

DISPUTES

Who was worse: The Attorney or the Legal Practice Council?

1 December 2021 9 min read

Roll of attorneys

In a matter recently heard before the Western Cape High Court, erstwhile attorney Gerrit Smit Van Wyk (57) was struck off the roll of attorneys after racking up a "*dismal record of disciplinary infractions which go back some 23 years to 1998*".

Not only was the attorney taken to task for his lamentable failure to carry out his duties (ranging from failing to execute on several mandates, failing to return client queries to failing to account to clients or the Law Society (now the [LPC](#))), but given the lengthy track record of the complaints made to the Law Society, and the appalling delays in prosecution of those complaints by approaching the High Court, the Legal Practice Council was also taken to task for its failure to meaningfully and with due expedience, carry out its duties and to seek to have the offending attorney in question removed from the roll.

In fact, after over 42 acts of professional misconduct had been committed over a period of 14 years by the attorney in question, and despite several sanctions (in the form of fines) imposed on him by the LPC (at that time the Law Society of the Cape of Good Hope), the Law Society only saw fit to make application to Court in 2013, originally seeking to interdict him from practicing and having his trust accounts managed by a curator pending an application to strike him from the roll of attorneys.

Whilst the then Law Society of the Cape of Good Hope had initially launched its application as one of urgency in March 2013, it decided, after advice received from its attorney, to amend the relief it sought to a two year suspension of the practitioner from practice, and to this end set about supplementing its founding papers. This got further delayed by additional complaints being raised relating to the practitioner in question giving rise to further supplementary submissions being needed, and then the Law Society could not locate the practitioner. Eight years passed until the amended notice of motion and supplementary submissions were made (in October 2020), seeking the suspension of the practitioner in question from the roll of attorneys for a period of 2 years.

The matter only eventually came before the Court in 2021. Initially, no explanation was provided to the Court concerning the reason for the delay.

Whilst some of the transgressions appeared trivial in nature, the court noted that all of them would have been prejudicial to his clients and taken collectively evidenced a repeated and consistent failure "*to measure up to the standard of ethical behaviour and conduct required of an attorney*". The court commented further:

"These were accordingly not isolated lapses or mistakes, of the kind sometimes made by a young or inexperienced practitioner. The respondent's conduct was indicative of a long-standing pattern of behaviour that reflected not only a lack of insight and respect for the profession and disregard for the interests of those he was meant to serve, but a profound inability to take responsibility for his actions and to correct them. These are serious character defects, inconsistent with what is required as an attorney"

Unquestionably then, the attorney in question was found wanting – the court struck him from the roll in consequence. The attorney was not the only one to secure a thorough reprimand though.

The Court was displeased with the LPC's "lackadaisical and haphazard fashion" in prosecuting the matter and criticised the LPC on a number of grounds:

1. Firstly, it had failed to substitute the LPC for the Law Society which had been dissolved and was accordingly improperly before the Court;
2. Secondly, because it had provided no adequate explanation concerning the cause for delays between 2013 and 2021;
3. Third, because the nature of the transgressions in question (which were, as indicated above, numerous and serious) warranted a far more serious sanction than a mere suspension

These concerns were raised at the first hearing in February 2021, along with an instruction that the LPC substitute itself for the now defunct Law Society under Rule 15 and make supplementary submissions to the Court concerning the cause for delay, and why the sanction of the attorney being struck was not an appropriate remedy in the circumstances. The Court also instructed, in light of its inclination to make a more serious direction, that the attorney in question be personally notified of the return date and afforded an opportunity to make a submission as to why he should not be struck from the roll.

On the return day, in May 2021 (where the matter was postponed at the request of the respondent (attorney) due to his not having prepared submissions as directed by the court), the explanation afforded by the LPC was that the delay ostensibly arose in consequence of several factors:

1. Firstly, the sequence of events giving rise to the need to amend and supplement its original application. In this regard, the court commented as follows

"One would have expected that given these circumstances, in light of the additional complaints the Society would have approached the Court as a matter of urgency in 2014 for an order interdicting the respondent and removing him from the roll. Yet it still did nothing..."

2. The Law Society then lost contact with the attorney in question in 2016. He had hitherto been practising in Cape Town until his last fidelity fund certificate was issued to him in 2015, and as such they were unable to serve papers on him. No application for substituted service was brought by the LPC and efforts to trace him only resulted in him being located in Gansbaai in 2019. In this regard:

2.1 the Court noted that there was in fact an earlier successful trace on the attorney made in March 2018 which had been overlooked by the LPC;

2.2 when he was again located in August 2019, the tracer noted that the attorney was still, in fact, practising as an attorney (without a fidelity fund certificate since 2015);

2.3 even after they had located him, practising without a fidelity fund certificate, the LPC "dilly-dallied" until October 2020 to file its supplementary submissions to enrol the matter;

2.4 upon "perfunctory" enquiries being made in June 2021 at the instance of the Court, the LPC informed the Court that the respondent had informed the LPC that he was no longer practising as an attorney, but as a "legal consultant" – no attempt was made by the LPC to establish what precisely this entailed or to visit the respondent in Gansbaai to check on his status;

2.5 all the while, and against a damning track record of repeated infractions, eight long years had marched on and the attorney in question had been allowed to carry on without intervention or oversight.

As to the nature of the relief sought, the Law Society advanced submissions to the effect that it understood that striking off orders could only be obtained in circumstances where dishonesty had *de facto* occurred. The LPC had evidently overlooked that several of the complaints made concerning the attorney related to his failure to account to clients and did accordingly involve elements of dishonesty. The Court concluded:

"...if a Court finds that, based on the facts before it the practitioner is not a fit and proper person to continue to practise it does not necessarily follow that he/she must be removed from the roll as a matter of course. The personal and professional implications of striking a practitioner from the roll are serious and a Court making such an order envisages that he/she should not be permitted to practise again....that removal from the roll is ordinarily reserved for those who have acted dishonestly and those whose transgressions do not involve dishonesty are usually visited with a lesser sanction of suspension....is neither an inviolate rule nor a

sine qua non and each matter must be determined on its facts, and a practitioner may in appropriate instances be struck from the roll in circumstances where their acts of misconduct are not accompanied by any dishonesty."

The court was, needless to say, unimpressed by the submissions of the LPC:

"Even on the most benevolent interpretation of events the conduct of the regulatory bodies in this matter, therefore, cannot be described as anything less than woefully inadequate"

In June 2021, when the matter once again came before the court, the respondent/attorney had still made no submissions to court, and upon consideration of the application, the practitioner was permanently removed from the roll. But that was not the end of the matter.

The Court, meted a strong admonition to the LPC for its mishandling of the matter and stated

"it has unfortunately become necessary for the Court, in the exercise of its powers in matters such as these to step in to ensure that the regulatory bodies which do not discharge their duties in relation to the profession are held to account, by making the appropriate order against them when and if needs be, as we have attempted to do in this matter. We hope and trust that the LPC will take this both as a warning and an opportunity to get its house in order."

Consequently and in order to ensure that the systemic failures were addressed, the Court directed that its judgment be furnished to the Chairperson of the LPC for comment and report-back within three months as to the causes and deficiencies responsible for the delays, and the manner in which the matter was dealt with, as well as a report concerning what steps have been or will be taken by the LPC to hold those responsible for the delays to account and as to the steps to be taken to ensure effective measures are put into place so that appropriate effect can be given to the LPC's statutory obligations in terms of regulating the profession.

The Court also, for good measure, and despite striking the attorney off the roll, visited an adverse cost finding against the LPC on a punitive scale concerning all costs incurred after April 2013 in the court proceedings.

We await with interest the report back from the LPC, because the message is clear: the LPC needs to pull up its socks – attorneys are getting away with all manner of mischief.

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