondent's aforementioned lie for the benefit of Ms Angula: all these matters are mentioned in the first charge.

[41] In my opinion, with the greatest deference to Mr Soni, Mr Soni's application appears to be an attempt to have a second bite – undeservingly – at the cherry. To start with, as I have said *ad nauseam*, the first respondent's counsel agreed that the hearing could proceed on the basis of the papers; and what is more, the first respondent has not challenged his acquittal respecting the second charge and his conviction and imposition of sanction by the applicant in the selfsame disciplinary hearing in respect of the other charges of which he was also found guilty and fined. In any case, I can in terms of rule 6(5)(g) of the Rules of Court decide the application on the papers without referring any matter to oral evidence; and I now proceed to do that. Mr Soni's application is, therefore, respectfully rejected.

[42] Now, to the question whether there is sufficient evidence upon which this Court could find that the first respondent is guilty of unprofessional or dishonourable or unworthy conduct. The facts of the first charge appear from affidavits filed in the Court in the *de bonis propriis* proceedings and which the Court summarized at pages 1–4.

[43] I have carefully considered the affidavits and the probabilities they raise; and having done so, I come to the following reasonable and inevitable conclusions. As to the issue of the so-called agreement between the first respondent and Ms Angula; there may not have been an agreement *in sensu stricto*, but I find that the first respondent gave an undertaking to Ms Angula in ongoing proceedings: the first respondent gave an undertaking that he would not apply for a final order in virtue of the pending rescission application launched by Ms Angula on behalf of her client in the matrimonial matter. But the first respondent failed to implement that undertaking. If, indeed, the first respondent had not made any such undertaking which he knew he must implement he would not have gone to extremely unconscionable lengths to give false information to Ms Angula that he was not aware that a final order of divorce had been obtained as Adv. Pickering had been briefed; which was not true, and which he knew to be so. What is more, and to make matters worse; the first respondent suborned his own secretary to repeat, in his interest, the same lie to Ms Angula.

[44] From all this, I find that by failing to implement the undertaking he had given to Ms Angula in an ongoing proceeding and also by giving false information to Ms Angula, the first respondent, on the authorities referred to supra, is guilty of unprofessional or dishonourable or unworthy conduct within the meaning of Part IV of the LPA.

[45] Furthermore, from the affidavits, it is as plain as day that the first respondent did not disclose the existence of the aforementioned rescission application to the Court; and for his reason for so acting, he says, ‘ ... there was no obligation on me to inform the Court on 12 August 2002 of the pending application for the rescission of the restitution order ...’ It seems to me clear that from the first respondent’s own affidavit , the true reason was rather that he was prepared – willy – nilly – to brush aside his duty to the Court in order to satisfy his client by hook or by crook.

[46] The first respondent misses the point about his supremely important duty in any proceeding to inform the Court of all material matters within his knowledge and about which the Court should have been informed. The first respondent had knowledge of the pending rescission application and it was absolutely necessary that the Court should have been informed about the pending rescission application for the Court itself to decide whether, in the circumstances of the case, it was in

accordance with justice to grant the final order of divorce. It was not the place of the first respondent – none at all in any legal imagination – to decide (as Mr Soni appears to contend in his submission) whether 'that rescission application was a relevant fact which would have persuaded this Honourable Court not to grant the final order'. This is, with respect, speculative thought on the part of the first respondent: it cannot assist him in not being found guilty, as I do find him, of unprofessional or dishonourable or unworthy conduct within the meaning of Part IV of the LPA for failing to inform the Court of the material matter of the pending application for rescission about which, as I have said, the Court should have been informed.

[47] Thus, for the aforegoing reasoning and conclusions I find that the first respondent is guilty of unprofessional or dishonourable or unworthy conduct. The applicant was entirely justified in finding him guilty of such conduct. I now proceed to determine what appropriate order to grant in terms of s. 37 of the LPA, that is, as respects penalty.

[48] The applicant has made an application in which it prays, going by the majority decision, the Court for an order to strike the first respondent's name off the roll. It is to this prayer that I direct the rest of the enquiry that now follows, keeping in firm view the power of the Court according to s. 37 of the LPA. Under this head, I make the following conclusions. First, it must be remembered that although this Court has found the first respondent guilty of unprofessional or dishonourable or unworthy conduct, unlike the applicant, the reason of the guilty verdict pronounced by this Court is not based on the first respondent wilfully misleading the Court but on the first respondent's failure to inform the Court of a material matter that was within his knowledge and about which the Court should have been informed. Second, unlike the applicant, this Court has found the first respondent guilty of unprofessional or dishonourable or unworthy conduct on the basis of his failure to implement an undertaking given to Ms Angula and not on the basis of a breach of agreement between the first respondent and Ms Angula. Wilfully misleading the Court is a far cry from failure to place before the Court a material matter which is in the knowledge of a legal practitioner and about which the Court must be informed. Furthermore, a breach of agreement is not the same as failure to implement an undertaking.

[49] It is worth noting that the cases referred to the Court by Mr Smuts where the name of the delinquent attorney concerned was removed from the roll cannot be followed in the present case; not least because the nature of misconduct that was involved in many of those South African cases does not in terms of its reprehensibility and deplorability come any way close to the nature of unprofessional or dishonourable or unworthy conduct for which the first respondent has been found guilty by this Court: the misconduct in many of the South African cases do not contain the same *corpus delicti* as in the unprofessional or dishonourable or unworthy conduct that has been found to be proven in the present proceedings. For instance, in *Botha and Others v Law Society, Northern Provinces* 2009 (3) SA 329 (SCA) the misconduct involved included books of accounts kept by the delinquent attorneys reflecting a trust shortage in excess of a whopping R12, 000,000.00 and touting. An in *Malan and Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) the misconduct involved included conducting a Road Accident Fund practice that was the result of active touting and 'selling' of claims by touts to the delinquent attorneys' firm, some of which turned out to be fraudulent, overreaching, failure to account and failure to keep proper books of account. By a parity of reasoning while in *Society of Advocates of Natal and Another v Merret* 1997 (4) SA 374 (N) the misconduct was the attorney deliberately misleading a Judge, in the instant case the first respondent has been found guilty of failure to inform the Court of a material matter within his knowledge about which the Court should have been informed.

[50] Now comes the case of *Disciplinary Committee for Legal Practitioners v Berend Johannes Viljoen and Law Society of Namibia* Case No. A 170/2008 (Unreported) which Mr Soni referred to the Court. There, the legal practitioner involved was found guilty of unprofessional or dishonourable or unworthy conduct in that –

> '(i) during the year 2000 he backdated a letter to the MVA Fund concerning an alleged agreement not to keep his client bound to a prescription period in relation to a claim and that the contents of the letter was factually incorrect; and in that (ii) he did not inform his client timeously that the letter was backdated but that he did so on the date of the commencement of the civil trial thereby misleading his client to

> believe that the actual agreement he had was indeed reached in the manner and at the time as indicated in the letter, while it was not.'

[51] For these very serious proven instances of unprofessional or dishonourable or unworthy conduct, the applicant considered it fair and reasonable to apply to the Court for an order to suspend the delinquent legal practitioner from practice for only 12 months. The application was unopposed and came before Van Niekerk, J in the first motion court on 25 July 2008. She made an order in the following terms:

> 'That the first respondent is hereby suspended from practice for a period of 12 months, calculated from 25 February 2008.'

This was after counsel for the applicant moved for same on the basis that the legal practitioner concerned had already formally agreed to the sanction proposed by the applicant and in fact stopped practising on 25 February 2008.

[52] The acts that have been judged to be unprofessional or dishonourable or unworthy conduct in the instant case do not come anywhere near the acts judged to be professional misconduct in either the *Malan* case or the *Botha* case; or, indeed, on any pan of scale comparable to the acts committed by the delinquent legal practitioner in the *Viljoen* case. The legal practitioner deceived and/or misled his client. In this regard it has been said that the main consideration in deciding whether to strike the name of a legal practitioner from the roll is the protection of the public (*Malan and Another* supra at [7]); and yet such fate did not befall the legal practitioner concerned, albeit, in my opinion he should have suffered that fate.

[53] I have dwelt on the *Viljoen* case at some length because, to start with, it is a home-grown case and also because it was referred to the Court by the first respondent in his papers filed of record and Mr Soni took it up in his submission. Moreover, I have done so to make a point, that is to say, if the applicant thought it was fair and reasonable to apply for and obtain an order (as it did) to suspend the legal practitioner involved from practice for 12 months in the *Viljoen* case, I really do not see the legal basis upon which the applicant now applies in the instant case for an order to strike the name of the first respondent off the roll.

[54] As respects the first respondent in these proceedings; as Mr Soni submitted, the first respondent has been practising for three years since he was found guilty by the applicant; and there is no evidence before the Court that the first respondent has acted in a manner from which the public must be protected in that regard. This observation ought to count weightily in favour of the first respondent – when all is said and done; as it has been said and done supra.

[55] In all this, I take into consideration the following apt and succinct counsel by Lord Denning MR in his sterling work *The Discipline of Law*, 1979: p. 87:

> 'Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "the judge was biased".'

I think on the facts and circumstances of the present case and comparing it, as I have done, not with not only cases from other jurisdictions but with a case in this jurisdiction, it would be unfair and unjust to strike the name of the first respondent off the roll. If this Court did that, I am afraid, right-minded people would go away thinking this Court was biased.

[56] For the avoidance of doubt, I hasten to add to all this: I think the conduct of the first respondent comes dangerously close to justifying his name being struck off the roll. But I have great hesitancy in going that route because I have grave doubt as to the fairness, justice and reasonableness about making such an order for the aforegoing conclusions and reasoning. It is, therefore, my view that an order that the first respondent should be suspended from practice will meet the justice of the present case.

[57] Whereupon, I make the following order:

(1) The first respondent is suspended from practice for 12 months wholly suspended for three years on condition that the first respondent is not found guilty of unprofessional or dishonourable or unworthy conduct in terms of the Legal Practitioners Act, 1995 (Act No. 15 of 1995), committed during the period of suspension.

(2) The first respondent must pay the costs of the application.

_____
PARKER J

I agree.

_____
SIBOLEKA J

VAN NIEKERK, J: [1] I am in respectful agreement with the judgment written by my brother PARKER, J in many respects. In fact, I have made certain contributions to the judgment which need not be specified. However, there are certain material aspects on which I hold a different view or on which I wish to place a certain perspective.

The application for referral to oral evidence

[2] The first respondent's counsel applied that, *inter alia* (i) the issue of whether there was an agreement between Ms Angula and the first respondent that he would extend the rule *nisi*; and (ii) the issue of whether was a duty on the first respondent to inform the Court about the rescission application, be referred to oral evidence as there is a material dispute of fact about these matters on the papers. In the alternative, counsel requested the Court to apply the well known rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635D), namely to base its decision on facts that are common cause or otherwise on the first respondent's version.

[3] I am in complete agreement with the submissions by Mr *Smuts* that there is no merit in this application. In deciding this issue I take into consideration that the first respondent elected not to give oral evidence at the hearing before the applicant, where he was represented by eminent and experienced counsel and that there was agreement between the applicant and the first respondent that the complaint be

considered on the basis of the affidavits filed in "the *de bonis propriis* proceedings". In the first respondent's answering affidavit before this Court he relies again on what he stated in those proceedings. In my view there is no *bona fide* dispute of fact on the papers. It seems to me that if the second and important leg of the *Plascon-Evans* rule is considered, this Court is justified in rejecting the disputes raised merely on the papers.

[4] In regard to the allegation that there was an agreement the first respondent states:

> "Though I have no specific recollection of discussion surrounding what I always regarded as a separate application proceedings, I am prepared to concede for the purposes hereof that I was personally amenable to extending the return day of the restitution order subject to directions by my client. I however deny ever having undertook *(sic)* to extent *(sic)* the return day of the restitution order."

[5] Firstly this paragraph commences with the statement that he has no specific recollection about the discussion, yet he denies giving an undertaking. He then makes a concession "for purposes hereof" which supports the version of an agreement to extend, just to deny it again. I agree with Mr *Smuts* that this denial is equivocal.

[6] Later he states:

> "Subsequently to the above developments I had consultation with applicant [i.e. his client in the divorce matter] on 8 August 2002 when we settled the opposing affidavit at which occasion he again impressed on me the need for finalisation of the divorce action on the scheduled date." [my insertion]
>
> Also:
>
> "I was taken to task by my client over the matter [i.e. in not obtaining a final order of divorce] on 14 August 2011 when he initially sought to collect his final order of divorce, I at that occasion assured him that I

> would secure the order on the 19th August 2002 and I did that, returning to office on Monday from my study leave." [my insertion]

[7] These two paragraphs read with the previous one convey to my mind that that the first respondent had agreed to extend the return date, but that he failed to act in accordance with that agreement when his client insisted on a final order. As the other facts show, he did not revert to Ms Angula to inform her of his client's stance, as he should have done. I further am of the view that the first respondent's subsequent conduct by telling lies to Ms Angula and to her secretary, as well as by influencing his secretary to perpetuate the deceit, is consistent with there having been an undertaking to extend the rule. There is no need to refer this matter to oral evidence.

[8] In regard to the second matter on which Mr *Soni* applied for referral, it seems to me that it does not concern a dispute of fact. What appears to be in issue is whether there was a duty on the first respondent to disclose to the Court the existence of the rescission application. In my view this is not a factual issue but a legal one and may be argued. In so far as there was a suggestion that the first respondent could orally explain his understanding about the nature of the rescission proceedings and that he could be cross-examined on this in order to test his credibility, I do not think that is necessary. It is plain as daylight that the rescission application was not separate or parallel proceedings, which, as the applicant stated in its ruling, "struck at the very heart of the relief that respondent sought as without a restitution order there can be no final order". The first respondent's attempts to convince not only MANYARARA AJ, but also the applicant and this Court that he was under the impression that it had no bearing on the divorce matter are farfetched and not *bona fide* and may be rejected on the papers.

<u>The consequences of the finding that the first respondent is guilty of unprofessional or dishonourable or unworthy conduct</u>

[9] Fortunately striking-off applications in this jurisdiction are rare. Apart from the *Viljoen* matter which related to suspension, counsel did not refer us to any Namibian authority. By way of introduction I state at this stage that I intend relying on several South African cases by the Supreme Court of Appeals, most of which were also relied upon by counsel for both sides.

[10] Section 32(1)(b) of the LPA states that the court may, on application made to it in accordance with subsection (2), order that the name of a legal practitioner be struck off the roll or that a legal practitioner be suspended from practice if he or she is guilty of unprofessional or dishonourable or unworthy conduct of a nature or under circumstances which, in the opinion of the Court, show that he or she is not a fit and proper person to continue to be a legal practitioner.

[11] In terms of section 37 the Court may, if in the circumstances of the case it thinks fit so to do, and instead of granting an order that the name of the legal practitioner be struck off the roll or that he or she be suspended from practice, (a) reprimand the legal practitioner; or (b) reprimand and order the legal practitioner to pay a penalty not exceeding N$ 10 000; and may, in either of these cases, make any order as to restitution in relation to the case.

[12] The application under section 32 contemplates a three-stage enquiry:

> First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry.
>
> Second, it must consider whether the person concerned 'in the opinion of the court' is not a fit and proper person to continue to be a legal practitioner. This involves a weighing up of the conduct complained of against the conduct expected of a legal practitioner and to this extent, is a value judgment.
>
> Third, the Court must inquire whether in all the circumstances the person in question is to be removed from the roll of legal practitioners or whether an order of suspension from practice would suffice.

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

[13] For the reasons stated in PARKER, J's judgment it is clear that the first leg of the inquiry has been concluded and that the first respondent is guilty of unprofessional or dishonourable or unworthy conduct.

[14] As far as the second stage of the inquiry is concerned, it is necessary to consider the nature of the conduct which forms the basis of the conviction. The first respondent failed to honour an undertaking about the way he would be dealing with a matter before the Court which had grave consequences for the opposing party. She was seeking to set aside the restitution order and to defend the action for divorce. It is no use to attempt to justify this conduct by saying, as the first respondent did, that the opposing party also wanted a divorce and merely wanted to contest the ancillary relief. The proposals she made about the ancillary relief were contained in a letter by her lawyer, (p 60 of the record), and were for purposes of settlement. While her lawyer relied on his undertaking, the first respondent abused her trust by deliberately and dishonestly moving for relief which undermined the whole purpose of what she was intent upon achieving. It might be added that although he may have thought that he served his client's interests, the first respondent did not, as ultimately the opposing party applied successfully for the rescission of both the restitution order and the final order as appears from the judgment of MANYARARA AJ (at p2). In my view the fact that this matter was one concerning the status of the parties is an aggravating feature of the first respondent's misconduct.

[15] Furthermore, when enquiries were made by Ms Angula and her staff, the first respondent repeatedly lied about what he had done while bringing Ms Angula under the false impression that he had acted in accordance with his undertaking or feigning ignorance about the true position. The respondent in his affidavit seeks to excuse this conduct by stating:

> "I admit having had a telephone conversation with an unknown female person from Lorentz and Bone law firm concerning this matter. I was however resolved at that stage not to bring the wrath of my client onto me hence I needed a dilatory ploy which would have enabled me to see off my client by securing a degree (*sic)* of divorce as I knew at that stage that his departure was imminent. I do not deny having told Ms Viljoen that the rule was extended but state that I had to do it to honour the undertaking with my client."

[16] He even falsely drew in a completely innocent and respected member of the Bar, pretending that he had instructed the latter to appear, while he appeared in

person on both occasions. He further involved another person in the web of deceit, namely his secretary, who he requested to perpetuate his lies to Ms Angula.

[17] As to his conduct before MANYARARA, AJ when first respondent moved for a final order, I note PARKER, J's view that this conduct was not wilful and that the misleading that took place was not wilful. I regrettably find myself unable to agree with this view. In my respectful opinion a failure to disclose, just like a misleading, may be wilful, or negligent or innocent. The evidence in this case clearly establishes that the non-disclosure whereby the Court was misled, was wilful and deliberate. Whether he was charged with a wilful misleading before the applicant is in my view not material, the fact is that the evidence discloses wilful misleading. In this respect the first respondent was not prejudiced in any way. He knew that this was the allegation made in the affidavit on which the complaint was based. The applicant's ruling makes it clear that this is also the basis on which it convicted the first respondent.

[18] Based on the nature of the conduct set out above, I conclude that the first respondent is not a fit and proper person to continue to be a legal practitioner.

[19] I now turn to the third stage of the inquiry, and that is to consider what consequence should follow upon the preceding finding. This is a matter which lies in the discretion of the Court. In *Malan's* case the Supreme Court of Appeals dealt with the principles applicable to striking-off applications and stated the following in the context of such an application of an attorney (at 219H-221A):

> "...[W]hether a court will adopt the one course or the other depends upon such factors as the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession, the likelihood or otherwise of a repetition of such conduct and the need to protect the public. Ultimately it is a question of degree.....
> [7] First, in deciding on whichever course to follow the court is not first and foremost imposing a penalty. The main consideration is the protection of the public.
>
> [8] Second, logic dictates that if a court finds that someone is not a fit and proper person to continue to practise as an attorney, that person must be

removed from the roll. However, the Act contemplates a suspension. This means that removal does not follow as a matter of course. If the court has grounds to assume that after the period of suspension the person will be fit to practise as an attorney in the ordinary course of events it would not remove him from the roll but order an appropriate suspension. In this regard the following must be borne in mind:

> 'The implications of an unconditional order removing an attorney from the roll for misconduct are serious and far-reaching. *Prima facie*, the Court which makes such an order visualises that the offender will never again be permitted to practise his profession because ordinarily such an order is not made unless the Court is of the opinion that the misconduct in question is of so serious a nature that it manifests character defects and lack of integrity rendering the person unfit to be on the roll. If such a person should in later years apply for re-admission, he will be required to satisfy the Court that he is 'a completely reformed character' (*Ex parte Wilcocks* 1920 TPD 243 at 245) and that his 'reformation or rehabilitation is, in all the known circumstances, of a permanent nature' (*Ex parte Knox* 1962 (1) SA 778 (N) at 784). The very stringency of the test for re-admission is an index to the degree of gravity of the misconduct which gave rise to disbarment.'

(*Incorporated Law Society, Natal v Roux* 1972 (3) SA 146 (N) at 150B - E quoted with approval in *Cirota and Another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 194B - D.) It is seldom, if ever, that a mere suspension from practice for a given period in itself will transform a person who is unfit to practise into one who is fit to practise. Accordingly, as was noted in *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 852E - G, it is implicit in the Act that any order of suspension must be conditional upon the cause of unfitness being removed. For example, if an attorney is found to be unfit of continuing to practise because of an inability to keep proper books, the conditions of suspension must be such as to deal with the inability. Otherwise the unfit person will return to practice after the period of suspension with the same inability or disability. In other words, the fact that a period of suspension of, say, five years would be a sufficient penalty for the misconduct does not mean that the order of suspension should be five years. It could be more to cater for rehabilitation or, if the court is not satisfied that the suspension will rehabilitate the attorney, the court ought to strike him from

> the roll. An attorney, who is the subject of a striking-off application and who wishes a court to consider this lesser option, ought to place the court in the position of formulating appropriate conditions of suspension.
>
> [9] Third, the exercise of this discretion is not bound by rules, and precedents consequently have a limited value. All they do is to indicate how other courts have exercised their discretion in the circumstances of a particular case. Facts are never identical, and the exercise of a discretion need not be the same in similar cases. If a court were bound to follow a precedent in the exercise of its discretion it would mean that the court has no real discretion. (See *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) at para 21.)"

[20] It has been stated time and again that if a court finds that a practitioner acted dishonestly, the usual order is removal from the roll instead of a suspension. This obviously is because a dishonest person is, generally speaking, especially not a fit and proper person to practise law. In *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA), the following was said in this regard at par [21]:

> "The further argument on behalf of the appellant was that, as a general rule, striking-off is reserved for attorneys who have acted dishonestly, while transgressions not involving dishonesty are usually visited with the lesser penalty of suspension from practice. Although this can obviously not be regarded as a rule of the Medes and the Persians, since every case must ultimately be decided on its own facts, the general approach contended for by the appellant does appear to be supported by authority (see eg *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A); *Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop* 1994 (1) SA 359 (A); *Law Society of the Cape of Good Hope v King* 1995 (2) SA 887 (C) at 892G - 894C; *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538I - 539A; *Law Society, Cape of Good Hope v Peter* [2006] SCA 37 (RSA) in para [19]). This distinction is not difficult to understand. The attorney's profession is an honourable profession, which demands complete honesty and integrity from its members. In consequence dishonesty is generally regarded as excluding the lesser stricture of suspension from practice, while the same can usually not be said of contraventions of a different kind."

[21] Having quoted this passage from *Summerley*, the court in *Malan* continued (at p221D-F):

> "Obviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal. (Exceptional circumstances were found in *Summerley* and in *Law Society, Cape of Good Hope v Peter* [2006] ZASCA 37 and the court was able in the formulation of its order in those cases to cater for the problem by requiring that the particular attorney had to satisfy the court in a future application that he or she should be permitted to practise unconditionally.) Where dishonesty has not been established the position is as set out above, namely that a court has to exercise a discretion within the parameters of the facts of the case without any preordained limitations."

[22] From these authorities it appears that, while the Court has a discretion to decide on removal or suspension, in the case of dishonesty the discretion of the Court is limited by the consideration that removal is the usual consequence for dishonesty and that suspension will only follow in exceptional circumstances.

[23] Applying these principles there are in my respectful view no exceptional circumstances requiring a deviation from the norm. I do not intend embarking upon a comparison of the facts of other cases. In this regard it is apposite to have regard to the following passage from *Law Society of the Northern Provinces v Sonntag* 2012 (1) SA 372 (SCA):

> "[16] I am of the view that the court below materially misdirected itself in ordering the suspension of the respondent and not her striking off the roll of attorneys. It did so by comparing the matter *in extenso* with *Malan's* case and deciding that, because the scale of wrongdoing in *Malan* was so much greater, a lesser penalty in this case was justified. Comparisons are odious and, as was stated by Harms ADP in *Malan*:
>
> > 'Facts are never identical, and the exercise of a discretion need not be the same in similar cases. If a court were bound to follow a precedent in the exercise of its discretion it would mean that the court has no real discretion.'

> The question is not whether this case is as serious as *Malan's* but whether, or, if appropriate, when, an attorney should be permitted to continue in practice."

[24] The first respondent relies on the *Viljoen* matter which is dealt with in the judgment of PARKER, J. As I sat on that matter I can state that it was heard on the first motion roll on an unopposed basis. The matter was not argued. If the same matter came before me now, I would, with hindsight and having had the benefit of argument by full argument by the parties in this case, probably deal with that matter differently. If any errors were made in that matter it is regrettable, but they should not be repeated or perpetuated for the sake of parity. On the contrary, it is this court's duty to deal with the matter as legal principle and the facts of the case require. In other words, the task before this Court is to apply its mind to the law and the facts of this case and to decide independently from the applicant what consequences should follow upon the Court's conviction of the first respondent. That is clear from the LPA and the authorities already cited.

[25] In my view the first respondent's insistence throughout that there was no agreement; that his lies to his colleague are to be seen in a lesser light because he acted on directions of his client and the obstinate insistence that there was no duty on him to disclose the fact of the rescission application to the Court show a state of mind evincing a lack of integrity not to be expected from a legal practitioner (cf. *Sonntag* 380H). Some of these aspects also indicate a lack of insight into his misconduct which contributes to the finding that he is not fit to continue to practise.

[26] In *Botha v Law Society, Northern Provinces* 2009 (3) SA 329 (SCA) the following was said:

> "[23] The appellants have been dishonest, have shown a lack of integrity and openness and have shown no insight into the extent of their transgressions. An attorney should not have these character traits. An order suspending them from practice would only be appropriate if there were some way in which the court could expect them to overcome these character traits during the time of their suspension. It is simply impossible to look into the future and know that the public would be adequately protected after a period of suspension. Hence the logical and sensible approach must be that the

> appellants be prevented from practising until they can convince a court that they have in fact reformed to the point that they could be allowed to practise again."

[27] In considering the option of suspension I find myself at a loss to think of any appropriate condition upon which such a suspension may sensibly operate. In this regard I may state respectfully that I found the discussion of the relevant considerations in *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA) very useful. Furthermore, the matter should not be approached as if a sentence in a criminal case is to be imposed (*Botha v Law Society, Northern Provinces* 2009 (3) SA 329 (SCA) 338B).

[28] Mr *Soni* submitted that the conduct of the first respondent is not indicative of a flaw in character as there are no further instances of this nature, which would otherwise have come to light by now. The problem I have with this submission is that the telling of lies and the failing to disclose material matters where there is a contrary duty is calculated to deceive and to hide the truth. When a legal practitioner misleads a Court by wilfully failing to disclose material facts, such conduct is, by its very nature, unlikely to be picked up, unless there is, as in this case, another party who cries foul. It cannot be said that such conduct would have come to the fore by now. Viewed from a slightly different perspective, how often does it not happen that the assurance of a legal practitioner is given in circumstances where the Court would never know the true position if the assurance were false? Such opportunities arise countless times daily. In fact, every time a legal practitioner appears, a court is counting thereon that any assurance given may be relied upon without question or that any material matter which could have a bearing on the matter will be disclosed. A failure to disclose is inherently more difficult to detect. The functioning of our courts is vitally dependent on the assumption that legal practitioners will act with complete honesty and integrity. Without it the courts simply cannot function.

[29] In this context it is apposite to quote the following extract from *Ex parte Swain* 1973 (2) SA 427 (N) where at 434H James JP said:

> "Furthermore, it is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The

> same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court. The applicant has demonstrated that he is unable to measure up to the required standard in this matter."

(See also *Society of Advocates of Natal v Merret* 1997 (4) SA 374 (N)).

[30] The question ultimately arises, if this legal practitioner appears in future, would a Court be prepared to accept his word? In my view the answer should be “no”.

[31] To sum up, the conclusion reached is that the striking-off application should succeed. As far as the costs are concerned, it is usual that in matters such as this the offending legal practitioner should pay the costs on an attorney and client scale. I do not intend deviating from this approach.

[31] In my view the following order should be made:

1. That the first respondent’s name be struck from the roll of legal practitioners.

2. The applicant is further granted the orders prayed in paragraphs 2 – 8 (as amended) of the notice of motion.

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

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VAN NIEKERK J

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