Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 3698/2014

In the matter between*:*

GRANCY PROPERTY LIMITED	First Applicant
MONTAGUE GOLDSMITH AG IN LIQUIDATION	Second Applicant
And	
LAW SOCIETY OF THE CAPE OF GOOD HOPE	First Respondent
D P SMITH N.O.	Second Respondent
N B NYATI N.O.	Third Respondent
C LOUBSER N.O.	Fourth Respondent
DINES CHANDRA MANILAL GIHWALA	Fifth Respondent
JOHN ROGERS N.O.	Sixth Respondent
COUNCIL OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE	Seventh Respondent

Court: Justice J Cloete

Heard: 14 October 2014

Delivered: 5 November 2014

JUDGMENT

CLOETE J:

Introduction

[1] This is a review application which has been settled between the applicants and the first and seventh respondents, save for the issue of costs. No relief is sought against the second to sixth respondents, who did not oppose.

[2] The applicants seek a two-fold costs order against the first and seventh respondents (for sake of convenience I will refer to them collectively as *'the respondents'*). Costs are now sought, jointly and severally, on the scale as between party and party until the date upon which the respondents filed a notice of intention to oppose, and thereafter on the scale as between attorney and own client, in both instances including the costs of two senior counsel.

[3] The respondents contend that any costs award against them is unwarranted.

[4] It is necessary to set out the background to the costs dispute in some detail.

Background

[5] This application concerned a review of various decisions of the respondents' Disciplinary Enquiry Committee (*'DEC'*), consisting of the second to fourth respondents, in the context of a disciplinary enquiry into the alleged professional misconduct of the fifth respondent. The applicants are the complainants in that enquiry which is ongoing. The applicants have been, and still are, embroiled in litigation with, amongst others, the fifth respondent; and on the papers it is common cause that they have played a pivotal and active role throughout the disciplinary proceedings which have been fraught with various disputes of a technical nature.

[6] By virtue of their involvement in the disciplinary proceedings as well as the ongoing litigation, the applicants sought permission from the DEC, as far back as April 2010, for their legal representatives to play an active role in the disciplinary enquiry itself. The DEC afforded them the opportunity to make representations in this regard. Due to various intervening disputes, the applicants were only able to make such representations during February 2013. They requested that their legal representatives be permitted to attend the enquiry, lead oral evidence, advance oral and written submissions and question all individuals who testified before the DEC.

[7] During July 2013 (a month before the enquiry's scheduled hearing over the period 19 to 23 August 2013) the DEC provided the applicants with copies of the answering submissions of the fifth respondent as well as the sixth respondent (who is the pro forma prosecutor in the enquiry) for comment.

[8] The fifth respondent adopted the position that the applicants' request should be refused. He contended that the DEC could not lawfully accede to the request for the following reasons. First, the applicants' proposed level of participation would usurp the functions of the pro forma prosecutor. It would thus amount to an impermissible conferral of such powers upon the applicants' legal representatives in circumstances where they would seek to advance the applicants' own cause against the backdrop of continuing litigation with the fifth respondent.

[9] Second, the proceedings before the DEC are regulated by the Attorneys Act 53 of 1979 (*'the Attorneys Act'*) as well as rule 15.11 of the rules promulgated thereunder. There is no provision in either which allows a complainant or witness to be legally represented; and the general provision in rule 15.11.3.1, namely that in the absence of any specific provision, the DEC is to be guided by the procedure prevailing in High Court criminal trials, was equally of no assistance to the applicants as complainants.

[10] Third, neither the common law nor any of the recognised limited exceptions permitting of legal representation found application.

[11] The sixth respondent correctly adopted a more neutral approach but raised similar concerns, while at the same time conveying his willingness to abide the decision of the DEC. He also pointed out that a material procedural irregularity could render any finding which the DEC might ultimately make which was adverse to the fifth respondent vulnerable to review at the latter's instance.

[12] On 24 July 2013 the applicants in response repeated their call for active participation by their legal representatives in the enquiry but recorded that, should the DEC not be amenable, then in the alternative a more limited role for their legal representatives was sought. The applicants provided reasons motivating both.

[13] The alternative request was that their legal representatives be permitted to attend the enquiry and participate therein only to the extent of ensuring that their rights were protected, and thus that *'the extent of any direct intervention would… be limited to safeguarding our clients' interests and rights during the examination and cross-examination of our clients' representatives, should the need to do so arise'.* The applicants also sought permission to be furnished with a transcript of the proceedings at their own expense.

[14] On 31 July 2013 the applicants also sought permission for their representative, Mr Mawji, to testify by means of video link, and simultaneously provided the DEC with reasons for such request. The main reasons were that Mr Mawji resides abroad and that he feared for his safety.

[15] On 6 August 2013 the fifth respondent, in a letter from his attorneys, opposed the video link request *'in the strongest terms'.* He gave various reasons, in particular that the prejudice which he stood to suffer if video link testimony was allowed would far outweigh any convenience or saving of expenses to Mr Mawji. The prejudice, so it was alleged, lay primarily in the contention that his legal representative would be severely hampered in his cross-examination of Mr Mawji. In support of this contention the fifth respondent referred to *S v F* 1999 (1) SACR 571 (C). At 577f the court emphasised that a presiding officer *'should be careful not to make light of the importance of having a witness in the presence of the cross-examiner and also under the constant gaze of the judicial officer'* (although it was not this particular passage, but what immediately followed thereafter by way of explanation, that was quoted in the letter).

[16] On 8 August 2013 the applicants responded, providing further motivation for their video link request.

[17] The DEC duly considered all of the submissions made (it is not suggested otherwise by the applicants) and on 15 August 2013 it handed down an order refusing all of the applicants' requests, save for that in relation to video link testimony. It postponed making any decision on this issue on the basis that same would be considered *'if and when it is made during the course of the disciplinary enquiry'.*

[18] On 17 August 2013 the applicants informed the DEC of their view that the order was unlawful and prejudicial to them. The applicants requested reasons for the order and these were provided on 5 September 2013. In its reasons the DEC not only dealt with its refusal of the applicants' request for active participation, but also with its refusal of the more limited participation which the applicants had sought in the alternative. The reasons reflect that all of the submissions made by the applicants, the fifth respondent and the sixth respondent had been taken into account, and that *'whilst not making a decision on the matter, the DEC is prima facie of the view that a proper case appears to have been made* [out] *for the evidence of Mr Mawji to be adduced through video conferencing'.*

[19] The DEC had decided however to postpone making any final ruling on this issue until it had received submissions from both the fifth and sixth respondents, as well as further argument during the course of the enquiry, as to how certain practical considerations should be addressed, such as the

handing up of documents during Mr Mawji's testimony. The DEC's explanation for adopting this approach was that:

> *'The various submissions were received by the DEC only shortly before the scheduled commencement of the enquiry on 19 August 2013. The DEC is aware that the Law Society has been directed to proceed with the disciplinary enquiry without delay. Rather than delaying the disciplinary enquiry in order to hear further argument on the matter, the DEC is of the view that the parties should be afforded an opportunity to make further comment and submissions during the course of the disciplinary hearing should they wish to do so.'*

[20] The disciplinary enquiry was postponed as a result of the applicants' request for reasons for the DEC's order.

[21] On 12 December 2013 the applicants wrote to the respondents advising them of their view that, in light of further complaints since lodged by the applicants against the fifth respondent, the review of the DEC's decision would be premature at that stage. The applicants proposed that the disciplinary enquiry be consolidated with the enquiry in respect of the further complaints, and repeated its earlier requests relating to participation and the like (which the DEC had refused). It was the applicant's position that if the DEC effectively reconsidered its decisions and acceded to their requests, as well as to consolidation of the two enquiries, a review of the DEC's order would be rendered unnecessary. The applicants made it clear however that,

insofar as its active participation request was concerned, this was now limited to the alternative request for less active participation.

[22] On 19 December 2013 the respondents replied that the applicants' proposal *'will have to be conveyed to our Disciplinary Committee for directions'*; that the fifth respondent had been requested to provide answering submissions by mid-January 2014, and that the matter would be referred to the Disciplinary Committee (*'DC'*) as soon as possible thereafter. It was anticipated that the referral would take place in February or March 2014 *'as it will take some time to prepare the extensive documentation for consideration'* by the DC.

[23] As a consequence, on 14 January 2014 the applicants requested both the respondents and the DEC to agree to an extension of the statutory 180 day period under PAJA (i.e. s 7(1) of the Promotion of Administrative Justice Act 3 of 2000) until 90 days after the DC's decision. The respondents provided a vague response through their attorney on 24 January 2014, and on 3 March 2014 informed the applicants that the DC had directed that the fifth respondent be afforded an extension (at his request) to respond to an earlier letter of the applicants as well as an opportunity to respond on the proposed consolidation. The applicants were also informed that the submissions of the fifth respondent would be considered by the DC at its next meeting scheduled for 14 April 2014. Neither of these communications dealt with the

applicants' request for an extension of the statutory 180 day period, which would have expired on 5 March 2014.

[24] Mr Mawji deposed to the founding affidavit on 4 March 2014 and the review application was launched on 5 March 2014. Annexed to the founding affidavit were the order of the DEC as well as its reasons for the order.

The relief sought in the notice of motion

[25] In their notice of motion the applicants sought orders declaring the decisions of the DEC to be unlawful, irrational, unreasonable and / or procedurally unfair; the setting aside of such decisions; and the substitution of such decisions with orders in accordance with their previous requests.

[26] The applicants also sought costs against the first respondent, as well as any other respondent opposing the relief, jointly and severally on the scale as between party and party, including the costs of two counsel.

Sequence of events subsequent to launching of review application

[27] On 11 April 2014 the respondents filed a notice of intention to abide. Annexed thereto was an affidavit *'for consideration by the above Honourable Court'* which was deposed to by Mr Nuku, a member of the seventh respondent.

[28] The respondents' position as set out therein was that s 67(2) of the Attorneys Act precludes the seventh respondent, after having assigned to the DEC the power to enquire into a complaint, from amending or withdrawing any decision arrived at or anything done by the DEC in terms of the powers so assigned.

[29] This notwithstanding, in the same affidavit, the respondents maintained the stance adopted by them in December 2013, namely that the DC (not the DEC) would consider the applicant's proposals at the meeting scheduled for 14 April 2014. Although not stated in express terms, it is clear from a reading of the annexures referred to at paragraph 4.1 of Mr Nuku's affidavit that this was the case. The reference to annexure *'KM19'* is to the letter from the applicants' attorney dated 12 December 2013. Paragraph 6 of that letter contains the applicants' proposals. The reference to annexure *'KM20'* is to the letter of 19 December 2013 in which the respondents had replied that the applicants' proposals would have to be conveyed to the DC for directions.

[30] On 25 April 2014 the fifth respondent deposed to an affidavit in which he stated that: (a) he did not oppose the application as he was of the view that it is the responsibility of the first respondent and its organs to defend their own decisions; (b) the decision by the respondents not to oppose the application caused him prejudice for the reasons set out therein; and (c) the court

hearing the application was asked to consider his submissions made in this regard.

[31] On 16 May 2014 the respondents confirmed that they would continue to abide the decision of the court. They asked to be advised of the date when the matter was due to be heard, as they *'may wish, as a courtesy to the Court, to arrange to attend the hearing through counsel'.*

[32] On 9 June 2014 the respondents' attorney however wrote to the applicants' attorney as follows:

> *'We have been instructed to advise you that the council of the Law Society of the Cape of Good Hope… at its meeting of 26 May 2014 resolved that in light of the recent judgment in Mtshabe v Law Society of The Cape of Good Hope… it was incumbent on the Law Society to set out its position in respect of all of the relief sought by your clients, including opposing where appropriate.*
>
> *Accordingly, the Law Society intends to file a full answering affidavit in the application, supplemented by the necessary request for condonation for filing out of time. In the meantime, we shall be filing the necessary notice of opposition, in substitution of the earlier notice of intention to abide.'*
>
> (I will return to the *Mtshabe* judgment hereinbelow).

[33] The respondents' notice of intention to oppose was filed on 10 June 2014.

[34] On 24 June 2014 the applicants took issue with the stance now adopted by the respondents, as also their interpretation of the *Mtshabe* judgment. The applicants pointed out that the respondents had already filed an affidavit for the assistance of the court simultaneously with their notice of intention to abide. This was met with an abrupt response on 30 June 2014 in which the respondents confirmed their decision to oppose the application. The applicants thus proceeded to file a supplementary founding affidavit dealing with the record provided by the respondents in terms of rule 53, as well as developments in the litigation subsequent to the launching of the application. The supplementary founding affidavit was deposed to on 7 July 2014.

[35] The respondents' answering affidavit was deposed to by Mr Nuku on 7 August 2014. He explained therein that on 26 May 2014, at a meeting of the seventh respondent, it resolved that the first respondent should fully set out its position in respect of the application and the relief sought and, if appropriate, oppose. He also stated that this resolution by the seventh respondent was *'prompted in part'* by the judgment in *Mtshabe*. The respondents contended that the applicants would not suffer any prejudice should they be permitted to file the answering affidavit and oppose the relief sought where appropriate. Mr Nuku stated that: *'The Law Society is acting in what it conceives to be the interest of the public, the legal profession and the administration of justice.'*

[36] What is noteworthy is that the respondents then conceded in the self-same affidavit that:

35.1 because the applicants had played an active role in the disciplinary proceedings they might be afforded greater participatory rights than is usually the case. The nature and extent of any such entitlement was what had to be determined; and further that the applicants should be granted the alternative relief (i.e. the more limited participatory role) in the disciplinary enquiry;

35.2 the applicants had indeed made out a *prima facie* case for Mr Mawji to testify by means of video link; that it was appropriate for the DEC to reconsider its decision in this regard; that the respondents did not *'in principle'* oppose the relief sought in respect of video link testimony; and

35.3 the applicants should be furnished with a copy of the transcript subject to appropriate confidentiality safeguards.

[37] The respondents further emphasised that their opposition to the relief claimed was confined to the applicants' request for <u>active</u> participation in the disciplinary proceedings. The respondents sought costs against the applicants only in the event of them persisting with their active participation request.

[38] On 4 September 2014 the applicants, in light of the concessions made for the first time in the answering affidavit, proposed that the respondents consent to an order for the substantive relief and that they further agree to pay the applicants' costs on the party and party scale. It was recorded that this would put an end to the review proceedings without further costs being incurred.

[39] On 10 September 2014 the respondents agreed to the applicants' proposal, save for the issue of costs. They adopted the position that each party should bear their own costs.

[40] On 11 September 2014 the applicants persisted with their claim for costs on the basis that:

> *'But for the Law Society's belated* volte face *and opposition, our clients' costs would have been significantly curtailed. Moreover, at all times, our clients have sought costs against the Law Society, as well as any party electing to oppose the application.'*

[41] The applicants further proposed that in the event of the respondents still not being agreeable to paying their costs, same be argued separately.

[42] On 17 September 2014 the respondents agreed to an order in respect of the substantive relief and also agreed that the costs issue be argued separately. However, they nevertheless undertook to consider the issue of costs at the

next monthly meeting of the seventh respondent scheduled for 29 September 2014, whereafter they would revert.

[43] The respondents do not appear to have reverted as undertaken, and costs were thus argued before me on 14 October 2014.

The arguments presented

[44] The applicants contend that they were forced to launch the review application. They were also obliged to persist with the application right up to the point where the respondents ultimately conceded the substantive relief. The respondents' belated decision to oppose the substantive relief (which opposition was devoid of merit and in any event based upon a misinterpretation of the *Mtshabe* judgment) was grossly unreasonable, irrespective of whether they acted in good faith. The respondents have a duty, not only towards their members, but to the public at large (including the applicants) as well as the administration of justice. Had the respondents not belatedly decided to oppose, virtually no costs would have been incurred thereafter. Furthermore, their stance in persisting with their refusal to pay the applicants' party and party costs after conceding the substantive relief similarly demonstrates their grossly unreasonable attitude to the litigation. (Although the applicants put the respondents on notice that a punitive costs award from inception would be sought at the hearing, this was effectively abandoned in argument before me). The applicants submit that the

respondents should be ordered to pay party and party costs to the date of opposition as well as attorney and own client costs from the date upon which they took the decision to oppose, in both instances, including the costs of two senior counsel.

[45] On the other hand the respondents argue that they only took the decision to oppose and to file an answering affidavit in pursuance of what they perceived in good faith to be their duty, namely to clarify their view as to the relief sought and to place what they considered to be relevant information before the court. It was submitted that the applicants' response to these steps, namely seeking punitive costs, is unwarranted, if not opportunistic, given the nature of the respondents' functions. The fact that the respondents filed a notice of opposition, which may have been unnecessary in the circumstances, must be considered in context and its significance should not be overstated. What should also not be overlooked is the stance adopted by the fifth respondent, namely that, while not formally opposing, he challenged the appropriateness of the substantive relief sought which he contended would redound to his prejudice. Furthermore, the relief ultimately agreed between the applicants and the respondents in relation to participation in the disciplinary enquiry was not the main relief, but the alternative relief sought. However, in the event of the court seeing fit to award costs, these should be limited to: (a) those arising out of the respondents' opposition; (b) party and party costs; and (c) the costs of one counsel only.

Applicable legal framework and principles

[46] The first respondent is a statutory body which derives its powers and duties from Chapter 3 of the Attorneys Act. Section 60(1) thereof provides that the affairs of the first respondent *'shall be managed and controlled by a council* [i.e. the seventh respondent] *which may… exercise the powers of the society'* subject to certain limited exceptions which are not relevant for present purposes. Given that the first and seventh respondents have to all intents and purposes acted in unison in taking the decision to oppose, I accept, for purposes of this judgment, that both exercised such powers in their dealings with the applicant. It is for this reason that I collectively refer to them as *'the respondents'*.

[47] In *Law Society of South West Africa v Orman* 1933 SWA 68 at 71 it was held that a law society is not in the position of an ordinary litigant in disciplinary proceedings concerning its members which serve before the court:

> *'… the Law Society is not here prosecuting a right in the ordinary way. It is performing a public duty… It is merely assisting in the maintenance of a standard of profession and cleansing the profession where the need arises.'*

[48] In *Incorporated Law Society v Taute* 1931 TPD 12 at 15 the court highlighted the distinction between a statutory body performing a public duty and the position of an ordinary litigant:

> *'If the Court had been of the opinion that the Society was in the position of an ordinary litigant, costs would have followed the event as a matter of course and there would have been no occasion to base the decision on costs on a reason other than the failure of the application.'*

[49] In *Law Society of the Cape of Good Hope v Frank and Warshaw* 1921 CPD 169 at 170 the court, dealing with the approach adopted by the Law Society had the following to say:

> *'The Law Society, which is a very necessary institution, created and incorporated by an Act of Parliament, possesses very wide powers. In its effort to maintain proper discipline, and uphold the integrity, honour and etiquette of the profession, it is no doubt entitled to look to the Court for support. But it is incumbent on the Society to carry out its duties not only with due regard to the interests of the profession as a whole, but also to the interests of individual members against whom it may receive a report or be called upon to act. If complaints of unprofessional conduct are made against any particular attorney or attorneys, it is the duty of the Society carefully to investigate such complaints with proper regard to the position of those who are affected thereby.'*

[50] Having considered the facts in that matter, and having arrived at the conclusion that the Law Society had not properly investigated the complaints in question, it was held at 171 that:

> *'A consideration of these circumstances, to which I have referred, leads me to think that a little more care and discrimination might and should have been bestowed in examining into and formulating the charges against the defendants… The result is that judgment must be in favour of the defendants with costs.'*

[51] The court in *Frank and Warshaw* thus found that a failure to properly investigate complaints was sufficient to result in an award of costs against the Law Society (see also *Incorporated Law Society v Buirski* (1908) 25 SC 843). That there should be special circumstances to justify an award of costs against a law society appears to have been followed consistently (see *inter alia Randell v Cape Law Society* 2012 (3) SA 207 (ECD) at para [28]), although what constitutes special circumstances obviously depends upon the facts of each case and is moreover always subject to the trite principle that an award of costs is a matter of judicial discretion.

[52] The decision in *Kwazulu-Natal Law Society v Davey and Others* 2009 (2) SA 27 (NPD) at paras [215] to [217] illustrates just how reluctant some of our courts have been to award costs against the Law Society in the past:

> *'[215] Finally I turn to the issue of costs. The respondents have been successful in this application. In a normal civil case they would have been entitled to their costs. However, as pointed out above, these are not civil proceedings. The principle is embedded in our case law that a law society being the custodian of the profession is entitled to act as informant and to bring to the notice of the court any conduct which it believes to be unprofessional or unworthy. There has not been one instance that I have been able to find where a law society was mulcted in costs, even though its application was unsuccessful. (See, for example,* Vaatz v Law Society of Namibia *1991 (4) SA 382 (Nm)). The situation may be different if it were shown that there were mala fides. However, that is clearly not the case* in casu.

[216] Mr Ploos van Amstel SC who appeared on behalf of the fifth respondent submitted in his oral argument that the applicant should at least bear a portion of the fifth respondent's costs. There is much to be said for Mr Van Amstel's argument. The evidence clearly showed that the fifth respondent played no role at all in the marketing and advertising strategies devised by the third respondent. Indeed, the third respondent quite categorically in his affidavit took the responsibility for all these decisions. One would have expected the applicant to have carefully investigated and then evaluated the fifth respondent's role in her practice and whether she could be held accountable for any alleged wrongdoing. Calling upon her to furnish an explanation in regard to the allegations would have in my view been a fair process. Instead, she is joined as one of the respondents in an application where very serious allegations are made against her. When she puts up her affidavit and gives a detailed explanation, the applicant persists in seeking relief against her. It was only at the eleventh hour that counsel for the applicant conceded that a strike-off was not appropriate but they nonetheless sought her suspension from practice. On the assumption that my above findings of fact are incorrect, I would nonetheless in the case of the fifth respondent have completely exonerated her. I am in entire disagreement with the approach of the applicant in this regard.

Having said all this, I am constrained by well-established precedent not to make any order for costs in favour of the fifth respondent. It may be that in the future this issue could be reconsidered by the Supreme Court of Appeal.'

[53] Subsequently there has been occasion for the Supreme Court of Appeal to do so. In *Law Society of the Northern Provinces and Another v Viljoen and Others* [2011] 3 All SA 133 (SCA) at paras [21] to [22] the court, while acknowledging the longstanding principle that a law society should not be mulcted with costs considering its status as a special litigant acting in the public interest, held that the it was indeed deserving of an adverse costs

order on the party and party scale, considering that its initial decision had been based on bad judgment, and that it had pursued an appeal of the high court's decision which had clearly been correct:

> *'[21] The appellants argued against any costs being awarded against them. It was contended that a law society is a special litigant in the sense that it does not come to court for its own interests. As a body with statutory powers to administer the affairs of its members, it has a statutory duty to approach a court in any matter where it is of the opinion that a practitioner is guilty of conduct which impugns his or her fitness to continue to practise. It was argued further that it does this in the public interest as well as that of the court. We were further urged to consider the fact that there are conflicting judgments on this aspect by the North Gauteng High Court and the appellants were justified to approach this court for clarity.*
>
> *[22] I have no doubt that in the circumstances of both cases, the appellants were not entitled to refuse to issue fidelity fund certificates to the respondents. It is clear to me that the second appellant's decision was indeed misconceived. Furthermore, even after the appellants had lost both cases in the high court, they still zealously pursued the appeal in this court, thus exposing the respondents to substantial legal costs. Notwithstanding the long standing and salutary practice of not mulcting a Law Society with an adverse order of costs as it is a special litigant acting in the public interest, I am of the view that it would be unfair, given the facts of this case, not to award costs to the respondents.'*

[54] The decision in *Viljoen* confirmed that the court's discretion is not limited to a finding of *mala fides.* It accepted the respondents' argument summarised at para [20] that:

'the appellant's decision to refuse to issue fidelity fund certificates was flawed from the beginning on a bad judgment. It was argued that it would be wrong and unfair for the respondent to be left out of pocket in circumstances where the respondents have been put to considerable financial loss due to some bad judgment on the part of the appellants.'

[55] In *Mtshabe v Law Society of the Cape of Good Hope* 2014 (5) SA 376 (ECM) at paras [63] to [66] the Law Society was severely criticised for failing to fulfil its statutory obligation to protect both the interests of the legal profession and the public. It had simply elected to abide the decision of the court where a former attorney, on parole after having been incarcerated for fraud committed while still in practise, had applied for his readmission:

'[63] In the light of these obligations and, in particular, in the light of the respondent's duty to protect both the interests of the profession and the public interest, it is extraordinary that the respondent did not consider it necessary, notwithstanding its decision not to oppose the application, to appear at the hearing of the matter and to advance submissions in relation to the matter which would assist the court in the exercise of its discretion. This is all the more astonishing in the light of the fact that this application raised novel and potentially far-reaching and significant questions of principle regarding the readmission of an attorney who is still on parole for a very serious offence.

[64] In my view the law society failed in its statutory obligations, both to the public and to this court, and its conduct in relation to this application is to be deprecated.

[65] Lest it be misunderstood: it is not suggested that the respondent was obliged to oppose this application. The respondent is of course entitled to have taken a decision not to oppose the application on the basis that it was

satisfied that the applicant is indeed a fit and proper person to be readmitted and enrolled. But then, in the light of the particular circumstances of the matter, it was obliged to justify that decision and to place before this court appropriate submissions regarding the readmission of the applicant notwithstanding that he is a parolee. It did not do so and in failing to do so it failed to comply with its statutory obligations.

[66] In the light of the fact that the application is not opposed it is not necessary to make any order as to costs. In the circumstances I would make the following order: The application is dismissed.'

[56] Given the nature of the costs order sought by the applicants, it is also necessary to briefly refer to the established principles pertaining to an award of punitive costs as well as an award of the costs of two counsel.

[57] The approach to an award of attorney and client costs was reiterated in *Nkume v TransUnion Credit Bureau and Another* 2014 (1) SA 134 (ECM) at para [12]:

'It is trite law that an award of attorney and client costs is not granted lightly. Such order is granted by reason of some special considerations arising either from the circumstances which gave rise to the action, or from the conduct of the losing party. The list is not exhaustive.'

[58] As to the costs of two counsel, it was held in *Davis v Caledon Municipality and Another* 1960 (4) SA 885 (CPD) at 887G-H:

> *'Mr Levy, who appeared on behalf of the excipient, has applied, firstly, that the Court should order that the fees of only one counsel for the respondent should be allowed by the taxing master… In my view there is no substance in the contentions advanced by the excipient. The exception did not raise any difficult legal questions, and had this been the only issue between the parties, I would probably have ruled that only one counsel for the respondent would have been justified. But inasmuch as this is an interlocutory proceeding in an action which appears to be one of importance and of substance I cannot hold that two counsel were not justified. In my view if the main action justified two counsel then two counsel must be allowed in all interlocutory applications.'*

[59] This *dictum* has been consistently followed in a number of subsequent cases and is also said to reflect the practice in the Cape: *Trust Bank van Afrika BPK v Van Jaarsveldt en 'n Ander* 1978 (4) SA 115 (O) at 126A-127B; *Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 (CPD) at 776G-H; *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (WLD) at 57G; *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (CPD) at 370B-C.

[60] Although in *Wanderers Club v Boyes-Moffat and Another* 2012 (3) SA 641 (GSJ) the court took a different approach, I have no difficulty in following the practice in this division. I am also comfortable in treating the review application as an interlocutory one although, as will appear from what is set out below, I do not believe that argument on costs alone should fall into this category.

Application of legal principles to the facts

[61] As far back as July 2013 the applicants had informed the DEC that they would accept limited participation as an alternative to active participation in the disciplinary enquiry. They simultaneously asked to be furnished with a transcript of the disciplinary proceedings at their own expense. A week later, on 31 July 2013, they sought permission for their representative to testify by means of video link.

[62] The DEC refused these requests, save for deferring a decision on the video link issue. They provided written reasons on 5 September 2013. The applicants' subsequent requests of 12 December 2013 for consolidation of the two disciplinary enquiries and for the DEC to reconsider its decisions were entertained by the respondents, and it was already made clear by the applicants at that stage that the request for limited participation (i.e. the alternative relief) was all that was sought in respect of participation. The respondents ignored the applicants' request made in January 2014 for an extension of the 180 day period under PAJA until 90 days after the DC had made its decision. The respondents failed to provide their answer to the applicants' requests within the 180 day period. The applicants thus had no option but to launch the review proceedings, which they did on the last day of that 180 day period.

[63] After the review application was served, the respondents took a decision to abide and filed an affidavit for the assistance of the court. In that affidavit they informed the court that, given the provisions of s 67(2) of the Attorneys Act, they were effectively precluded from interfering with the decisions of the DEC which formed the subject matter of the review. They submitted that they had no reason to believe that the DEC had not acted in good faith in reaching its decisions but made no other submissions. However, notwithstanding that, according to them, they were precluded from interfering with the decisions of the DEC, they stated that the DC would nevertheless consider the applicants' proposals.

[64] This affidavit was filed on 11 April 2014, two weeks before the fifth respondent's affidavit on 25 April 2014, in which he complained that the respondents had prejudiced him by not defending the decisions of the DEC.

[65] At that point the respondents must surely have considered the fifth respondent's complaint. They must surely also have concluded that they had nonetheless placed sufficient information before the court, because subsequently on 16 May 2014, almost a month after the decision in *Mtshabe*, they confirmed that they would continue to abide. The first respondent presumably received a copy of the *Mtshabe* judgment almost immediately after it was delivered on 17 April 2014, given that it was a party to those proceedings.

[66] It was only on 9 June 2014 that the respondents informed the applicants that in light of the *Mtshabe* judgment it was incumbent upon them to set out their position in respect of all of the relief sought, including opposing such relief *'where appropriate'*.

[67] By filing a notice of intention to oppose, and by refusing to consider the applicants' reaction to their *volte face*, the respondents compelled the applicants to draft and deliver a supplementary founding affidavit. The respondents' answering affidavit which followed effectively constituted a capitulation to the relief sought by the applicants since almost a year prior to the review proceedings being launched. Although the respondents limited their *'opposition'* to the applicants' request for active participation in the disciplinary enquiry, they had to have been aware that the applicants had been agreeable since July 2013 to more limited participation, and had informed the respondents in December 2013 that they now only sought such limited participation. Not only were the applicants agreeable to limited participation, but they had spelt out exactly what the nature of that limited participation would involve; and the respondents ultimately consented to the terms of that alternative relief.

[68] I cannot accept that the respondents were motivated to oppose the application only after consideration of the *Mtshabe* judgment, even if only in part. What was said by the court in *Mtshabe* about the respondents'

obligations to the court is nothing new. This has always been the position. What the court in *Mtshabe* did was to criticise the Law Society for failing to fulfil a statutory obligation of which they must surely already have been well aware.

[69] However, if I am wrong, then the respondents' answering affidavit did not attempt to defend the decisions of the DEC or to place them in any context for the assistance of the court. On the contrary, the respondents, who on the one hand contend that they are unable to do anything about the decisions of the DEC, on the other in effect agreed that the decisions of the DEC were indefensible and then proceeded themselves to consent to the relief sought.

[70] The question that arises is why, in these circumstances, the respondents did not agree from the outset that the decisions of the DEC were wrong. Whether or not they have any power to interfere in the decisions of the DEC by virtue of s 67(2) of the Act is not the issue. Their duty was to assist the court. The point is thus that, had they properly and timeously applied their minds to the issue at hand, which they should have done given that they were cited as parties to the application, they could have informed the court of their attitude at a much earlier stage. It would thus have been entirely unnecessary for the applicants to have incurred any further costs from the date upon which the notice of intention to abide was filed, save for those attendant upon counsel

moving for an order on an unopposed basis, given that neither the DEC nor the fifth respondent opposed.

[71] It is against this backdrop that I am compelled to find that the respondents have been to blame for the unnecessary costs which have been incurred since the notice of intention to oppose was filed. Following the approach of the Supreme Court of Appeal in *Viljoen*, I conclude, in the exercise of my discretion, that it would be unfair, given the particular facts of this matter, not to award certain costs to the applicants.

[72] That having been said, I am not persuaded that the applicants are entitled to costs from the date upon which the review application was launched. There is nothing to indicate that the DEC did not act in good faith. Although the respondents must be criticised for failing to respond timeously to the applicants' request for an extension of the 180 day period under PAJA, there is nothing on the papers to indicate that the applicants themselves took active steps to put the respondent to terms on costs if they were not given such an extension. Furthermore, having informed the respondents in December 2013 that they would limit the participatory relief sought to the alternative relief, the applicants themselves did something of a *volte face* by seeking active participation as part of the main relief in their notice of motion. Accordingly I am of the view that there are no special circumstances

warranting an adverse costs order against the respondents until the date upon which they filed their notice of intention to oppose.

[73] I am also not persuaded that a punitive costs order is warranted. An adverse costs order on the scale as between party and party is sufficient where special circumstances exist, if regard is had to the authorities which I have quoted above. To award attorney and own client costs would, in my view, doubly penalise the respondents.

[74] Insofar as the costs of two counsel are concerned, I would have had no difficulty in awarding same had the merits of the review application been an issue before me. However, the applicants were aware since 17 September 2014 (almost a month before costs were argued before me) that the respondents had consented to the substantive relief sought. Although the applicants were entitled to employ the services of two senior counsel to address the issue of costs, this does not mean that it is reasonable to expect the respondents to pay for them both. As I understand the practice in the Cape, the costs of two counsel are awarded, in the ordinary course, in respect of interlocutory or subsidiary matters relating to the main proceedings, even where these matters are not complex. However, to my mind, if I were to apply the same practice to argument which revolved only about the issue of costs, I would be taking it too far.

[75] During argument I was urged by counsel for the applicants to order that the costs of attendance of the applicants' attorney, including his travel and accommodation costs (given that he practices in Johannesburg) as well as those of one of the senior counsel who appeared, and who similarly practices in Johannesburg, be recoverable from the respondents. However I believe that it is appropriate to leave this in the hands of the taxing master.

[76] Finally, having considered the authorities where costs have been awarded against the Law Society, I have not been able to find any decision where the Law Society's Council was also ordered to pay.

Conclusion

[77] **In the result the following order is made:**

1. By agreement between the applicants and the first and seventh respondents, and in respect of the disciplinary enquiry into the alleged professional misconduct of the fifth respondent, Dines Chandra Manilal Gihwala, with reference number DISC/42923/PP/gb (*'the Enquiry'*):

1.1 the applicants' legal representatives are entitled to attend the Enquiry and to participate in the Enquiry, to the extent necessary to ensure that the applicants' rights (including the rights of the applicants' representatives) are protected;

1.2 the applicants will be furnished with a copy of the transcript of proceedings of the Enquiry on an ongoing basis during the Enquiry, as soon as such transcript becomes available; and

1.3 the applicants' Mr K I Mawji is entitled to testify by means of video conferencing in the Enquiry.

2. The first respondent shall pay the applicants' costs from the date upon which the first and seventh respondents filed a notice of intention to oppose, on the scale as between party and party, including the costs of two counsel where employed, save that the costs of one counsel only shall be allowed in respect of preparation for argument on costs and the appearance on 14 October 2014.

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J I CLOETE