Senekal v Legal Practice Council and others
[2023] 2 All SA 834 (FB)

Division:	FREE STATE DIVISION, BLOEMFONTEIN
Date:	31 March 2023
Case No:	3858/2021
Before:	JJ MHLAMBI and C VAN ZYL JJ
Sourced by:	J (Maartens) Richter
Summarised by:	DPC Harris

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Legal Practice – Legal Practice Council – Disciplinary enquiry against attorney – Review of decisions of Council and disciplinary committee chairman – Decisions running contrary to Rules of the Uniform Rules governing the Attorneys Profession falling to be set aside – Decision of chairman not to recuse himself also reviewable where there was a reasonable apprehension of bias.

Editor's Summary

The applicant was a practising attorney and the first respondent was the Legal Practice Council, Free State Province (the "LPC"). In 2017, the court in a matter in which the applicant was cited as third respondent ordered a referral to the Free State Law Society to determine whether the applicant had misled the court or acted in a manner inconsistent with his professional obligations to the court during that case. The second respondent ("Mr Litheko") was a practising attorney appointed to act as chairperson of the disciplinary hearing against the applicant, scheduled as a result of the referral.

Opposing the review application, the LPC filed a counter-application for an order striking the applicant's name from the roll of legal practitioners; alternatively, that the applicant be suspended from practice for such period and on such conditions as the court might deem fit. That led to the applicant seeking review of the decision to apply for his striking from the roll. In a further urgent application, the applicant successfully applied for an interdict against the LPC, contending that he should first be heard in a disciplinary enquiry before an application for the striking off of his name from the roll of attorneys could be filed. The parties subsequently entered into a settlement agreement in terms of which the applicant agreed not to proceed with his review application and that the disciplinary enquiry would be proceeded with. However, after the enquiry was set down for hearing, the applicant applied for the review and setting aside of the decision of the LPC and the chairman to continue with the enquiry with only one member of the disciplinary enquiry committee, in contravention of rule 50(1)(3) of the Uniform Rules governing the Attorneys Profession; and to hold the enquiry via a virtual platform and/or video conference. He also sought the review of Mr Litheko's refusal to recuse himself as chairperson of the enquiry.

Held – The LPC's decision to proceed with the enquiry with only one member of the disciplinary enquiry committee was in contravention of the parties' agreement in that regard, and the peremptory provisions of rule 50(1)(3). The LPC's decision to the contrary, and the chairperson's implementation thereof, especially without having consulted the applicant, constituted an unlawful decision which fell to be reviewed and set aside.

The decision to hold the enquiry via a virtual platform and/or video conference was regulated by rule 50(17)(1) which stated that the duties, functions and powers of the disciplinary enquiry committee relating to its conduct of a formal enquiry was to be determined through its chairman. The decision was taken by

the LPC, which did not have the authority to do so. It was a decision to be taken by the chairperson. The decision was consequently unlawful and was reviewed and set aside.

Mr Litheko's recusal was called for by the applicant after it emerged that he and the prosecutor appointed in respect of the disciplinary enquiry had shared an office and a laptop. The prosecutor admitted that they had discussed the applicant's matter. The test for recusal is the "reasonable apprehension of bias" test. Mr Litheko ought to have withdrawn as chairperson when the applicant requested him to do so. His failure to have done so was irrational, unfounded and arbitrary. His decision was also reviewed and set aside.

The application succeeded and the LPC's counter-application was dismissed.

Notes

For Legal Practice see:

- *LAWSA* (3ed) (Vol 26(3) paras 1–335)

Cases referred to in judgment

Cool Ideas 1186 CC v Hubbard and another 2014 (8) BCLR 869 ([2014] ZACC 16) (CC) – **Referred to**	843
President of the Republic of South Africa v South African Rugby Football Union 1999 (7) BCLR 725 (1999 (4) SA 147) (CC) – **Considered**	847
Senekal v Law Society of the Free State [2018] JOL 40058 ([2018] ZAFSHC 101) (FB) – **Referred to**	838
South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku 2022 (7) BCLR 850 (2022 (4) SA 1) (CC) – **Considered**	847

Legislation Considered

Legal Practice Act 28 of 2014: s 4

Uniform Rules of Court: rule 6(15), rule 53

Judgment

VAN ZYL J:

[1] This is a review application in terms of rule 53 of the Court Rules. In terms of the amended notice of motion the applicant is seeking the following relief:

"1. Reviewing and setting aside the decision of the first and second respondents to continue with an enquiry in contravention of rule 50.13 of the Uniform Rules governing the Attorneys Profession promulgated in *Government Gazette* number 39740, dated 26 February 2016, against the applicant before only one member of the Disciplinary Enquiry Committee.

2. Reviewing and setting aside the decision of the first and second respondents to continue with an enquiry against the applicant via any virtual platform and/or video conference.

3. Reviewing and setting aside the decision of the second respondent that he will not recuse himself as chairperson of the enquiry against the applicant.

4. That any respondents that oppose the application be ordered to pay the costs jointly and severally, the one paying the other to be absolved.

5. Further and/or alternative relief."

[2]
The applicant is Mr FJ Senekal, a practising attorney, practising as such in Bloemfontein, Free State Province.

[3]
The first respondent is the Legal Practice Council , Free State Province, a statutory body created in terms of section 4 of the Legal Practice Act 28 of 2014, with its main place of business at 139 Zastron Street, Westdene, Bloemfontein (the "LPC").

[4]
The second respondent is Mr M Litheko, a practising attorney, appointed to act as Chairperson of the disciplinary hearing relevant to this application ("Mr Litheko" or the "chairperson").

[5]
The third respondent is Mr NW Phalatsi, a practising attorney, appointed to act as *pro forma* Prosecutor in the disciplinary hearing relevant to this application ("Mr Phalatsi" or the "prosecutor").

[6]
The LPC is opposing the review application and also filed a counter-application in terms whereof it is seeking, *inter alia*, an order that the applicant's name be struck off the roll of legal practitioners; alternatively, that the applicant be suspended from practice for such period and on such conditions as the court may deem fit.

[7]
The LPC filed an answering affidavit in opposition of the review application, which it requested should also serve as founding affidavit in support of the LPC's counter-application.

[8]
The applicant subsequently filed a replying affidavit in the review application, which he requested should also serve as answering affidavit in opposition to the LPC's counter-application.

[9]
The LPC did not file a replying affidavit in response to the applicant's last-mentioned answering affidavit in opposition to the LPC's counter-application.

[10]
The complete record which had been filed in this matter consists of 1 700 pages. Many personal and/or emotionally loaded allegations are contained in the papers and not necessarily all of them unfounded. I will, however, refrain from unnecessarily dealing with allegations and issues which are unnecessary and/or not directly relevant to the relief which is being sought by the respective parties.

Condonation

[11]
The applicant's replying affidavit in the review application, which also constitutes his answering affidavit in the counter-application, was filed a few days late. However, the applicant advanced acceptable reasons for the slight delay and requested condonation for the late filing thereof, which condonation is granted.

[12]
The LPC's answering affidavit in opposition to the review application, which also constitutes the founding affidavit of the counter-application, was filed late and no reasons were advanced for the late filing, no condonation application was filed and no condonation was even requested. It was consequently submitted on behalf of the applicant that it is to be considered that the said answering affidavit, the counter-application and the founding affidavit in support thereof, are not before court.

[13]
The applicant also filed an application in terms of rule 6(15) in terms whereof the applicant requested that the said answering affidavit in opposition to the review application, which also constitutes the founding affidavit of the counter-application, constitutes hearsay evidence and stands to be struck out as inadmissible hearsay evidence.

[14]
Although both the aforesaid issues were very validly raised by the applicant, I consider it in the interest of justice and in the interest of both parties that the said defects be condoned in order for the application and the counter-application, with all issues properly ventilated, be adjudicated on its merits. Condonation is consequently granted.

[15]
The applicant furthermore raised the issue that the founding affidavit in the counter-application contains annexures which have not been properly placed before court and should not be taken into consideration by the court. Although this point was also very validly raised, I do not deem it necessary to decide upon it for reasons which will become evident later in the judgment.

The factual background to the review application

[16]
The factual background which led to the review application is very relevant in the present matter.

[17]
During 2017, the Free State Law Society, the predecessor in title of the LPC, received a referral from Lever AJ, at the time an acting Judge in the Northern Cape High Court, Kimberley, who presided in an application under case number 2616/16 in which the present applicant was the third respondent, which referral formed part of the court order issued under the aforesaid case number, dated 24 March 2017.

[18]
In terms of paragraph 3 of the last-mentioned court order, the following order was made:

"3.
In matter number 2616/16 the matter is referred to the Free State Law Society to determine whether Mr Senekal, the third respondent, misled the court or acted in a manner inconsistent with his professional obligations to this court on the following issues:

(a)
The contentions made in the founding affidavit at pages 63679, specifically paragraphs 122, 123 and 124 in relation to the allegation that second and third respondents were misappropriating the funds of the first respondent (Kimcrush). The answer to such allegations which appear at page 788 of the record, specifically paragraphs 37 and 38. The reply thereto that appears at pages 999–1012, specifically paragraph 11 thereof.

(b)
The matter of Senekal in full knowledge of the interdict on the bank account of Kimcrush (Pty) Ltd used the Trust account of his firm, Matsepes, in order to circumvent the said interdict by Kimcrush (Pty) Ltd to pay their debts into the relevant Trust account. Further allowing such Trust account to be used as a business account."

[19]
At an earlier date, 18 November 2016, a certain Mr A Pan, who was the applicant in the aforesaid matter which served before Lever AJ, also filed a complaint against the applicant with the Free State Law Society.

[20]
In the LPC's answering affidavit to the review application and founding affidavit in the counter-application the following was stated at paragraph 5.9 thereof:

"The FSLS, because of the seriousness of the allegations made against the applicant and the *prima facie* infractions in the record of proceedings under oath from the hearing of the application under application number 2616/16 of the Northern Cape Division, Kimberley, decided to file an application for the striking off of the name of the applicant from the roll of attorneys."

[21]
The applicant then issued a review application in this Court under case number 1953/2018, in which he, *inter alia*, sought an order that the Free State Law Society's decision to bring an application to have his name struck from the roll of attorneys, be reviewed and set aside. The aforesaid decision by the Free State Law Society led to an urgent interdictory application

which the applicant issued against the Free State Law Society in which the applicant sought that the Free State Law Society be interdicted and restrained from proceeding with the proceedings against him pending the finalisation of the review application. In the said urgent application, the applicant contended that he should first be heard by the Free State Law Society in a disciplinary enquiry before an application for the striking off of his name from the roll of attorneys can be filed. Judgment in that matter, *Senekal v Law Society of the Free State* (1990/2018) [2018] ZAFSHC 101 (8 June 2018) [reported at [2018] JOL 40058 (FB) – Ed], was delivered by Pohl AJ on 8 June 2018. I deem it necessary to firstly quote from the said judgment where Pohl AJ dealt with the events preceding the issuing of that urgent application:

"[7]

On 23 May 2017, the applicant received a letter from the respondent, advising the applicant that the Council of the respondent has resolved on 19 May 2017, to proceed with an application to strike the applicant from the roll of attorneys after the above mentioned referral to it from Lever AJ. I shall herein after refer to this resolution as 'the first resolution'."

Thereafter the events set out in paragraph 9 of the judgment followed:

"[9]

On 24 May 2017, the applicant wrote a letter to the respondent in reply to the letter in which he was informed of the first resolution. In this letter the applicant informed the respondent that he did not have a chance to place his version before the Council prior to the Council of the respondent reaching its first resolution. He indicated that he throughout laboured under the impression that he be afforded that opportunity and that rule 50 of the rules, governing disciplinary proceedings for the attorneys profession (published in a Government Notice), would be adhered to and applied in this instance. He placed on record that according to him, the resolution was taken in contravention of his rights."

Subsequently the following occurred:

"[8]

On 28 June 2017, the applicant was notified by the respondent that the respondent's Council took another resolution on 23 June 2017, to the effect that the applicant must appear before the Council to give reasons why the Council should not proceed to bring an application to remove the applicant's name from the roll of attorneys. I shall herein after refer to this resolution as 'the second resolution'.

. . .

[13]

The applicant then received a letter dated 2 February 2018, from the respondent. This letter informed the applicant to appear before the respondent's council on 23 February 2018 to give reasons why the council should not proceed with the applicant's 'suspension' application. The letter specifically referred to a charge sheet annexed to it. The charge sheet referred to a resolution adopted by the respondent's council, which was taken on 13 December 2017 that the applicant should appear before the council and give reasons why he should not be removed from the roll of attorneys, alternatively suspended from practice. This resolution will be referred to herein later as 'the third resolution'. The said charge sheet contained the two matters referred by Lever AJ and a third complaint lodged by one Claassen and Joluza Boerdery (Pty) Ltd.

[14]

The applicant then wrote a letter to the respondent on 12 February 2018, requesting a formal hearing (in terms of the provisions of rule 50(12) of the disciplinary proceedings, referred to above.). The applicant also requested a postponement of the appearance scheduled for 23 February 2018. The respondent replied in a letter dated 21 February 2018, in which the request for a formal enquiry was denied. In this letter, the respondent itself, referred to the provisions of rule 50.6.2.2. The respondent said that in terms of that rule, the applicant is called upon to come and furnish reasons why the application to strike or suspend him should not be proceeded with. The respondent then rescheduled the appearance of the applicant to 8 March 2018. The matter did not proceed on 8 March 2018.

. . .

[18]

According to the applicant, he was therefore compelled to bring this urgent application for the above mentioned relief. He thus instructed his counsel to draw this application as well as the review and compel application, which was annexed to this application as an annexure. In the review application under case number 1953/2018, which was issued on 18 April 2018, the applicant in essence seeks to have the respondent's decision to bring an application to have

his name struck from the roll, reviewed and set aside and he also wants the Court to compel the respondent to furnish the applicant with the documentation requested in terms of Act 2 of 2000."

[22]

Pohl AJ reasoned as follows before concluding that the applicant was entitled to the urgent interdictory relief:

"[29]

It is first of all important to have regard to the fact that when Lever AJ referred the matters before him to the respondent, he did so on the basis that the respondent must determine and investigate the matter thus referred. He did not make a finding of unprofessional conduct himself. At best, he probably had a *prima facie* view of unprofessional conduct by the applicant but his referral envisaged a process of determination by the respondent. That process had to be procedurally and administratively fair as contemplated by the Constitution of the Republic of South Africa.

. . .

[34]

There may well be instances where the council of the respondent may approach the Court to have the name of a member struck of the roll without a formal enquiry preceding the application to Court.

[35]

To my mind, *this case before me is not one of those instances*. The decisions referred to in paragraphs 32 and 33, *supra*, both predates the Constitution of the Republic of South Africa. Besides the fact that they do, the *De Beer*-case acknowledges the need for the formulation of proper charges, a trial and the opportunity of such an attorney to defend himself at such a trial. Despite the applicant's request for same *in casu*, he was denied such a trial. In the *Meyer*-case, the far reaching consequences of the mere decision such as the one *in casu*, is emphasized.

[36]

Section 33 of the Constitution of the Republic of South Africa clearly enshrines the right of everyone to administrative action which is lawful, reasonable and procedurally fair. The above mentioned decisions and the Attorneys Act, Act 53 of 1979, must be viewed in that context.

[37]

If this is properly done, the argument raised on behalf of the respondent that the applicant will get the chance to put his version before Court when the application for the striking of his name from the roll of attorneys is brought, is fatally flawed. In the circumstances and on the factual basis I have already alluded to above, the applicant should

have had that opportunity to state his case before the decision was made to strike his name from the roll. The only sensible way to have done that, was to hold a formal enquiry as envisaged by rule 50. The applicant's fundamental right to be heard before the decision was made, was thus denied and it can thus in the circumstances not be said that the administrative action of the respondent was lawful, reasonable and administratively fair. To my mind, the applicant thus has a reasonable chance of succeeding with the review application. That being so, I conclude that the applicant satisfied the first requisite of an interim interdict, to wit, a *prima facie* right" (own emphasis).

[23]

After the *Pohl* judgment and order was granted on 8 June 2018, a settlement was reached between the applicant's attorney at the time, Mr Holtzhausen, and the prosecutor, at the instance of the LPC. This settlement was on the basis that the applicant will not proceed with his review application, that each party was to pay its own costs and that the disciplinary enquiry would be proceeded with.

[24]

On the strength of the aforesaid settlement between the parties, two presiding chairpersons were appointed, being retired Judge Haneke and Mr Litheko. Two *pro forma* prosecutors were also appointed, being Mr Phalatsi and another practising attorney, Mr Hechter.

[25]

Mr Phalatsi, without having consulted the applicant and his legal team, set the disciplinary enquiry down for hearing on 4–15 February 2019, by way of a notice dated 19 October 2018. The notice further advised that all documents in the matters will be provided to all the parties on or before 16 November 2018, to enable them to prepare for the enquiry.

[26]
The applicant objected to the unilateral set down of the enquiry, which objection was based on a number of grounds. Subsequent thereto when Mr Hechter also became involved, it was agreed that a pre-disciplinary enquiry meeting with the two chairpersons was to be held on 4 February 2019.

[27]
On 17 January 2019 Mr Hechter addressed an e-mail to both the applicant and Mr Phalatsi in which he, *inter alia*, stated the following:

"2.
Skrywer se opdrag is die volgende:

2.1
Dat daar op 4 Februarie 2019 (in die teenwoordigheid van die voorsittende beamptes) 'n datum gereël sal word wanneer die aangeleentheid sal voortgaan.

2.2
Daar sal op daardie ooreengekome datum voortgegaan word met die klagtes van Pan en Joluza Boerdery – hierdie twee klagtes sal met ander woorde afgehandel word. U is nog nie in besit van die klagstaat in die Pan aangeleentheid nie en sal dit dan ook aan u beskikbaar gestel word."

[28]
On 7 February 2019 Mr Hechter wrote a memorandum which set out the issues agreed upon at the aforesaid pre-disciplinary enquiry meeting:

"1.
Die aangeleentheid insake bovermelde is op Maandag, 4 Februarie 2019 in die teenwoordigheid van die Voorsittende Beamptes, Regter SPB Hancke en Mnr Litheko, Mnr Senekal, Mnr Hechter en Mnr Phalatsi, uitgestel na 3–14 Junie 2019.

2.
Slegs die aangeleenthede van Mnr Pan en Joluza Boerdery sal in daardie tyd aangehoor word.

3.
Die datums is vasgestel om al die partye te pas, ingesluit Mnr Senekal se regsverteenwoordiger. Die omvang van die dokumente is ook in aggeneem met die vasstelling van die datums.

4.
Die volgende datums is van belang:

4.1
Mnr Senekal sal voor of op 15 Februarie 2019 alle dokumentasie insake die hofaansoeke wat op die twee aangeleenthede van toepassing is aan Mnre Hechter en Phalatsi beskikbaar stel.

4.2
Die klagstaat van Joluza Boerdery is reeds aan Mnr Senekal gegee en die klagstaat in Pan-aangeleentheid sal nie later as 28 Februarie 2019 aan Mnr Senekal beskikbaar gestel word nie.

4.3
Mnr Phalatsi en Hechter sal ook teen 28 Februarie 2019 die bundels van die dokumente gereed hê en aan Mnr Senekal en die Voorsittende Beamptes voorsien.

4.4
Mnr Senekal sal 'n versoek om nadere besonderhede [indien enige], aanvra nie later as 29 Maart 2019 nie en die antwoorde daarop sal nie later as 30 April 2019 daarop verskaf word nie.

4.5
Die partye sal, indien nodig, 'n voorverhoor hou op 17 Mei 2019."

[29]
According to the applicant he complied with his obligations in terms of paragraph 4.1 of the aforesaid memorandum. With regard to paragraph 4.2 of the memorandum, the charge sheet pertaining to the *Pan* matter was only provided to the applicant on 10 May 2019. With regard to paragraph 4.3 of the memorandum, the applicant received the bundles of documents in the *Joluza Boerdery*/*Claassen* matter only on 13 May 2019. The bundles of documents pertaining to the *Pan* matter, were not handed to the applicant at all.

[30]

The applicant brought his dissatisfaction with the aforesaid to the attention of Mr Hechter, who suggested that the matters be postponed by agreement. However, the applicant insisted that the *Joluza Boerdery/ Claassen* matter at least be proceeded with on those dates. It was then agreed that the *Joluza Boerdery/Claassen* matter be proceeded with on 11–14 June 2019.

[31]

According to the applicant he was consequently not the cause for the delay in finalising the disciplinary enquiry. He would also have proceeded with the *Pan* matter on the agreed dates, had it not been for the tardiness of Messrs Phalatsi and Hechter as set out above.

[32]

The disciplinary enquiry against the applicant in the *Joluza Boerdery/ Claassen* matter proceeded and was finalised. The applicant was found to be not guilty on all the charges in the *Joluza Boerdery/Claassen* matter. In his replying affidavit in the review application the following uncontested allegations were made by the applicant:

> "78.
>
> . . . Mrs Claassen, the complainant, was constrained to concede during cross-examination that she lied in lodging the complaint that I stole trust monies and she conceded that she in fact still owed Matsepes Incorporated a certain amount of money.
>
> 79.
>
> Mrs Claassen also conceded that her complaint that I failed to account for some R40 million of assets in the estate of Ludwig Claassen/Joluza Boerdery was also false."

[33]

As a result of what occurred during the *Joluza Boerdery/Claassen* matter, retired Judge Haneke was no longer prepared to act as one of the chairpersons in the applicant's disciplinary enquiry pertaining to the *Pan* matter. He withdrew as chairperson.

The decision to continue the disciplinary enquiry in the *Pan* matter before only chairperson

[34]

As part of the record of proceedings which was filed, it came to the applicant's knowledge that a resolution (at 236(73) Volume 1 of the record) was purportedly taken by the LPC on 20 August 2020 that the formal enquiry committee should propose dates for the hearing and should the applicant not be available on the proposed dates, the enquiry should proceed in his absence. Paragraph 3 of the said resolution further reads as follows:

> "The formal enquiry should proceed with Mr Phalatsi as the prosecutor and Mr Litheko as the chairperson."

It needs to be pointed out that the said resolution was only signed on 8 September 2021.

[35]

In addition to the aforesaid a letter was addressed by the LPC to the prosecutor in which it was stated that "Council at its meeting of 4 December 2020" resolved as follows:

> "1.
>
> You must set down a date on when the hearing should proceed and communicate same to Mr Senekal.
>
> 2.
>
> The absence of Mr Senekal's specific legal representative should not bar the hearing from taking place, as Mr Senekal has the right to legal representation and not the right to a specific representative."

[36]

The applicant pointed out that the aforesaid decisions regarding the arrangement of dates for the disciplinary enquiry in the *Pan* matter were contrary to the agreement and understanding reached at the pre-disciplinary enquiry meeting.

[37]

However, the present review application is not seeking the review of the aforesaid decisions regarding the continuation of the disciplinary enquiry even should Mr Senekal and/or

his legal representative not be present. I therefore do not intend dealing with it. The applicant specifically indicates in his replying affidavit that this resolution will/may be the subject of a review application and consequently it may be inappropriate for me to express any view on this issue at this stage.

[38]

On 6 April 2021 the applicant addressed a letter (at 236(42) Volume 1 of the record) regarding the hearing of the *Pan* matter to the prosecutor wherein the following was raised in paragraphs 3–4 of the said letter:

> "3.
>
> Please advise writer who is the disciplinary committee who will hear the matter and when was the disciplinary committee appointed?
>
> 4.
>
> Please forward writer with contacting details of the members of the disciplinary committee who will hear the matter."

[39]

An extract from the minutes of a meeting of the LPC held on 12 April 2021 (at 236(48) Volume 1 of the record) reflects that the aforesaid letter received from Mr Senekal should be responded to as follows with regard to paragraphs 3–4 thereof:

> "The disciplinary hearing will be presided over by Mr Litheko, who has long been appointed to preside over all the matters of Mr Senekal. He was appointed long before the hearing of the matter of Joluza. Mr Senekal already has the contact details of Mr Litheko."

[40]

Mr (LP) *Halgryn* SC, who appeared on behalf of the applicant, assisted by Mr (T) *Halgryn*, submitted that because the parties agreed that both the *Joluza Boerdery/Claassen* matter and the *Pan* matter will be presided over

by two chairpersons and subsequent thereto the *Joluza Boerdery/Claassen* matter was indeed heard and finalised by two chairpersons, it created the legitimate expectation for the applicant that the *Pan* matter will also be presided over by two chairpersons. He further submitted that for the LPC to have decided differently, especially without having consulted the applicant, constituted an unlawful decision.

[41]

Mr *Halgryn* pointed out that the aforesaid contention is more over so considering that the fact that the hearing of the *Pan* matter could not be continued with on the designated dates of 3–14 June 2021, was due to the tardiness of the LPC and/or the prosecutors in their failure to have delivered the charge sheet and the supporting documents to the applicant on or before the agreed dates and/or at all. It was not as a result of any conduct on the side of the applicant.

[42]

Mr *Mfazi*, who appeared on behalf of the LPC, assisted by Ms *Sogoni*, submitted that there was no decision taken by the chairperson in this regard which can be reviewed and set aside.

[43]

I cannot agree with the submission by Mr *Mfazi*. The chairperson clearly associated himself with the resolution taken by the council in this regard and he gave effect to it. In any event, one must be mindful of the fact that the LPC is the first respondent. Even if it is to be considered to be a decision of the LPC, it in any event constitutes an irregular decision in that it is contrary to what was agreed between the parties.

[44]

The further argument on behalf of the applicant is based on rule 50(1)(3) which determines as follows:

> "Where the Council resolves to hold a formal enquiry, or where a member has called for such an enquiry as contemplated above, the Council shall refer the matter to a Disciplinary Enquiry Committee appointed by it. The committee *may consist of two or more members*, who shall not have participated in the finding and sanction imposed upon the member as provided for above. The Council may also appoint any practicing attorney or advocate or an employee who is admitted

as such as *pro forma* prosecutor in the leading of evidence against, and the presentation of the case against, the member, at the enquiry" (own emphasis).

[45]
Mr *Halgryn* submitted that the language used is unambiguous. The intention is that two or more members shall be appointed, which clearly means at least two, otherwise it would have determined "one or more".

[46]
Mr *Mfazi*, however, submitted that it should be highlighted that the rule states "may'' and not "must'. He relied on the principles to be applied for purposes of statutory interpretation as set out by the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and another* [2014] ZACC 16 [reported at 2014 (8) BCLR 869 (CC) – Ed] at paragraph 28. He consequently submitted that the said provisions of the rule are not peremptory and allow the LPC a discretion to make a choice, in appropriate circumstances, according to the dictates of its own judgment and conscience and with regard to what is fair and equitable in each particular case.

[47]
I cannot agree with Mr *Mfazi*'s construction of the relevant words. If that was the intention, it would have stated "one or more members". I understand the word "may" in this context to mean that that is what is "allowed", being two or more members.

[48]
In the alternative, and should I be wrong in my interpretation of the rule, the fact remains that it was agreed upon between the parties that the enquiry committee will consist of two chairpersons, the *Joluza Boerdery/ Claassen* matter commenced and was finalised with two presiding chairpersons and the *Pan* matter, which formed part and parcel of the aforesaid decision, is consequently also to be presided over by two chairpersons. The LPC's decision to the contrary, and the chairperson's implementation thereof, especially without having consulted the applicant, constituted an unlawful decision.

[49]
In my view, the decision is consequently to be reviewed and set aside.

The decision to continue with the enquiry against the applicant in the *Pan* matter via any virtual platform and/or video conference

[50]
When considering this issue, it is important to note that it is not a decision on the merits or demerits of hearing Mr Pan's evidence virtually as opposed to in person. The review to set aside the decision is based on the following two grounds:

1. The LPC is not authorised to have made this decision, it was for the chairperson of the enquiry to have done so; and

2. The LPC made the decision without affording the applicant an opportunity to be heard.

[51]
Mr *Mfazi* submitted that no decision was taken by the chairperson in this regard and that there consequently is no decision which stands to be reviewed. In this regard he relied on the following extracts from the record of the proceedings on 19 April 2021 where the chairperson stated as follows at 137 line 22 to 138 line 5 of the record, Volume 1:

". . . The issue that I said I would give you an opportunity to address me on, Mr Senekal, is that of the hearing proceeding virtually but I think that decision or my decision in as far as that is going to be concerned is not dependent upon whether I grant a postponement or I do not grant a postponement, but it depends on what will be expedient considering all the circumstances, including the fact that Mr Pan, if we do not proceed virtually will have to travel from China to South-Africa only for the purposes of this hearing . . ."

Mr *Mfazi* further pointed out that at 142 lines 4–8 of the record of the same proceedings, the applicant said the following:

"... The question of the virtual hearing, we will deal with at the appropriate time or place. I do not know whether you want us to, when we deal with it, but that concludes my application for the postponement."

[52]

Mr *Halgryn*, however, pointed out that although the chairperson never made a formal ruling during the April 2021 enquiry on the manner of hearing with regard to the evidence of Mr Pan, he did record that he cannot take such a decision in his capacity as chairperson and that it was a decision which is to be taken by the LPC considering the circumstances that they were in. In this regard the chairperson stated the following in his ruling in the disciplinary enquiry of 19 April 2021, at 51 lines 7–12 of the record, Volume 1:

"Now the decision that these proceedings proceed virtually is not the decision that I, in my capacity as a presiding officer, took. It is a decision that was taken by the council considering the circumstances that we are now in and because of the fact that I would not have had the proper space where I would participate virtually today . . ."

[53]

During the disciplinary enquiry proceedings of 21 April 2021, the applicant voiced his objections to Mr Pan's evidence being heard on a virtual platform and stated the following, as reflected in the record of the disciplinary hearing of 21 April 2021, at 163 line 22 to 164 line 12 of the record, Volume 1:

"I want Mr Pan to be cross-examined, because he committed numerous acts of perjury in this matter. He lied under oath and I want him to be properly cross-examined and that was what I said from the beginning and that is why I brought an interdict and the Honourable Acting Pohl said I have that right. Mr Pan, I have done a search on him, he has got seven companies in South-Africa. I am not going to accept that he cannot be here. I want him to have his cross-examination conducted in person because he has misled the Court and I want to deal with it in a proper manner and to have his matter heard piecemeal is in nobody's interest. That is why, Mr Litheko, you are the chairman, I absolutely abide to your decision, considering your reasons for this matter, but may I ask that we have this matter concluded. We set it down for that whole week and we get this matter finalised, please."

[54]

Subsequently to the aforesaid proceedings and despite the objections raised by the applicant to the chairperson, the LPC unilaterally took a decision on 7 June 2021 that Mr Pan will be allowed to testify virtually. This decision is reflected in annexure "E" to the first respondent's answering affidavit to the review application and founding affidavit in the counter-application (at 295 Volume 2 of the record), being an extract from the minutes of a meeting of the LPC held on 7 June 2021 with regard to the formal enquiry pertaining to the applicant. In the said document it is recorded that it was resolved by the council that:

"Mr Senekal should be provided with the documents he requested for the formal enquiry and that the matter must proceed at the next sitting. Mr Pan will be allowed to testify virtually."

[55]

As correctly submitted by Mr Halgryn, rule 50(17)(1) determines that:

"... the duties, functions and powers of the disciplinary enquiry committee relating to its conduct of a formal enquiry shall be . . . to *determine through its chairman* and subject always to the provisions of these rules and of the Act *the manner in which the enquiry shall be conducted*" (own emphasis).

[56]

The LPC consequently did not have the authority to have taken the said decision. It was for the chairperson to have done so. The fact that the LPC took the decision unilaterally, without giving the applicant the opportunity to be heard, makes it even worse.

[57]

The decision is consequently unlawful and stands to be reviewed and set aside.

The decision by Mr Litheko not to recuse himself as chairperson of the enquiry against the applicant in the *Pan* matter

[58]

When the virtual hearing commenced on 19 April 2021, the chairperson and the prosecutor were not only sharing an office at the offices of the LPC, but they were making use of the same computer/laptop.

[59]
When the applicant requested an audience by means of a virtual hearing with both the chairperson and the prosecutor prior to the hearing in April 2021 with a view to discuss the insufficiency of the documents and other relevant issues (per email at 236(52) Volume 1 of the record), his request was refused. At 27–29 of the record of the hearing of 19 April 2021, Volume 1, the applicant raised his concerns:

"No, I intend to do it, Mr Litheko, for the reason that I honestly feel that I will be severely prejudiced. I mean I request you and Mr Phalatsi to have a virtual hearing to discuss exactly the issues that is at point in time here. . . . Then I am being excluded from any discussions. Mr Phalatsi phoned you and between the two of you, you decide after the discussion you informed Mr Phalatsi, not even replying to my request, that you are not going to hear me, because you might compromise yourself, but how on the same token can you hear Mr Phalatsi in my absence without compromising me?

. . . with the greatest of respect towards you and Mr Phalatsi, it is absolutely unacceptable that litigating parties have discussions with one another to the exclusion of the other party. I Mean, here today, without notice, without any consideration of anybody this trial or this hearing is turned into a zoom meeting. I mean, how on earth can you have a zoom meeting? You and Mr Phalatsi sit there together, I do not know what you discuss, I do not know what is being exchanged in documentation between you and Mr Phalatsi, and I sit here in my office and I have no right to say I am objecting to the zoom meeting. . . . There are just decisions taken and I am excluded out of it and I think it is very unfair. So yes, I am persisting with my application for your recusal.

I honestly also fail to understand why in the *Claassen*-matter you and Judge Haneke were presiding in this matter. Now all of a sudden there is only one presiding officer. Was this just a game, another unilateral change of the rules without my notification, or without considering my view?

. . . I think it is totally inappropriate that that you and Mr Phalatsi having a meeting without firstly, my consent, secondly my knowledge and thirdly, in total exclusion of me and then without granting me the opportunity to say anything you entertain and give audience to Mr Phalatsi and today, you sit there and Mr Phalatsi in the same room. The minute this zoom meeting is discontinued you can have whatever discussions you want with Mr Phalatsi. So, in my absence you and Mr Phalatsi can proceed to discuss this matter while I am not there to protect my own interest and I think it is totally unacceptable."

[60]
Despite the applicant's objections, the chairperson and the prosecutor remained in the same office during the hearing. According to the chairperson he did not know how the computer/laptop worked and the prosecutor was operating same on his behalf.

[61]
On the prosecutor's own concession, he took it upon himself to email the chairperson regarding the letter he had received from the applicant and thereafter spoke to him telephonically so that the two of them could "attend" to the contents of the email. He also conceded that he had received an SMS message from the chairperson.

[62]
Mr *Halgryn* referred back to the instance when the LPC addressed a letter to the prosecutor on 15 January 2021 on the strength of the resolution taken at a meeting on 4 December 2020, when Mr Phalatsi was instructed to set the matter down on a date and communicate the date to the applicant, irrespective of whether his legal representative was available or not. Mr *Halgryn* contended that the question that begs to be answered is how Mr Phalatsi had secured the attendance of the chairperson before he simply advised the applicant of the date.

[63]
Mr *Mfazi* referred to the following extract from the proceedings of 19 April 2021 at 34 lines 1–14, Volume 1 of the record, where the prosecutor stated the following:

". . I want to put it on record that as an officer of the court I will not do anything that will compromise this hearing by discussing the issues with you in

the absence of Mr Senekal . . . it is speculative and it is without any factual basis that we might be discussing or actually exchanging the documents between yourself and myself in respect of Mr Senekal saying that he saw the paper. The paper it said he received summons without annexure

'A' and I want to place on record again that I was asking the lady who helped us with the sending of the summons to Mr Senekal whether it was only the summons which was sent or also the annexure 'A' was also sent . . ."

[64]

The test for recusal as formulated in *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 (4) SA 147 (CC) [also reported at 1999 (7) BCLR 725 (CC) – Ed] was confirmed in the recent judgment of *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and another* 2022 (4) SA 1 (CC) [also reported at 2022 (7) BCLR 850 (CC) – Ed], where the Constitutional Court pronounced as follows at paragraphs 56, 60 and 63:

"[56]

. . . And, because impartiality of judicial officers and the impartial adjudication of disputes of law constitute the bedrock upon which the rule of law exists, there must, in any sound legal system, exist a general presumption of impartiality on the part of judicial officers. In *SARFU*, this court stated:

'A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.'

. . .

[60]

That being said, there are of course instances where a judicial officer may not be able to demonstrate impartiality or there may exist some apprehension of bias. Therefore, although the correct point of departure must always be a presumption of impartiality, 'the presumption can be displaced with "cogent evidence" that demonstrates that something the judge or Magistrate has done gives rise to a reasonable apprehension of bias'.

. . .

[63]

As alluded to above, it has become trite law that the test for recusal is the 'reasonable apprehension of bias' test. And, as it says on the tin, the 'existence of a reasonable suspicion of bias satisfies the test'. The Code of Judicial Conduct for judges addresses recusal thus:

'A judge must recuse him or herself from a case if there is a–

(a)

real or reasonably perceived conflict of interest; or

(b)

reasonable suspicion of bias based upon objective facts, and shall not recuse him or herself on insubstantial grounds.'

And the test for recusal was later expanded upon by this court, for example, in *SARFU*. We can do no better than cite the pertinent finding of that case in full:

'It follows . . . that the correct approach to this application for the recusal of members of this court is objective and the *onus* of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the

submissions of Counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and *a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer*, *for whatever reasons*, *was not or will not be impartial*'" (own emphasis).

[65]

I have to agree with the submission of Mr *Halgryn* that the suggestion and argument that the conduct or the prosecutor and the chairman by having shared the same office and computer/laptop during the virtual hearing on 19 April 2021 could not have caused the applicant to have a reasonable apprehension or suspicion of bias on the side of the chairperson. It does not suffice for the prosecutor and the chairperson to contend that they never discussed anything to the applicant's peril. It comes back to the well-known saying that "justice must be seen to be done".

[66]
The applicant's perception that the chairperson is biased, is unfortunately bolstered by the pattern that the pattern in this matter whereby the LPC takes crucial decisions pertaining to the conducting of the enquiry and the chairperson merely abides by and implements the decisions. He clearly allows the LPC to dictate to him on issues in relation to which only he has the authority to decide.

[67]
In the circumstances Mr Litheko ought to have withdrawn as chairperson when the applicant requested him to do so. His failure to have done so was irrational, unfounded and arbitrary.

[68]
In the circumstances his decision stands to be reviewed and set aside.

The counter-application

[69]
There are a number of grounds upon which the applicant is opposing the counter-application:

1. The Pohl AJ judgment already pronounced that the applicant is entitled to state his case in a disciplinary enquiry pertaining to the *Pan* matter before the LPC is entitled to approach court with an application to have his name removed from the roll of legal practitioners. The said judgment was not appealed against and therefore still stands. In the circumstances the issue is *res judicata*.

2. In addition to the aforesaid, the parties agreed subsequent to the Pohl AJ judgment that the LPC will continue with a disciplinary enquiry against the applicant pertaining to the *Pan* matter. The LPC was consequently not entitled to have filed the counter-application.

3. The lack of merits of the counter-application.

[70]
In my view, it is evident from the Pohl AJ judgment that the matter is in fact *res judicata* and that the LPC was therefore not entitled to have instituted the counter-application prior to the finalisation of the disciplinary enquiry against the applicant in relation to the *Pan* matter.

[71]
Other than for the fact that the *Claassen* matter has been finalised, the relevant circumstances, facts and principles are presently no different than what they were when the Pohl AJ judgment was delivered.

[72]
The counter-application consequently stands to be dismissed.

Costs

[73]
There is no reason why the costs of the application and the counter-application should not follow the outcome of the respective applications.

[74]

The rule 6(15) application was, in my view, very validly filed. If I had not granted the condonation indicated at the beginning of the judgment, the relief sought in the rule 6(15) application would have been granted. There is consequently no reason why the LPC should not also pay the costs thereof.

[75]

With regard to the scale of costs, Mr *Halgryn* requested that it be ordered on an attorney and client scale. I agree. The conduct of the LPC to have, in the circumstances, again dragged the applicant to court before finalisation of the disciplinary enquiry, reeks of malice. The issues for which I have granted condonation with regard to the LPC's papers, as well as the manner in which the LPC attempted to make the annexures to the LPC's founding affidavit to the counter-application part of the affidavit, are also unacceptable. There is no reason that the applicant should be out of pocket in the circumstances.

Order

[76]

The following order is consequently made:

1.

The counter-application is dismissed, with costs on an attorney and client scale, which costs are to include the costs of the application in terms of rule 6(15), and which costs are also to include the costs of two counsel.

2.

The decision of the first and/or second respondents to continue with the disciplinary enquiry against the applicant in the *Pan* matter before only one member of the Disciplinary Enquiry Committee, is reviewed and set aside.

3.

The decision of the first and/or second respondents to continue with the disciplinary enquiry against the applicant in the *Pan* matter via any virtual platform and/or video conference, is reviewed and set aside.

4.

The decision of the second respondent not to recuse himself as chairperson of the disciplinary enquiry against the applicant in the *Pan* matter, is reviewed and set aside.

5.

The matter is referred back to the first respondent to commence *de novo* with the disciplinary enquiry in terms of rule 50 against the applicant in the *Pan* matter before two duly appointed members of a Disciplinary Enquiry Committee, should the first respondent wish to continue with the said enquiry.

6.

The first respondent is ordered to pay the costs of the application on a scale as between attorney and client, which costs are to include the costs of two Counsel.

(Mhlambi J concurred in the judgment of Van Zyl J.)

For the applicant:

LP Halgryn SC and *T Halgryn* instructed by *FJ Senekal Incorporated*, Bloemfontein

For the first respondent:

L Mfazi and *PR Sogoni* instructed by *NW Phalatsi & Partners*, Bloemfontein