THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 736/10

LAW SOCIETY OF THE NORTHERN PROVINCES Appellant

and

KASHAN RAMOKOKA MABANDO First Respondent

THE LAW SOCIETY OF BOPHUTHATSWANA Second Respondent
(The Law Society of the North West Incorporated as the Law Society of Bophuthatswana)

Neutral citation: *Law Society of the Northern Provinces v Mabando* (736/10) [2011] ZASCA 122 (2 September 2011)

CORAM: Navsa, Heher, Van Heerden, Majiedt JJA and Petse AJA

HEARD: 15 August 2011

DELIVERED: 2 September 2011

SUMMARY: Regulatory jurisdictional conflict between appellant and second respondent becoming a spectacle to the detriment of attorneys' profession – second respondent repeatedly engaging in unnecessary and unbecoming litigation challenges to appellant's statutory right to regulate attorneys' conduct within former Bophuthatswana – second respondent failing in its own regulatory function – time for Minister to inquire whether second respondent serves any useful purpose – whatever the source of the complaint the court on whose roll name of attorney appears has the ultimate disciplinary power – three-stage inquiry by court considering complaints of unprofessional, dishonourable or unworthy conduct restated and applied.

ORDER

On appeal from: North West High Court (Mafikeng) (Leeuw JP and Landman J sitting as court of first instance):

1. The appeal is upheld with costs on an attorney and client scale for which the first and second respondents are jointly and severally liable, the one paying the other to be absolved.

2. The order of the court below is set aside and substituted as follows:

'(a) The application succeeds and the first and second respondents are ordered to pay the applicant's costs on an attorney and client scale jointly and severally, the one paying the other to be absolved.

(b) An order is made in terms of paras 1-10.4, 11 and 12 of the applicant's notice of motion. '

JUDGMENT

NAVSA JA (HEHER, VAN HEERDEN, MAJIEDT JJA and PETSE AJA concurring)

[1] This appeal by the Law Society of the Northern Provinces is directed against a judgment of the Mafikeng High Court (Leeuw JP and Landman J), in terms of which an application by it to have the first respondent's name removed from the roll of attorneys was dismissed and each party was ordered to pay its own costs. Notwithstanding the dismissal of the application, the high court 'reprimanded' the first respondent, Mr Kashan Ramakoko Mabando, for his 'unprofessional conduct'. The appeal is before us with the leave of that court.

[2] Before us the appellant contended that the court below ought to have held that

the first respondent is not a fit and proper person to continue practising as an attorney, not only because of his conduct in relation to two fellow practitioners and a client, but also because he failed to co-operate and comply with sanctions imposed by it, subsequent to disciplinary proceedings. The appellant also relied on the fact that the first respondent had not taken steps to undo the wrongs perpetrated against three of these four parties, up until the date of the hearing of the appeal. It was submitted that the appellant's application to have the first respondent's name struck from the roll of attorneys was wrongly refused by the court below.

[3] The first respondent submitted that the conduct complained of was not such as to render him liable to be struck from the roll of attorneys *and* that he had and continues to have a genuine belief that s 84A of the Attorneys Act 53 of 1979 (the Act), in terms of which the appellant claims to have concurrent jurisdiction over him and other attorneys in the geographical area of the former Republic of Bophuthatswana, is unconstitutional. This latter point he accepted he was unable to pursue before us because he had failed in the court below to follow the prescribed procedure for challenging the validity of the legislation in question. That belief, he submitted, dictated his justifiable attitude towards the appellant.

[4] The present litigation is the culmination of a long standing feud between the appellant and the first respondent, concerning the former's jurisdiction over attorneys practising in the geographical area that constituted the former Bophuthatswana, located within the area of jurisdiction of the court below. Furthermore, as will be demonstrated later in this judgment, it is a continuation of a long running litigation saga between the appellant on the one side, and practitioners and the second respondent, the Law Society of Bophuthatswana,[1] on the other. As will be demonstrated later, it is a sad indictment against the legal profession in the geographical area over which the second respondent has concurrent jurisdiction that numerous courts have been unnecessarily inundated with the same battle for dominance and exclusivity over and over again. For

1 The second respondent was established by s 50 of the Attorneys, Notaries and Conveyancers Act 29 of 1984 (the Bophuthatswana Attorneys Act). It recently changed its name to the Law Society of the North West incorporated as the Law Society of Bophuthatswana.

the sake of the dignity of the legal profession as a whole it is a pattern that has to end. Both in the court below and before us, up until the eleventh hour, the second respondent supported the first respondent. These are aspects to which I will revert in due course. The first respondent's relevant particulars, the details of the complaints referred to above and the facts leading up to the present litigation are all set out in the paragraphs that follow.

[5] The first respondent was admitted as an attorney on 25 June 1991 and practises as such in Garankuwa, North West Province. His name appears on the roll of attorneys in the court below and he is a member of the second respondent. On 5 November 2002 and 30 January 2003 the appellant received two written complaints against the first respondent ─ one each from attorney Mr David van Zyl and attorneys' firm Bell Dewar and Hall, respectively.

[6] Mr van Zyl complained that he had obtained instructions from the first respondent to act as the latter's correspondent in a matter in Vryburg and that he had executed those instructions and performed the necessary services, rendering an account for R3 420, which, despite repeated demand, remained unpaid. At the time he lodged the complaint with the appellant Mr van Zyl's account had been outstanding for two years. The first respondent, according to Mr van Zyl, had failed to answer numerous letters addressed to him in this regard.

[7] Landed with the complaint, the appellant wrote to the first respondent requesting him to comment. He failed to respond.

[8] According to Bell Dewar and Hall they had instructed the first respondent to act as their correspondent and to collect moneys on behalf of their client, United Distillers & Vintners, from a bottle store, which he did. Bell Dewar and Hall alleged that the first respondent subsequently failed to account to them for the moneys so collected. Once again, the appellant requested the first respondent to comment on the complaint received by it. Once again, he failed to do so.

[9] Unsurprisingly, the appellant convened a disciplinary committee to consider the complaints and to consider the first respondent's failure to respond to its written communications. The appellant claims the right to exercise concurrent disciplinary power over attorneys practising in the former Bophuthatswana, in terms of s 84A of the Act, which provides as follows:

'Notwithstanding any other law, the Law Society of the Transvaal and its council, president and secretary, may in respect of practitioners practising in the areas of the former Republic of Bophuthatswana and Venda, perform any function which is similar to a function assigned to that Law Society, council, president or secretary, as the case may be, by section 22(1)*(d)* or *(e)*, (2), 67 (2), 69*(a)*, *(e)* or *(m)*, 70, 71, 72, 73, 74(1)*(a)*, *(e)* and *(f)*, 78, 81(1)*(e)* and *(f)*, (2)*(a)*, *(d)*, *(e)*, *(i)* or *(j)*, (5) or 83(9), (13) or (15).'

[10] Section 71 of the Act gives the council of a law society the power to enquire into cases of alleged unprofessional or dishonourable or unworthy conduct on the part of any attorney, notary or conveyancer whose name has been placed on the roll of any court within its province, 'whether or not he is a member of such society'. Section 72(6) provides for a court at the instance of a law society to suspend any practitioner from practice or to strike him from the roll.

[11] Acting in terms of s 71 the appellant charged the first respondent as follows:

'(a) *Complaint by Attorneys David van Zyl*

That you are guilty of unprofessional or dishonourable or unworthy conduct on the part of a practitioner in that you contravened the following Rules of the Law Society of the Northern Provinces, incorporated as the Law Society of the Transvaal (the Rules);

1.) Rule 89.25 of the Rules in that you failed or neglected to comply with a request by the Secretary in that you failed to answer correspondence addressed to you by the Law Society of the Northern Provinces dated 17 December 2002; and

2.) Rule 89.23 of the Rules in that you failed or neglected to answer or appropriately to deal with within a reasonable time any correspondence or other communication which reasonably requires a reply or other response addressed to you by Attorneys David van Zyl dated 23 May 2002; and

3.) Rule 68.9 of the Rules in that you failed or neglected to pay, within a reasonable time, the reasonable fees and disbursements of your correspondent attorneys, David van Zyl in the matter of *J M Mothusi and J M Mothusi Bottle Store (Pty) Ltd v Vryburg Municipality*.

b) *Complaint by Attorneys Bell Dewar & Hall*

That you are guilty of unprofessional or dishonourable or unworthy conduct on the part of a practitioner in

that you contravened the following Rules of the Law Society of the Northern Provinces, incorporated as the Law Society of the Transvaal (the Rules);

1) Rule 89.23 of the Rules in that you failed or neglected to answer or appropriately to deal with within a reasonable time any correspondence or other communication which reasonably requires a reply or other response addressed to you by Attorneys Bell Dewar & Hall dated 18 June 2002, 26 July 2002, 11 September 2002, 23 October 2002 and 9 December 2002 in the matter of *Guinness UDV SA (Pty) Ltd v Lerato Bottle Store*; and

2) Rule 89.9 of the Rules in that you failed or neglected to pay, within a reasonable time, the reasonable fees and disbursements of your correspondent attorneys, Bell Dewar & Hall in the matter of *Guinness UDV SA (Pty) Ltd v Lerato Bottle Store*;

3) Rule 89.7 of the Rules in that you without lawful excuse delayed the payment of trust monies after due demand in the matter of *Guinness UDV SA (Pty) Ltd v Lerato Bottle Store*.'

[12] Replying to the appellant's letter requiring him to appear before the disciplinary committee, the first respondent stated the following:

'It is therefore my submission that you do not have jurisdiction over the matter as it was dealt with outside your jurisdiction and at the time when writer hereof was practicing outside your jurisdiction.

Writer hereof is therefore not prepared to subject himself to any hearing by yourselves over a matter in which you had no jurisdiction unless you provide me with any statutory law that converse (*sic*) such jurisdiction on you.'

[13] That communication notwithstanding, the first respondent appeared before the disciplinary committee on 4 August 2005 and pleaded not guilty to all the charges. He raised the following point *in limine*: he was a member of the Law Society of Bophuthatswana and the appellant consequently had no jurisdiction over him.

[14] The appellant's disciplinary committee reserved its decision on the point *in limine.* It subsequently dismissed the point, providing written reasons for doing so and relying principally on s 84A of the Act. In response, the first respondent addressed a letter to the appellant, maintaining adamantly that it had no jurisdiction over him, stating, amongst others, that this section of the Act has 'very serious shortcomings'. He went on to state the following:

'I find it rather unfortunate that the Law Society of the Transvaal, despite all the transformation that has and is taking place since the advent of the new dispensation, is still clinging to the old apartheid style of wanting to rule others by force or absorption irrespective of all the protests. . . .

As a practitioner under the Law Society of Bophuthatswana, I have freely associated myself with that Society and I owe allegiance to it for all my activities that are carried out within its area of jurisdiction.'

[15] The regulatory legislative history in the geographical area concerned and a discussion of s 84A of the Act and judicial decisions in relation thereto will be dealt with in due course.

[16] The appellant decided to proceed with the disciplinary enquiry. On 4 September 2006 it notified the first respondent to appear before its disciplinary committee on 21 September 2006, to answer the charges preferred against him. He attended the proceedings. The disciplinary committee found him guilty on all three charges related to the complaint by attorney Van Zyl. In respect of the first respondent's failure to respond to the appellant's invitation to comment on the complaint, he was fined an amount of R500. In respect of his failure to respond to Van Zyl's letters he was fined an amount of R500. In respect of his failure to pay the account he was fined an amount of R500, suspended for a period of 60 days on condition that he paid the amount due to the attorney.

[17] The first respondent paid the fines in respect of the first two charges. It is common cause that the amount due to Van Zyl remained unpaid for approximately nine months after the sanctions were imposed and was paid in two instalments after an amount was finally agreed between them.

[18] In relation to the complaint by Bell Dewar and Hall the first respondent was found guilty on two charges. The first was that he had failed to respond to correspondence from them and the second that he had failed to account for the moneys collected on their behalf. He was fined R1 000 on the first charge and an amount of R2 000 on the second, suspended for 30 days, to allow him to account to Bell Dewar and Hall.

[19] In respect of the fines imposed, an amount of R2 000 was due to be paid to the appellant by 30 November 2006. The first respondent failed to pay the fines and

persisted in his failure to account to Bell Dewar and Hall. On 18 October 2006 the first respondent advised the appellant that he intended to bring an application to review the decision of the disciplinary committee, but that did not eventuate.

[20] In respect of the sanction in relation to the complaint by Bell Dewar and Hall, first respondent did however, pay an amount of R1 000 to the appellant, leaving a balance in an amount of R1 000 in unpaid fines. The appellant wrote to the first respondent demanding that he pay what was due. He failed to do so. In consequence, on 27 August 2008, the appellant notified the first respondent to appear before a disciplinary committee to answer the following charge:

'That you are guilty of unprofessional or dishonourable or unworthy conduct on the part of a practitioner in that you contravened Rule 89.25 of the Rules of the Law Society of the Northern Provinces, incorporated as the Law Society of the Transvaal (the Rules), in that you failed to pay the fine of R2 000.00 imposed by the disciplinary committee held on 21 September 2006.'

[21] The first respondent failed to appear before the committee and the conflict continued. In October 2008 the appellant received yet another complaint against the first respondent, this time from a member of the public, Mr G M Ntsweng. He alleged that he instructed the first respondent to recover damages he had sustained as a result of his motor vehicle being damaged in a collision. According to Mr Ntsweng, the offending motorist had signed an acknowledgment of debt in an amount of R6 438.46, in terms of which he had undertaken to pay over that amount in instalments to the first respondent. Mr Ntsweng alleged that the first respondent had failed to carry out his instructions to recover what was due and failed to account for monies actually received from the other motorist.

[22] The appellant notified the first respondent of this complaint and he was requested to comment. His response was to once again challenge the appellant's jurisdiction. This ultimately led to a further disciplinary committee being convened on

9 October 2008, where the following charges were brought against the first respondent:

'That you are guilty of unprofessional or dishonourable or unworthy conduct on the part of a practitioner in

that you contravened the following Rules of the Law Society of the Northern Provinces, incorporated as the Law Society of the Transvaal (the Rules);

1.) Rule 89.25 of the Rules, in that you failed or neglected, within a reasonable time, to comply with a request by the Secretary in that you failed to provide the Law Society of the Northern Provinces with your comments to the allegations against you, as conveyed in the letter of the Law Society dated 6 February 2008; and

2.) Rule 89.15 of the Rules, in that you failed or neglected to give proper attention to Mr G M Ntsweng's claim against Mr J J Zwane; and

3.) Rule 68.7 of the Rules of the Law Society of the Northern Provinces, within a reasonable time, after the performance or earlier termination of any mandate received from your client, Mr G M Ntsweng in regard to the matter of Mr J J Zwane, to furnish your client with a written statement of account setting out within reasonable clarity:

a) details of all amounts received by you in connection with the matter, appropriately explained;

b) particulars of all disbursements and other payments made by you in connection with the matter;

c) fees and other charges charged to or raised against your client and where any fee represents an agreed fee, a statement that such fee was agreed upon and the amount so agreed;

d) the amount due to or by your client.'

[23] The first respondent failed to appear. Thus, the proceedings were conducted in his absence and he was found guilty on all three charges. In respect of the first charge the first respondent was fined an amount of R5 000, half of which was suspended for a period of three years. The same penalty was imposed in respect of the second charge. In relation to the third charge a fine of R10 000 was imposed, half of which was suspended. In addition, the first respondent was ordered to account to Mr Ntsweng on or before 30 November 2008. He did not do so and failed to pay any of the fines imposed.

[24] On 21 October 2008 the first respondent wrote to the appellant, once again challenging its jurisdiction over him. Eight days later he wrote to the appellant, stating that the decision by the disciplinary committee was wrong. For completeness it is necessary to record that another complaint against the first respondent, received from a member of the public during October 2008, in respect of which the appellant convened a disciplinary committee attended by the first respondent, was resolved in his favour.

[25] This unsatisfactory state of affairs from the appellant's perspective, and indeed from the perspective of all interested parties, led to an application by the appellant in the court below, to have the first respondent's name removed from the roll of attorneys, on the basis of dishonourable, unprofessional and unworthy conduct. The appellant also sought ancillary relief that is conventional in this type of application, including the appointment of a curator to take control of the respondent's trust funds, in the event of the application for removal being granted. The appellant also sought costs on an attorney and client scale. The appellant served the application on the second respondent, for such interest as it might have. As stated above, the second respondent supported the first respondent in resisting the appellant's jurisdiction over him and indeed over all attorneys in that area. It must be said however, that the answering affidavit filed on behalf of the second respondent focused mainly on the legitimacy of the appellant and centred on whether the appellant's council had been properly constituted rather than on the point taken by the first respondent, namely that s 84A was unconstitutional.

[26] The application was opposed by the first respondent on the basis first, of a lack of jurisdiction on the part of the appellant. In respect of the merits of the respective complaints the first respondent's answering affidavit is instructive. In respect of the complaint by attorney Van Zyl, the following parts of the answering affidavit bear repeating:

'The allegations therein contained are admitted. I however did not have knowledge of the complaint and correspondence allegedly directed to me in this regard in that I was not handling the matter to which the Applicant refers and any correspondence relating to the matter directed to me was not brought to my attention by the person who was dealing with the file. I only came to know of the matter when I received a notice from the Applicant calling me to appear before a disciplinary committee. The notice came to my attention as same was served at my place of residence. I duly appeared before the disciplinary committee as requested and I explained to the committee which was dealing to the reason for my failure to respond to correspondence directed to me regarding the complaint. I, however pleaded guilty to the charge which was formulated against me on the basis of vicarious liability as the person who dealt with the matter was in my employment. I later found out that the correspondence which the Applicant and the complainant directed to my office was intercepted by the person who was handling the matter and did not bring same to my attention on the ground that fees were due to a correspondent and the person realized that there

were totally no funds on the file which went against the policy of the firm of instructing a correspondent without a client placing us in funds to cover correspondent's fees.
I explained to the committee that I was not aware of the correspondence the Applicant addressed to me.'

[27] In respect of the complaint by Bell Dewar and Hall the following is stated by the first respondent:

'I admit that I received instructions from Bell Dewar & Hall to act on their behalf in several matters one of which is the one referred to by the Applicant [Appellant]. In all matters in which I acted on their behalf, I duly accounted to them. The dispute between me and them arose after I had furnished Bell Dewar & Hall with my statement of account in matter in which they had instructed me to act on their behalf. I was told to see how to recover my costs and I informed them that I will be holding the money I had in trust for them until the issue of my outstanding account has been resolved. I then suggested that I deduct my fees from the money I had in trust and pay the balance to them which they still did not accept. To date my account has not been settled and we have not come to any resolution of the matter.
The Applicant failed to play a mediatory role in the matter but instead concentrated on finding fault on my part in order to deliver a verdict of guilt. It is further my submission that a proper complaint was not filed in terms of the regulations to the Act and therefore no valid charge could be formulated in terms of the Act and that means no valid order should be made on the matter.'

[28] The first respondent admitted that in respect of the Bell Dewar and Hall complaint he had received an invitation by the appellant to comment and did not respond on the merits, confining himself to raising the jurisdictional point. He insisted he had a bona fide belief in the jurisdictional point. He denied that the conduct he was accused of was of the kind that constituted a basis for removal from the roll of attorneys. In addition, the respondent made generalised and vague allegations that the appellant, in prosecuting him, failed to observe its own rules and that the proceedings were thus invalid and ineffective. This latter point was not persisted in before us.

[29] The following paragraph of the opposing affidavit is indicative of the fact that the conflict was assuming personal and ego dimensions:

'I consider it as an insult to my intelligence for Mr Mnisi to allege that I lack insight as to the meaning and import of the provisions of Section 84A of the Attorneys Act. In the legal profession people always have

different views and interpretation as regards the law and that cannot be regarded as lack of insight. It is clear that the Applicant and I have different legal opinions on the application of Section 84A. My difference to Applicant on this Section is based on the provisions of the Constitution which is the supreme law of the country.'

[30] Insofar as the complaint by Mr Ntsweng is concerned, the respondent admitted that he had received a letter from the appellant concerning the complaint and that he had objected to the appellant's jurisdiction. The respondent stated: 'To my knowledge the complainant referred the complaint to the Law Society of the North-West (Bophuthatswana) and the complaint was addressed.'

[31] As can be seen, the assertions in the preceding paragraph are equivocal and we are not told how the matter was resolved. In respect of the jurisdictional point taken by the first respondent he stated that he knew of no court decision in which the constitutionality of s 84A of the Act was tested when read against the provisions of items 2(1)*(a)* and *(b)* read with item 2(2) of Schedule 6 of the Constitution. These provisions will be dealt with later in this judgment. He submitted that he had a constitutional right to hold a differing point of view.

[32] Startlingly, the second respondent, in affidavits filed on its behalf in the court below, adopted the position that the appellant is an illegitimate body and that its council was constituted irregularly, a point that was abandoned in argument in the court below. I must admit that parts of the affidavit deposed to by the President of the second respondent make for difficult reading and I have strained to ascertain all the points made therein. I quote but one of the paragraphs to illustrate this:

'The allegation resolution of the allegation council of the 17th June 2009 marked annexure 1 in the founding affidavit is not valid as it was not taken by a legitaciate body as mentioned above and the founding affidavit is not valid as it was made illegally.'

[33] In respect of the merits of the complaints against the first respondent, there is no effective engagement by the second respondent with the allegations made by the appellant. Alarmingly, the second respondent appears unconcerned about the

substance of the complaints. In the affidavits filed on its behalf it contented itself by stating that the first respondent is 'our member in good standing and has never been brought before the disciplinary committee for any misconduct'. In respect of the complaint brought by Mr Ntsweng the second respondent merely refers to an exchange of correspondence between the interested parties without stating whether or how it was resolved.

[34] Before us counsel representing the first respondent accepted that the only conclusion that could be arrived at on the documents filed in the court below is that there had in fact been no final accounting by him to either Bell Dewar and Hall or Mr Ntsweng. It is common cause that the amount the first respondent alleged Bell Dewar and Hall owed him as fees for acting as correspondent together with associated disbursements was a fraction of the amount he had collected on their behalf, namely R1 084.72 as opposed to R3 960, leaving an amount of R2 875.28 due to them. In respect of Mr Ntsweng it was accepted by counsel representing the first respondent that on the latter's own version of events, as asserted in his answering affidavit, notwithstanding the fees he alleged the former owed him, an amount of money was due to his former client that had still not been paid over.

[35] However, during argument before us, first respondent's counsel informed us that he was in an invidious position as he had instructions belying the documents filed in the court below and the conclusion referred to in the preceding paragraph. He informed the court that his instructions were that the amounts outstanding had been paid to the parties concerned last year. Upon enquiry from us counsel reported that he was unable to provide any proof thereof. When it was pointed out to counsel that in the heads of argument filed in this court on first respondent's behalf in June *this* year it is clear that the amount still due to Bell Dewar and Hall had not yet been paid, he was unable to make any further submissions in this regard.

[36] The court below stated the following in relation to the complaints by the first respondent's colleagues and clients:

'I am therefore of the view that based on the findings of the applicant's disciplinary committee, the first respondent acted unprofessionally against his colleagues and client. However, notwithstanding the aforesaid finding, I do not find his conduct to be so gross as to warrant his . . . removal from the roll of attorneys.'

[37] Having dealt with the merits of the complaint in the manner referred to above, the court below went on to consider the jurisdictional point taken by the first respondent, namely, that s 84A of the Act was unconstitutional, particularly when read against the provisions of items 2(1)*(a)* and *(b)* read with item 2(2) of Schedule 6 of the Constitution, which provide:

'2(1) All law that was in force when the new Constitution took effect, continues in force, subject to-

(a) any amendment or repeal, and

(b) consistency with the new Constitution.

(2) Old order legislation that continues in force in terms of sub item (1)

(a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and

(c) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.'

[38] The Attorneys Amendment Act 115 of 1998 that introduced s 84A of the Act came into operation on 15 January 1999. Before that the second respondent was the sole regulatory authority over attorneys in the former Bophuthatswana. As best as can be discerned the submission on behalf of the first respondent is as follows. The legislation which established the second respondent, namely, the Bophuthatswana statute, the Attorneys, Notaries and Conveyancers Act 29 of 1984, continued in force when the new Constitution came into effect and s 84A has not extended the territorial application of the Act with the result that the second respondent continues to enjoy exclusive regulatory jurisdiction over attorneys in that territory. Furthermore, if the legislature had intended to extend the territorial application of the Act it would have repealed the whole of the preceding legislation. In addition it was submitted that in the event of it being accepted that the Act and the legislation giving effect to the second respondent exist side by side then the latter legislation takes precedence. I struggle to understand how this is a challenge to the constitutionality of s 84A rather than an

interpretation of that provision of the Act in the context of the stated items of Schedule 6 of the Constitution. However, as will become apparent that distinction is not critical to a decision in this case.

[39] The appellant on the other hand, in a submission that is easily understood, submitted that items 2(1) and 2(2) of Schedule 6 of the Constitution clearly permit amendments to old order legislation that enable wider statutory application and that this is exactly what occurred when s 84A was introduced.

[40] In leading up to the conclusion that the first respondent was unable to raise the constitutional point referred to above because of his failure to take a necessary preceding procedural step, the court below had regard to judgments of this court in which the legality of the appellant's concurrent jurisdiction with the second respondent was upheld.

[41] It is necessary to have regard to those cases. In *Mabaso v Law Society, Northern Provinces* 2004 (3) SA 453 (SCA), this court set out the history of the Law Society of the Northern Provinces, the present appellant. It had regard to its predecessors in title and to the fact that it had its origins in a Volksraadbesluit 1307, dated 10 October 1892. In *Mabaso* this Court took into account the historical change in provincial boundaries and took judicial notice of the fact that the areas served by that Law Society now make up the biggest part of what used to be the old Transvaal. This court considered s 57 of the Act by Act 15 of 1998 which provides that every practitioner who practises in any province, whether for his own account or otherwise, shall be a member of the society of that province. Importantly, at para 11 the following is stated:

'In any event, Mr *Poswa* conceded that at least the respondent is an association of attorneys. He conceded too, though reluctantly, that a voluntary association of attorneys would have been entitled to launch the application. *Cadit quaestio*.'

[42] In *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA), this court considered the position of attorneys enrolled as attorneys of the Bophuthatswana High Court and who are members of the Law Society of Bophuthatswana, the second

respondent in the present appeal. In *Mogami* this court considered amendments to the Act in 1998 and the effects thereof. First, for purposes of Chapter 2 of the Act (the provisions dealing with the Fidelity Fund) attorneys practising within the former Bophuthatswana are deemed to be members of the Law Society of the Northern Provinces, the present appellant ─ s 55 of the Act. Second, the Law Society of the Northern Provinces obtained concurrent jurisdiction with the Law Society of Bophuthatswana in relation to disciplinary matters ─ s 84A of the Act.

[43] In *Mogami* this court stated the following (para 7):

'The powers given to the appellant by s 84A include the jurisdiction to make rules as to conduct that constitutes unprofessional or dishonourable or unworthy conduct; to enquire into any case of alleged unprofessional or dishonourable or unworthy conduct; to apply for the suspension or striking-off of an attorney on the ground that the attorney is not a fit and proper person to continue to practise as an attorney; to prescribe the books, records, certificates or other documents to be kept and inspection thereof; and to direct any practitioner to produce for inspection any book, document, record or thing.'

[44] Dealing with the reaction to the amendments, Harms DP in *Mogami* said the following (para 8):

'Practitioners of Bophuthatswana and members of the Bophuthatswana society objected to the fact that the appellant was given these powers and refused to comply with the law as it stands. The society even instructed their members to ignore the law by refusing to recognise the appellant's powers and jurisdiction as conferred by the Act. The judgment in *Law Society, Northern Provinces (Incorporated as the Law Society of the Transvaal) v Maseka*[2] *and Another* 2005 (6) SA 372 (B) is in this regard particularly important. It involved an application permitting the appellant to inspect the books of the then chair and acting administrator of the society. Judgment was delivered on 8 March 2005 and the court held that the appellant had the powers referred to in the preceding paragraph (at 378D-G). On 23 May the society resolved more or less to ignore the judgment, insisting that all disciplinary matters against its members should be dealt with by it. Both this court and the Constitutional Court dismissed applications for leave to appeal, the latter on 4 October 2005. In spite of this the society made common cause with the respondents during May 2006 in rearguing the same point, namely that the appellant had no locus standi to *(a)* investigate complaints against the respondents; *(b)* require an inspection of the respondents' books; and *(c)* launch the present application.'

2 It is an aggravating feature of the second respondent's conduct in the present case that its opposition has apparently been driven by the same Mr Maseka who is now its President.

[45] Harms DP went on (para 11) to criticise the Bophuthatswana society for siding with errant attorneys. He said the following:

'It is bad enough for courts to deal with alleged unprofessional conduct of practitioners but it is a sad day for the legal profession in particular and justice in general if a professional body acts unprofessionally by ignoring the clear law and judgments of competent courts, and by presenting spurious evidence.'

[46] The court below has on a number of occasions pronounced on the legality of the disciplinary powers of the appellant. In this regard see *The Law Society of the Northern Provinces v Gaborone Mothoagae* [2006] ZANWHC 43 per Mogoeng JP and Leeuw J. It also pronounced in the *Mogami* matter per Hendricks J which ultimately found its way on appeal to this court and in *Law Society, Northern Provinces (Incorporated as the Law Society of the Transvaal) v Maseka & another* 2005 (6) SA 372 (BH) per Landman J.

[47] In the present case the court below nevertheless took the view that s 84A created confusion and in this regard referred to the complaint laid by Mr Ntsweng which was dealt with by both law societies. Leeuw JP stated that the court below had in previous decisions raised concerns in relation to the concurrent jurisdiction of two bodies to institute disciplinary proceedings. In the learned Judge President's view this state of affairs required the urgent attention of either the two bodies or legislative intervention.

[48] Dealing with the question whether the constitutional point raised by the first respondent was justiciable the court below correctly first had regard to Uniform rule 10A which reads as follows:

'If any proceedings before the court, the validity of a law is challenged, whether in whole or in part and whether on constitutional grounds or otherwise, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings and shall in the case of a challenge to a rule made in terms of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), cause a notice to be served on the Rules Board for Courts of Law, informing the Rules Board for Courts of Law thereof.'

[49] The Constitutional Court has repeatedly explained why it was important that the

relevant authorities be provided an opportunity to be heard when legislation in respect of which they bear responsibility was challenged. In *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) para 7 the following was stated:

'On a number of occasions this Court has emphasised that when the constitutional validity of an Act of Parliament is impugned the Minister responsible for its administration must be a party to the proceedings inasmuch as his or her views and evidence tendered ought to be heard and considered. Rudimentary fairness in litigation dictates so. There is another important reason. When the constitutional validity of legislation is in issue, considerations of public interest and of separation of powers surface. Ordinarily courts should not pronounce on the validity of impugned legislation without the benefit of hearing the State organ concerned on the purpose pursued by the legislation, its legitimacy, the factual context, the impact of its application, and the justification, if any, for limiting an entrenched right. The views of the State organ concerned are also important when considering whether, and on what conditions, to suspend any declaration of invalidity.'

See also *Road Accident Fund v Mdeyide (Minister of Transport Intervening)* 2008 (1) SA 535 (CC) and the judgment of this court in *City of Tswane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) para 10-12.

[50] The court below rightly concluded that since the first respondent did not join the responsible Minister it could not entertain the constitutional challenge. Before us, counsel on behalf of the first respondent readily conceded that that conclusion could not be faulted. As stated above, he nevertheless contended that it was necessary to consider the challenge as one in which the first respondent had a bona fide belief which dictated his attitude towards the appellant. It was submitted that this belief mitigated the first respondent's conduct in relation to the appellant.

[51] At this stage, it is necessary to restate the principles that apply to striking off applications. *Jasat v Natal Law Society* 2000 (3) SA 44; [2000] 2 All SA 310 (SCA) para 10 states that s 22(1)*(d)*[3] of the Act contemplates a three-stage inquiry:[4]

'First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry.

3 Section 22(1)*(d)* empowers a court on application by a Law Society to strike an attorney off the roll if he 'in the discretion of the court, is not a fit and proper person to continue to practise as an attorney.'
4 As summarised in *Malan & another v Law Society Northern Provinces* 2009 (1) SA 216 (SCA) para 4.

Second, it must consider whether the person concerned "in the discretion of the court" is not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment.
And third, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice.'

[52] It is abundantly clear in the present case that offending conduct has been established. Even the court below held that the first respondent was guilty of unprofessional conduct. In *Malan & another v Law Society Northern Provinces* para 5, this court stated:

'[I]t is well to remember that the Act contemplates that where an attorney is guilty of unprofessional or dishonourable or unworthy conduct different consequences may follow. The nature of the conduct may be such that it establishes that the person is not a fit and proper person to continue to practise. In other instances the conduct may not be that serious and a law society may exercise its disciplinary powers, particularly by imposing a fine or reprimanding the attorney (s 72(2)*(a)*).'

[53] A careful and proper assessment of the conduct in question is what is required in the next stage of the inquiry, when the court considers whether the attorney is a fit and proper person to continue to practise. As stated in *Jasat* and again in *Malan*, this involves weighing up the conduct complained of against the conduct expected of an attorney and that involves a value judgment.

[54] The court below took too lenient an approach to the misconduct complained of by the first respondent's fellow practitioners who had either instructed him to act as a correspondent or who did work for him as a correspondent. It did the same in relation to the complaint by Mr Ntsweng and failed to appreciate the full import of the first respondent's persistent failure to finally account to either Mr Ntsweng or Bell Dewar and Hall. In the case of Bell Dewar and Hall the first respondent has up to now failed to account to them for a period of more than eight years after the complaint was lodged and almost eleven years after the account was rendered. In October 2000 the first respondent scandalously and in stereotypical errant debtor style dispatched a letter to Mr van Zyl allegedly enclosing a cheque that in fact was not attached. In the case of Mr van Zyl the amount due was paid approximately five years after the complaint was

laid and then was paid in two instalments some nine months after the appellant had ordered him to so, following on the disciplinary enquiry. In the ordinary course the amounts collected and due to the instructing attorney or client would have had to be retained in a trust account. Considering the common cause facts the inference is inescapable that the amounts were not so retained ─ a grave and usually fatal error on the part of any attorney.

[55] Furthermore, the first respondent resisted all attempts by the appellant to get him to address the complaints, stubbornly attacking its jurisdiction, rather than dealing with what were clearly legitimate complaints. In his affidavit filed in the court below the first respondent was evasive, argumentative and disingenuous. To this day, the first respondent continues to demonstrate a remarkable lack of insight concerning the professional and ethical standards expected of an attorney. Lastly, even at the time of the hearing, the first respondent showed a remarkable lack of contrition and unaccountability.

[56] It is necessary to place the role of a court before which a Law Society brings a claim into proper perspective. In *Solomon v The Law Society of the Cape of Good Hope* 1934 AD 401 at 408-409 the following appears:

'[T]he Law Society claims nothing for itself from the applicant. It merely brings the attorney before the Court by virtue of a statutory right, informs the Court what the attorney has done and asks the Court to exercise its disciplinary powers over him. . . .Before the Cape Law Society received statutory recognition, the Court *mero motu* dealt with the unprofessional conduct of attorneys. In practice the *Attorney- General* was asked to lay the facts before the Court (in *re Cairncross*, 1877, Buch, 122). . . . The Law Society protects the interests of the public in its dealings with attorneys. It does not institute any action or civil suit against the attorney. It merely submits to the Court facts which it contends constitutes unprofessional conduct and then leaves the Court to determine how it will deal with this officer.'

[57] Section 71 of the Act provides that a council of a law society may enquire into cases of unprofessional, dishonourable or unworthy conduct on the part of any attorney, notary or conveyancer whose name has been placed on the roll of a court within the province of its society, whether or not that practitioner is a member of such society. It will be recalled that s 57 of the Act makes the first respondent and other attorneys in his situation *de iure* members of the appellant's society. Section 84A gives the appellant the

powers referred to in s 71. The first respondent did not attack the constitutionality of ss 57 or 71 of the Act.

[58] It is clear that it is the court before which a complaint of misconduct is brought that has the ultimate disciplinary power. Courts should be concerned about the professional conduct of those who appear before them or who otherwise practise within their areas of jurisdiction. However, there can be no doubt that, whatever the jurisdiction of the Law Society, a court has jurisdiction to decide whether an attorney appearing on its roll is a fit and proper person to continue to practise, particularly where, as in the present case, all the facts are known. This is made abundantly clear by the dictum from *Mabaso* (para 11) referred to in para 41 above. The first and second respondents' energies therefore appear to be misdirected and wrongly focussed on the jurisdictional aspect.

[59] I turn to briefly deal with the submission on behalf of the first respondent that his attitude towards the appellant was dictated by his bona fide belief in the sustainability of his constitutional point. I have serious doubts about the intelligibility and viability of the point but assuming it to encompass a proper challenge to the constitutionality of s 84A of the Act, it is for reasons stated above neither competent nor necessary to make a decision in that regard. The legality of the appellant's concurrent regulatory jurisdiction over attorneys in the former Bophuthatswana as provided for in provisions of the Act has repeatedly been addressed in its favour in the court decisions referred to above. It is not a question that requires revisiting. The truth is that it is not the first respondent's belief in the point, genuine or otherwise, that is in issue. It is his conduct characterised in paras 54 and 55 above that is under scrutiny. That conduct is clearly unprofessional, dishonourable and unworthy and renders him liable to be struck off.

[60] It was submitted on behalf of the first respondent that the appellant was not really concerned about his conduct in relation to his colleagues and client but rather was disgruntled about his resistance to its authority over him and accordingly sought to punish him. Whilst it is true that the appellant took umbrage at the first respondent's

attitude towards its authority, it is clear from the founding affidavit filed on its behalf that it was particularly concerned about his unrepentant lack of responsibility towards his colleagues and client up until the launch of its application. This attitude continued until the end of the hearing of the appeal. That attitude presents a danger to the public who are deserving of protection both from law societies and courts.

[61] To sum up: in respect of the second inquiry referred to in *Jasat* it is quite clear that the first respondent is not a fit and proper person to continue to practise. In respect of the third inquiry referred to in *Jasat*, the compelling conclusion is that the first respondent is liable to be removed from the roll of attorneys. The court below erred in its assessment of the gravity of the first respondent's conduct and in holding that a reprimand would suffice.

[62] It is evident that the second respondent is engaged in an unbecoming turf war with the appellant which has led to unnecessary and protracted litigation. It ought to focus its attention on serving the interests of the public by properly regulating the conduct of practitioners within its area and cooperating with its sister society with which it enjoys concurrent jurisdiction. None of the grounds on which its opposition to the appellant's authority was premised was persisted in before us. It was of no assistance in relation to the merits of the complaints. Its presence in this appeal is highly questionable, particularly when this court was informed towards the end of the hearing of this appeal that it was now willing to abide our decision. Its lack of concern about legitimate complaints brought by the public against one of its members is remarkable. Its track record evidenced by the present and other litigation brings into question its willingness to perform its regulatory function. It appears preoccupied with its status as opposed to the appellant's. One is entitled to ask whether its continued existence is justified. In *Mogami* this court accused the second respondent of dishonest behaviour and it was warned that responsible members of its executive themselves ran the risk of disciplinary proceedings in the event of a repetition. Considering how often the second respondent has needlessly engaged a number of courts misspending its funds the time has come for a plea to the Minister of Justice and Constitutional Development to

consider whether it serves a useful purpose. The Registrar of this court is hereby directed to serve a copy of this judgment on the Minister and particularly to bring to his attention the comments in this paragraph. In my view, a joint cost order against the second respondent on an attorney and client scale is wholly deserved.

[63] The following order is made:

1. The appeal is upheld with costs on an attorney and client scale for which the first and second respondents are jointly and severally liable, the one paying the other to be absolved.

2. The order of the court below is set aside and substituted as follows:

'(a) The application succeeds and the first and second respondents are ordered to pay the applicant's costs on an attorney and client scale jointly and severally, the one paying the other to be absolved.

(b) An order is made in terms of paras 1-10.4, 11 and 12 of the applicant's notice of motion.'

_____

M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant: A T Lamey

Instructed by
Rooth & Wessels Pretoria
Naudes Attorneys Bloemfontein

For Respondent: P J Loubser

Instructed by

Jerry Sithole Attorneys Mmabatho
Mabalane Seobe Inc Bloemfontein