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RISKALERT

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RISK MANAGEMENT COLUMN

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Legal Practitioners Indemnity Insurance Fund NPC
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LEGAL PRACTITIONERS' FIDELITY FUND
SOUTH AFRICA

RISK MANAGEMENT COLUMN

The 2025/2026 insurance year

The *Risk Alert Bulletin* is written by Thomas Harban, General Manager, LPIIF

The LPIIF's 2025/2026 insurance year commences on 1 July 2025. The policies for the new insurance year were published in the May 2025 edition of the Bulletin and are also available on the LPIIF's website, www.lpiif.co.za

It is apposite, at the beginning of the new insurance year, to address some of the recurring questions we receive. Previous editions of the Bulletin referred to below can be accessed on the risk management page of the LPIIF website.

Who is insured

Practitioners with valid Fidelity Fund certificates (FFCs) are, subject to the policy conditions, automatically covered in terms of the LPIIF Master Policy, and do not need to do anything further to renew their cover. The terms of the policies are unchanged from the 2024/2025 insurance year. Practitioners without valid FFCs will not be indemnified for losses arising from the period when they did not have such certificates (see clauses XV, XVIII, 5, 6 and 16 (u)).

Practitioners are urged to read the policies and to take particular note of the:

- annual amount of cover (clauses 7, 8, 9, 15 and Schedule A);
- excess payable in the event of liability (clauses 10,11, 12, 13 and Schedule B);
- exclusions listed in clauses 16, 17 and 18;
- insureds duties in clauses 22 to 29;
- claim notification requirements (clauses 22 and 29);
- duty to cooperate with the insurer (clauses 25 to 27); and
- consequences of breaching the policy (clause 30).

Only an insured as defined in the policy may notify the LPIIF of a claim or apply for indemnity (clauses 1 and 39). Third parties cannot notify the LPIIF of a claim

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or apply for indemnity. This was addressed in *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC and Others* [2017] 3 All SA 1005 (WCC) (30 June 2017) and *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC* 2019 (2) SA 221 (SCA). We have also addressed this on page 6 of the May 2022 edition of the Bulletin, page 8 of the August 2018 edition, and in the article "Instituting a PI claim on behalf of a client: Some considerations to be taken into account" (*De Rebus*, March 2017).

The LPIIF only covers legal practices conducted in the form of either:
(a) a sole practitioner;
(b) an incorporated legal practice referred to in section 34(7) of the Legal Practice Act; or
(c) an advocate referred to in section 34(2)(b) of the Legal Practice Act. For purposes of the policy, these advocates are regarded as sole practitioners.

The forms of authorised legal practice are addressed in the article "The significance of only using registered entities to conduct legal practice" (*De Rebus*, December 2024).

The claim procedure

The claim procedure is set out on the LPIIF website, clauses 22 to 29 of the policy, and pages 4 to 7 of the May 2022 edition of the Bulletin. If in doubt about when a claim needs to be notified, refer to page 9 of the May 2022 edition, page 4 of the March 2019 Bulletin, and Wim Cilliers' article "When to notify the insurer of a claim?" on page 3 of the May 2018 edition.

When a matter is notified to the LPIIF by an insured legal practitioner, the investigation of the claim includes assessing whether legal services were provided (clause XXII and 1). Claims where, for example, a practice does not provide any legal services and merely acts a conduit for funds, provides investment advice or acts merely as a "pay master" are excluded (clauses 16 (e), 16(f), 16(k) and 16 (n)). There are many claim notifications where no legal services were provided.

Certificates of insurance

The LPIIF does not issue certificates of insurance or confirmations of insurance cover. This is addressed on page 9 of the May 2022 edition and on the LPIIF website. Firms submitting bids to service entities who require proof of insurance must request certificates of insurance/ confirmations of insurance cover from their top-up insurers. Study the bid requirements carefully to see what type of insurance cover, and the minimum prescribed amount, is required. The minimum amount of insurance cover required usually exceeds the cover afforded under the LPIIF policy.

Some exclusions

Claims arising out of cybercrime are still excluded from the LPIIF policy (clauses X, 16 (c), 16 (p) and 39). The cybercrime related exclusion came into effect on 1 July 2017. Have a look at the risk management questionnaire and consider the responses provided in response to the cybercrime related questions 2.1.22.3, 2.1.22.5, 2.3, 2.4 and 2.7. As at 31 March 2025, the LPIIF had received 261 cybercrime related notifications with a total value of R178,658,635.85. If the firms that notified these losses did not purchase appropriate cyber liability insurance in the commercial market, they will have to bear the losses themselves.

Liability in terms of a court order to pay costs *de bonis propriis* is also excluded (clause 16(g)).

The insurance products available in the commercial market for legal practices are explained in the letter "An explanation of the insurance cover available to legal practitioners" (*De Rebus*, August 2022). Some of the differences between the LPIIF (then called the AIIF) and commercial insurance companies are explained in paragraphs 10 to 18 the judgment of the court *a quo* in *Propell*.

Practitioners representing clients who have suffered losses arising from the theft of trust funds must have regard to section 55 of the Legal Practice Act 28 of 2014. Those claims must be notified to the Legal Practitioners' Fidelity Fund (Fidelity Fund) and not to the LPIIF. The Fidelity Fund and the LPIIF are separate entities. The two organisations have distinctly separate claim procedures, differ in respect of who they indemnify and the risks they cover, respectively. Claims for losses arising out of the theft of trust funds are excluded from the LPIIF policy (clauses 16 (b), 16 (c) and 18). When dealing with a claim for losses resulting from the theft of money or property entrusted to either an attorney, or an advocate practising in terms of section 34 (2) (b), have regard to sections 55, 56, 78 and 79 of the Legal Practice Act. The procedure for such claims is also set out on the Fidelity Fund's website https://www.fidfund.co.za/ Parties such as those who suffer losses from the theft of trust monies or property do not have a right to apply for indemnity in terms of the Master Policy.

Fidelity Fund pays the LPIIF premium

Ensure that your insurance broker/ intermediary understands the unique insurance structure for legal practitioners in South Africa. The LPIIF provides the primary (base) layer of professional indemnity insurance to all legal practitioners with FFCs. This cover is provided in terms of section 77 of the Legal Practice Act, read with the Master Policy, and not "through the LPC", the "law society" or the LSSA as some incorrectly allege. Though the LPIIF's insurance premium is paid by the Fidelity Fund in terms of section 57(1)(g) of the Legal Practice Act on behalf of insured practitioners, some brokers contact

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us seeking quotes for the LPIIF cover. We cannot provide such quotes as the Fidelity Fund pays one annual premium on behalf of all insured practitioners. Similarly, there are some brokers who repeatedly notify us of claims that are excluded from the LPIIF policy. Those brokers place their clients at risk of late notifications to the insurers in the commercial market that are on risk. This is addressed further on pages 5 to 6 of the October 2023 edition of the Bulletin.

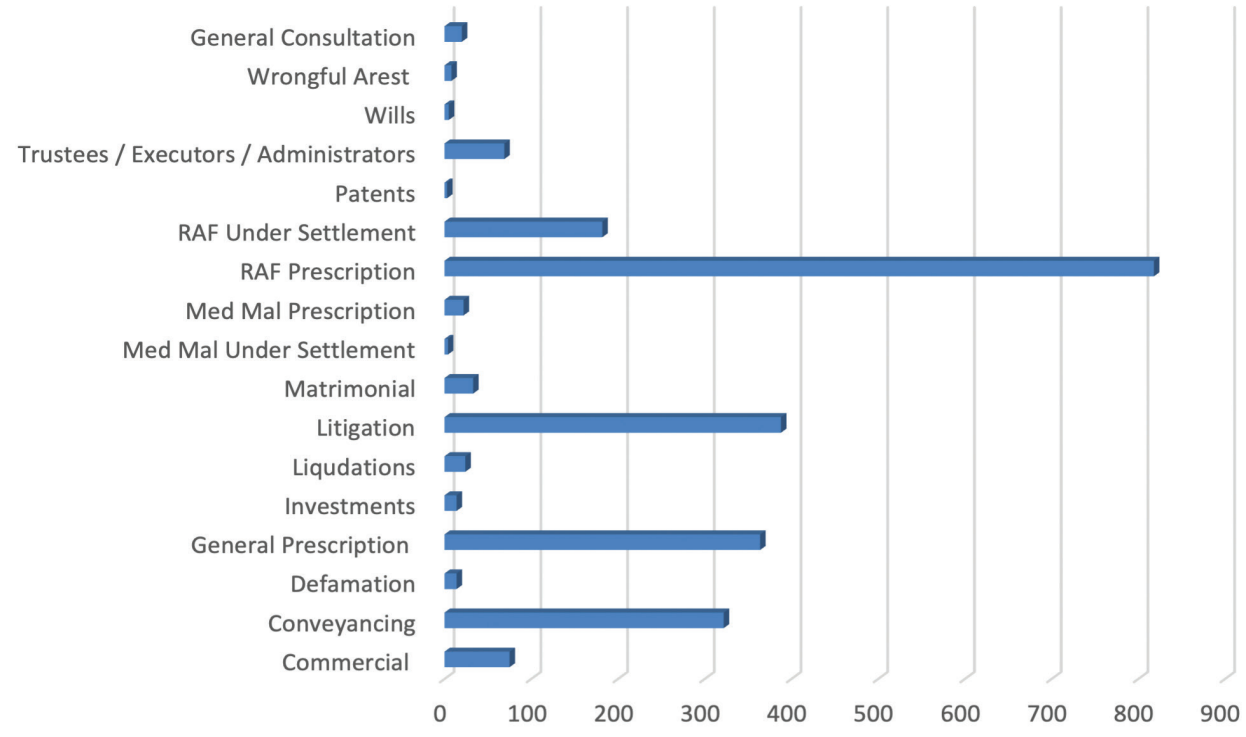
Risk and practice management training

Risk and practice management education is one of the most effective mitigation measures to prevent claims. The LPIIF continues providing risk and practice management training to firms at no cost. Please email risk.queries@lpiif.co.za to arrange training for your firm. Depending on a practice's individual needs, the training can be done either virtually or physically at the firm's offices. Virtual training allows for the firms with multiple branches to have the different locations log-in to the sessions simultaneously.

We wish you a claim-free 2025/2026 insurance year.

LPIIF claim statistics

Outstanding claims:



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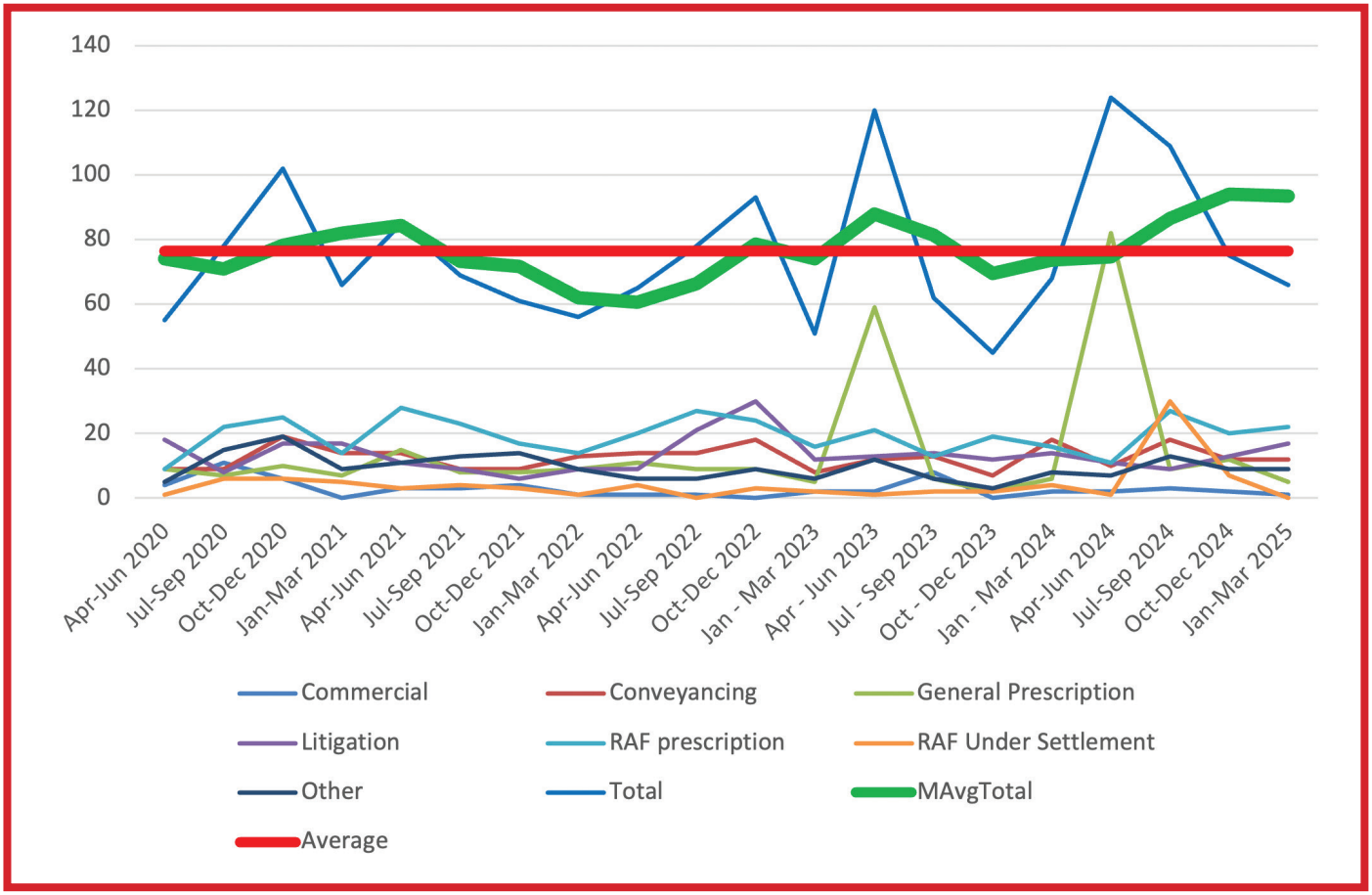
On 31 March 2025, the LPIIF had 2365 current claims. The prescription of Road Accident Fund (RAF) claims in the hands of practitioners remains the main source of risk. In the five years to end March 2025, payments made in respect of prescribed RAF matters made up 55% of total paid for liability related claims. This risk receives substantial attention in our publications and presentations. There are also extensive resources available on our website with measures that can assist legal practitioners to mitigate this risk. Practitioners are urged to have regard to the resources and to share them with everyone involved in the pursuit of personal injury litigation.

Other areas of concern are litigation, general prescription (i.e., the prescription of non-RAF matters), conveyancing and the under-settlement of RAF claims.

The graph on page 3 provides a breakdown of the outstanding claims.

The graph below gives an indication of the average value of the main claim types notified over the last five years. The figures on the vertical axis reflect the Rand values in millions.



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Review of the RAF Board Notices

The RAF's appeal is ongoing. Considering the complexity of the legal issues involved, the extent of the record, number of parties involved and the SCA's current workload, the matter is only likely to be heard in 2026. We will publish the date for the hearing when one is allocated by the SCA.

Despite what is stated in previous editions of the Bulletin, we still have practitioners contacting us seeking individual reports on the litigation. As indicated in the March 2025 edition, and those published before that, we cannot provide running reports to each practitioner individually. Spending an inordinate amount of time having philosophical debates with those enquiring, or having to justify why the LPIIF launched the review proceedings, is not an optimal utilisation of our limited resources. Those with strong views – or legal points –outside of those that we have raised are welcome to join the proceedings either in support of, or in opposition to, the appeal. The SCA's practice directives and the rules applied in that court are accessible on that court's website for those practitioners with queries regarding the appeal process and applicable timelines. The SCA's Bulletins are also available on the website listing the matters to be heard and the dates for the hearings.

The March 2025 edition of the Bulletin, and those published prior to that, summarises other cases relevant to overcoming the RAF's intransigent stance. We have also previously published steps that practitioners can consider. The cases covered in prior editions give an indication of litigation strategies and legal points successfully raised by other parties against the RAF.

Recent cases

In this section, we cover some of the risk, liability and attorney conduct related cases that have been heard since our last publication.

Liability related litigation against attorneys

A V Theron and Swanepoel Incorporated and Another v Knott (237/2024) [2025] ZASCA 84 (10 June 2025)

This was a successful appeal by a firm of attorneys against a judgment in the Magistrate's Court that had held the appellants liable for a loss allegedly suffered by a former client, the respondent. The respondent claimed that he suffered damages because he had lost out on a bargain due to erroneous legal advice he had received from the appellants.

The facts, in brief, are that the respondent instructed the appellants to provide him with professional services relating to the sale of his immovable property. The property in question was in a sectional title scheme and encroached onto land owned by the body corporate. He was thus required to obtain the consent of 70% of the owners to formalise the extension of the floor area of his unit onto the body corporate's property. He had entered into an agreement with a buyer, Blue Dot, and the purchase price was R700 000. The agreement also listed certain pieces of furniture which were sold for R500 000, and a boat and trailer valued at R100 000. The deed of sale included a suspensive condition that the respondent was to obtain the consent of all the owners in the scheme within 30 days of signature of the agreement. The appellants had erroneously advised him that the consent of 100% of the owners was required, whereas only 70% of the owners needed to consent. The respondent was unable to obtain the consent of 100% of the owners and the deal thus fell through. He eventually sold the property to Trymore. In terms of the agreement with Trymore, the immovable property and 34 items of movable property were sold for R1 050 000. The R250 000 loss the respondent claimed to have suffered was the difference between the price Blue Dot had agreed to pay, and that eventually paid by Trymore. Unlike the Blue Dot agreement, in the Trymore sale the goods were not sep-

arately valued and priced, although they were listed in the agreement.

The SCA found that the respondent had failed to prove, on a balance of probabilities, that he had suffered any loss. It also found that he had failed to prove that the appellant's breach had caused him to suffer any damages. The court further found that the Blue Dot and Trymore agreements were not identical.

Mamafha v TS Makhubela Incorporated and Another (8975/2021) [2025] ZAGPJHC 514 (29 May 2025)

The plaintiff alleged that he was injured in a motor vehicle collision that occurred on 19 October 2013. He had instructed the defendant, a firm of attorneys, to pursue a claim on his behalf against the RAF. The defendant failed to pursue the claim timeously, resulting in it prescribing. In 2021 the plaintiff instituted an action against the defendant for damages he allegedly suffered as a result of his RAF claim prescribing. The issues of merits and quantum were separated in terms of uniform rule 33(4). The defendant's negligence in allowing the plaintiff's claim against the RAF to prescribe was not in dispute. The question before the court was thus whether the accident was caused by the negligent driver of an unidentified insured driver and, if so, whether the plaintiff would have been successful in a claim against the RAF.

The plaintiff was the only witness who testified at the trial. The plaintiff's evidence of how the accident occurred differed materially to that which he had provided to the SAPS two days after the accident, and the version pleaded in the particulars of claim issued by his current attorneys eight years after the accident. The particulars of claim had not mentioned negligence on the part of the unidentified insured driver. The plaintiff's legal representative brought an application after the close of his case for an amend his pleadings to align with the evidence. The court noted that the plaintiff's "shifting accounts" (para 19) of how the accident occurred raised serious concerns about the reliability of his evidence. The court did not accept his version, and found that the plaintiff had not established that he would have succeeded in his claim against the RAF. His claim for damages was thus dismissed with costs.

Attorneys' conduct

South African Legal Practice Council v Mkhabela (455589-2023) [2024] ZAGPPHC 629 (20 June 2024)

The respondent had practiced as an attorney for 20 years. He was suspended from practising on 13 June 2023. The complaints against him included that he had:

(a) practised without a FFC;
(b) failed to submit an annual report by auditors for the financial period ended 28 February 2022;
(c) misappropriated trust funds;
(d) manipulated his accounting records to conceal the deficits in his trust account; and
(e) failed and/or refused to cooperate with the LPC in the inspection of his accounting records and practice affairs.

The respondent:

- admitted the conduct complained of by the LPC;
- agreed that he had prejudiced his clients and had brought the image of the profession into disrepute;
- said that his bookkeeper, who had his accounting records, was unresponsive and untraceable;
- contended that he only had delivered his only active files (12) to the LPC;
- stated that he had redeemed himself by refunding his clients R1 150 000 from property-related transactions, and not practising as an attorney since his suspension;
- blamed a lack of success in practice for his "mismanagement" of his trust account;
- had taken instructions in respect of at least 7 property transactions, even though he was not a conveyancer; and
- sought a sanction of suspension, rather than a striking-off.

The court found that:

- "Legal practitioners are to conduct themselves with integrity, honor and propriety. The respondent did not comport himself as required. He abused his position of trust in relation to his clients. He is not a fit and proper person, as required of a legal practitioner. His infractions include stealing trust funds and practising without a Fidelity Fund Certificate. Practising without a Fidelity Fund Certificate constitutes an offence." (para 10)
- "The appropriate sanction where a practitioner has been found not fit and proper is informed by whether a legal practitioner can safely be trusted to faithfully discharge the duties and obligations of a legal practitioner. It is not a consideration, for example, whether a respondent suffered from his prior suspension or whether a respondent will be unable to sustain himself or his family. The court must, as far as possible, ensure that the public interest, trust, and confidence in the profession are not placed at risk." (para 11)

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- the respondent's conduct was premeditated, rather than triggered by sudden temptation; and
- "There is no basis upon which the court can impose a sanction other than that of a striking off. A suspension would overemphasise the respondent's personal circumstances at the expense of the public and the profession at large. The respondent's misconduct is egregious." (para 18)

The respondent was thus struck off the roll.

South African Legal Practice Council v Kgaphola and Another (795/2023) [2025] ZASCA 66 (23 May 2025)

The LPC had brought an application to remove the respondent's name from the roll of practitioners, alternatively to suspend him from practice. The LPC had been unsuccessful in the Gauteng High Court, and appealed that decision in the SCA. At the hearing of the appeal, an application by the respondent for a postponement of the appeal was dismissed with punitive costs. He was ordered to pay the costs on an attorney and client scale.

The respondent had been admitted as an attorney on 28 August 2020 and opened his legal practice in October 2020. The LPC confirmed registration of his firm on 8 October 2020 and requested that he (i) pay his membership fees, (ii) furnish it with information, including the firm's trust bank details, and (iii) informed the respondent that a FFC would only be issued on receipt of the requested information. A FFC was not issued to the respondent as he did not reply to the LPC's letter or provide the requested information. On 10 March 2021, the LPC launched an application to either strike off, alternatively suspend, the respondent.

The respondent applied for, and was issued with, a FFC on 16 March 2021. However, the LPC withdrew his FFC on 30 April 2021 as he had failed to submit the firm's opening audit report which was due on that day in terms of the rules. Undeterred, he continued practising.

The LPC's application was based on complaints that the respondent had:

- without a FFC, practised as an attorney from 9 October 2020 to 31 December 2020 and 1 January 2021 to 15 March 2021;
- failed to inform it of his firm's trust banking details;
- in contravention of rule 54.13, opened his firm's trust account in a different province (Limpopo) to that in which his main office was based (Gauteng);
- failed to pay his annual membership fees timeously for the 2020 financial year;
- failed to register his firm with the Financial Intelligence Centre as required by section 43B on the Financial Intelligence Centre Act 38 of 2001;
- failed to reply to correspondence timeously; and
- failed, within the prescribed period, to register for a practice management course approved by the LPC. This was a prerequisite for issuing an FFC.

The SCA found that the:

- High Court had misapplied the three-stage enquiry by not conducting the first stage which is a factual enquiry to determine whether the complaints against the respondent had been established;
- High court, in taking account of (i) the respondent's youth and inexperience, (ii) that the LPC did not "proffer him any guidance", and (iii) his indigence as an excuse for not paying his membership fees, had considered irrelevant issues in arriving at its conclusions. None of those issues were relied upon by the respondent in his answering affidavit. It was thus not open to the High Court to consider them in its reasoning;
- High Court had materially misdirected itself in the first stage of the enquiry;
- complaints against the respondent had been proven on a balance of probabilities;
- respondent's conduct in the High Court resorted to impugning the integrity of the LPC. The SCA, in *Law Society of the Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA), had warned against such conduct. In *Mogami*, the court pointed out that such conduct, in itself, "constitutes unprofessional conduct and a strategy that the courts cannot countenance" (para 37) and

"[38] It behoves us to repeat that warning here. A time will soon arrive when legal practitioners who make themselves guilty of this unprofessional conduct risk being suspended from practice or struck off the roll, solely based on this, as this may be indicative of, or border on, lack of fitness to practise as a legal practitioner.

[39] The respondent's attitude is troubling, particularly because he is a new entrant into the profession. His real first encounter with the LPC has been characterised by his failure to comply with his professional obligations. What is more, the respondent has adopted an unjustifiably combative and hostile attitude against the LPC. His answering affidavit exhibits a worrisome lack of candour.

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[40] The respondent's conduct necessitates that the following trite principles be restated. Proceedings such as the present are of their own kind and of a disciplinary nature. They are neither criminal nor civil proceedings between the LPC and a respondent legal practitioner. The LPC, as a repository of professional norms, places facts before the court for consideration for it to exercise its discretion upon those facts. It is, therefore, expected of legal practitioners against whom allegations of impropriety are made, to co-operate and provide the necessary information, and to place the full facts before the Court to enable it to make a correct decision. Broad denials and obstructionism, as we have seen in the present case, have no place in these proceedings."

- respondent had remedied the situation in respect of the FFC, and had been issued with one when the High Court heard the application. Having regard to the conspectus of the facts, it concluded that although the respondent was guilty of unprofessional conduct, that did not render him unfit to continue practising as an attorney; and
- appropriate sanction was to suspend the respondent from practice for 12 months.

The court thus ordered that:

1. The first respondent is suspended from practice as a legal practitioner for 12 months;
2. The period of suspension is wholly suspended on condition that he:
   2.1. complies with rules 54.34 and 54.36 within 30 days of the order;
   2.2. does not contravene section 84(1) of the Legal Practice Act during the period of suspension;
   2.3. is not found guilty of contravening paragraph 3.1 of the Code of Conduct during the period of suspension;
3. the first respondent pay the costs on an attorney and client scale.

Candidate attorneys sent to address the High Court

A disturbing trend can be gleaned from several recent judgments. This involves partners in some firms sending candidate attorneys to the High Court and expecting that those candidate attorneys will address the court. Candidate attorneys do not have a right of appearance in the High Court (section 25(5)(a)(i) of the Legal Practice Act). This has, for example, occurred in *Tshikovhi v Standard Bank of South Africa and Another* (087487-2024) [2025] ZAGPPHC 586 (9 June 2025) and *Manamela v Maite* (2023/055949) [2023] ZAGPJHC 1011 (6 September 2023). In *Tshikovhi*, the court noted that "[it] is disrespectful to the Court and unfair to the candidate attorneys to saddle them with the responsibility to explain to the Court why counsel is not available."

It behoves legal practitioners, and all those with an interest in the proper functioning of the courts, the proper representation of parties and upholding the *decorum* of courts, and the administration of justice to ensure that persons with a right of appearance attend court proceedings if the expectation is that they will address the courts.

In *Van Louw v Nedbank Limited* (21341/243) [2024] ZAWCHC 241 (3 September 2024), the person sent to court by the law firm was not a legal practitioner. The court noted that:

"[10] …, Mr. November appeared in court on behalf of Ramabu Attorneys. It was immediately apparent that Mr. November was not an admitted legal practitioner, nor did he present himself in a manner befitting the *decorum* of the court. His casual attire was inconsistent with the professional standards expected of someone working in a legal office or who respects the court.

[11] The conduct of Mr. Ramabu of Ramabu Attorneys in this matter is to be strongly deprecated. His actions—…, failure to ensure proper representation at the hearing, and the unprofessional behaviour by a representative of his office exhibited in court—fall woefully short of the standards mandated by the Legal Practice Act and the Code of Conduct for Legal Practitioners, as established by the Legal Practice Council. According to the Legal Practice Act…, attorneys are expected to uphold the dignity and *decorum* of the legal profession, act with integrity, and ensure that their conduct does not bring the profession into disrepute. The actions of Mr. Ramabu in this case reflect a disregard for these principles and undermine the trust placed in legal practitioners by the court and the public."

A claim for compensation arising from circumstances where a candidate attorney, or anyone else, appears in court where they do not have a right of appearance will not be indemnified by the LPIIF as that conduct contravenes the Legal Practice Act (see clause 16(u) of the policy).