THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 435/02
Reportable

In the matter between:

THE LAW SOCIETY OF THE
NORTHERN PROVINCES — Appellant

and

MUTSHUTSHU WILSON MAMATHO — Respondent

Coram: SCOTT, FARLAM, CONRADIE JJA, VAN HEERDEN *et* MOTATA AJJA

Date of hearing: 22 AUGUST 2003

Date of delivery: 16 SEPTEMBER 2003

Summary: Attorney – admitted in the TPD but practising in Venda – jurisdiction of the TPD to strike him off the roll of attorneys

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JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] The appellant, which was formerly known as the Law Society of the Transvaal, instituted motion proceedings in the Transvaal Provincial Division for an order striking the respondent off the roll of attorneys together with the usual ancillary relief. The principal grounds relied upon for the relief sought were that the respondent had failed to submit an audit certificate for the year ending February 1999 and was practising as an attorney without a fidelity fund certificate issued in terms of s 42(3) of the Attorneys Act 53 of 1979 ('the Act'). An audit certificate is a requirement for the issue of a fidelity fund certificate. Practising without the latter is a criminal offence and a serious breach of an attorney's duty.

[2] Previously, on 2 July 1996, the appellant had brought an urgent application in the same court for an order suspending the respondent from practising as an attorney. A rule *nisi* was granted by Swart J calling on the respondent to show cause why a final order should not be made:

'That the respondent be suspended from practising as an attorney within the jurisdiction of this honourable court, but excluding the area formerly known as Venda, for an indefinite period, pending the institution of an application at the instance of either applicant or respondent to discharge this order.'

It is not apparent from the record in this appeal why Swart J expressly excluded 'the area formerly known as Venda' from the operation of the order. In the event, the order in that form was made final on 6 February 1997.

[3] Prior to 2 July 1996 the respondent practised within the jurisdiction of the Transvaal Provincial Division. From that date he ceased to do so and has since practised as an attorney at Thohoyandou within the jurisdiction of the Venda High Court.

[4] Three points *in limine* were taken in the Court *a quo.* The first was abandoned in that Court and requires no further consideration. The second was that the appellant had no *locus standi*. The point failed in the Court *a quo* and, for reasons which will become apparent, was correctly not pursued in this Court. The third point was that by reason of the provisions of s 22(1)(*d*)) of the Act, the Court *a quo* had no jurisdiction to hear the application because at the time the application was launched the respondent was no longer practising within its jurisdiction. Section 22(1)(*d*) reads:

'Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice *by the court within the jurisdiction of which he practises* –

…

(*d*) if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney'

(emphasis added).

The latter point was upheld by the Court *a quo.* Its reasoning, in so far as is relevant for the purposes of the present appeal, appears from the following passage in the judgment of Mynhardt J (with whom Moseneke J concurred):

'… I do not think that it is correct to say that merely because the respondent is an attorney and merely because he is before this court this morning, that this court is entitled to exercise its inherent jurisdiction over him. It is clear from the provisions of the Attorneys Act 1979, as I have already indicated, that there are different high courts exercising jurisdiction in different territorial areas. By virtue of section 56 of the Attorneys Act 1979, there are different law societies having jurisdiction in different territorial areas. It must follow therefore, that this court cannot merely because a person is an attorney, exercise jurisdiction over him by virtue of the inherent powers that the court has. That would make a mockery of the provisions of the Attorneys Act, 1979, which I think has been drawn meticulously to provide for the different law societies to exercise jurisdiction over practitioners practising within their respective areas over which they have control and also the different High Courts which exercise jurisdiction over different territorial areas.'

The application was accordingly dismissed with costs by the Court *a quo* without considering the merits of the matter and simply on the ground that the Court had no jurisdiction to entertain it. The

appellant contends that the Court *a quo* does have jurisdiction, hence the appeal.

[5] It is clear that in the absence of any statutory provision excluding the jurisdiction of the Transvaal Provincial Division that court would have jurisdiction at common law to strike the respondent from the roll of attorneys. In this regard, the respondent was admitted as an attorney in the Transvaal Provincial Division on 25 November 1986. In terms of s 21(1) of the Act the registrar would have enrolled his name on the register of all attorneys admitted by that Court. The respondent thereafter practised in that Division until 2 July 1996. His name remains on the register and subject to his suspension he remains entitled to practise in that Division. Moreover, in terms of s 6 of the Attorneys and Matters relating to Rules of Court Amendment Act 115 of 1998, the respondent, being an attorney practising within the former Republic of Venda, became obliged within 21 days of the commencement of that Act (15 January 1999) and subject to the rules of the Law Society of the Transvaal (the appellant) to apply for the issue of a fidelity fund certificate in terms of s 42(3) of the Attorneys Act. Section 84A of the Act (inserted by s 5 of Act 115 of 1998) specifically affords to the appellant the power, in respect of an attorney practising in Venda, to perform any function which is

similar to a function assigned to it by *inter alia* s 22(1)(*d*) of the Act. The effect of these provisions is therefore to place attorneys practising in the area of the former Republic of Venda under the jurisdiction of the appellant in so far as matters relating to the fidelity fund are concerned.

[6] The question in issue is whether s 22(1)(*d*) of the Act is to be construed as excluding the jurisdiction of the Transvaal Provincial Division in the circumstances outlined above. The present Act repealed the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, which was the first post-Union statute regulating the admission of attorneys. Initially the 1934 Act contained no provisions dealing with the striking off or suspension of attorneys but in 1964 that Act was amended by the insertion of s 28*bis*. This section was similar to the present s 22 but differed in that it provided for an application to strike off or suspend to be 'at the instance of any law society concerned'. Section 28*bis* and subsequently s 22 of the 1979 Act have been construed as not limiting the inherent power of a court to discipline its practitioners and the courts on occasion have done so in a manner or in circumstances not falling within the ambit of s 28*bis* and subsequently s 22 of the 1979 Act. See eg *Incorporated Law*

Society, Transvaal v G 1953 (4) SA 150 (T) at 160E-H; *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 638C-639F; see also *Hurter and Another v Hough* 1987 (1) SA 380 (C) at 381H-382C; *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 851E-H.

[7] Against this background counsel for the appellant submitted that the Court *a quo* ought to have exercised its inherent jurisdiction to entertain the application to strike the respondent off the roll of attorneys. However, as interesting as the question may be, I prefer to decide the issue on another basis and that involves the proper construction of s 22 of the Act.

[8] Quite clearly s 22(1) must not be read in isolation but in the context of the section as a whole. Section 22(2) is significant. It reads as follows:

'2(*a*) If it appears to the court that a person in respect of whom a society intends making an application under subsection (1), has left the Republic and that he probably does not intend to return to the Republic and that his whereabouts are unknown, the court may order that service on that person of any process in connection with such application may be affected by the publication of such process in an Afrikaans and an English newspaper circulating in the district in which the said person's last known business address, as entered in the records of the society concerned, is situated.

(*b*) Any such process may, if the court so orders, be so published in a form as near as may be in accordance with Form 1 (Edictal Citation) of the First Schedule to the Supreme Court Rules.

(*c*) Any process referred to in paragraph (*b*), shall before publication thereof be approved and signed by the registrar concerned.'

If, of course, an attorney has left the Republic 'and probably does not intend to return' it could be said that he or she no longer practises within the jurisdiction of a court in South Africa. But s 22(2) contemplates that such an attorney would fall within the ambit of s 22(1). The word 'practises' in s 22(1) must therefore be construed as meaning 'practises or has practised'. A contrary construction would render s 22(2) meaningless. It would also result in the anomalous situation that s 22(1) would not include an attorney who had ceased to practise in anticipation of process being served upon him or her.

[9] In *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) the attorney in question had previously practised in the jurisdiction of the Cape Provincial Division but by the time the application for his removal from the roll was launched he no longer practised and was employed by the Department of Foreign Affairs in Pretoria. It was not contended that the Cape Provincial Division lacked jurisdiction. Instead, it was argued that by virtue of the

wording of s 22(1) the appellant could not be struck from the roll as he had ceased to practise and therefore was beyond the purview of the section. In disposing of this contention Eksteen JA said at 537B-D:

'Such a person should not be allowed to remain on the roll of attorneys so as to be entitled to practise in the future, as he may have done in the past. Indeed it seems to me that anyone who has been admitted and enrolled as an attorney but has not yet commenced practising may be subject to being struck off the roll in terms of this section [s 22(1)(*d*)] where he has committed such a misdemeanour as to show that he is not a fit and proper person to remain on the roll. The Act itself seems to contemplate such an eventuality if one has regard to the provisions of ss 57(1), 71(1) and 72 (and more particularly s 72(6)).'

In the passage quoted the learned judge goes somewhat further than in effect construing the word 'practise' in s 22(1) as including 'has practised'. The section is stated also to apply to an attorney who has been admitted and enrolled but who has not yet commenced practising. But the Court was concerned only with the case of an attorney who had ceased to practise. The statement regarding an attorney who has not yet commenced to practise is therefore *obiter*. There can be little doubt that the court which admitted an attorney would have jurisdiction to strike him or her off the roll on the grounds of not being a fit and proper person, even

although such attorney had not commenced practising. But whether in such circumstances the court would be acting in terms of s 22(1) (in which event the word 'practises' would have to be read as including 'entitled to practise') or whether it would be acting in the exercise of its inherent jurisdiction, need not be decided.

[10] It is common cause that the respondent in the present case previously practised within the jurisdiction of the Transvaal Provincial Division. The Court *a quo* accordingly erred in holding that it did not have jurisdiction to entertain the application to strike him off the roll of attorneys.

[11] The appeal is upheld with costs. The order of the Court *a quo* is set aside and the matter is referred back to the Court *a quo* for determination of the merits of the application.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

FARLAM JA
CONRADIE JA
VAN HEERDEN AJA
MOTATA AJA