REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 559/02

In the matter between:

HECTOR ERNEST THEMBA HEROLD MABASO Appellant

and

LAW SOCIETY OF THE NORTHERN PROVINCES Respondent

CORAM: **MPATI DP, HARMS, SCOTT, ZULMAN JJA and MOTATA AJA**

HEARD: **13 NOVEMBER 2003**

DELIVERED: **28 NOVEMBER 2003**

Subject: Effect of an objection i.t.o. s 20(3) of the Attorneys Act 59 of 1979 to an application for enrolment as attorney i.t.o. s 20(1)

JUDGMENT

MPATI DP:

[1] The respondent sought and obtained from the Transvaal Provincial Division (De Vos J) an order setting aside the placing of the name of the appellant on the roll of attorneys of that court by its Registrar, which was placed on the roll of attorneys of that court pursuant to an application in terms of s 20 (1) of the Attorneys Act 59 of 1979 (the 'Act'). The appellant was also ordered to pay the respondent's costs on the scale as between attorney and client.

[2] On 25 April 2002 the court *a quo* granted the appellant leave to appeal to this Court. A notice of appeal was lodged on 21 May 2002 and, in terms of rule 8(1) of the rules of this Court, the appellant was required to lodge with the Registrar six copies of the record of the proceedings in the court *a quo* within three months of the lodging of the notice of appeal. He failed, however, to comply with the provisions of rule 8(1), but was granted an extension by the registrar, in terms of rule 8(2), to lodge the record by 2 October 2002. The record was not lodged on that date with the result that the appeal lapsed.

[3] It is common cause that an incomplete record was filed on 5 November 2002 together with a notice of application for condonation for its late filing and for the reinstatement of the appeal. Although the fact of the incomplete record was brought to the attention of the appellant, no effort was made by him to rectify the position. Ultimately, the respondent's attorneys prepared and lodged the remaining portion of the record, which contains relevant affidavits and documents. The appellant also lodged an application for condonation for the late filing of his heads of argument, which were only filed on 17 June 2003 when they ought to have been filed

on or before 4 February 2003.

[4] Both condonation applications were opposed. In its affidavit filed in opposition to the appellant's application for condonation in respect of the late filing of his heads of argument the respondent avers that the appellant's conduct of this appeal has been characterised by delays and non-compliance with the rules of this Court. That averment is undoubtedly correct, but to enumerate and deal with each and every one of those delays and non-compliances will serve no useful purpose. Only two instances need mention, viz the failure to lodge the record by the extended date of 2 October 2002 and the lodging of an incomplete record. As to the latter, there is no explanation why an incomplete record was lodged and why no steps were taken to rectify the shortcoming even after it was brought to the appellant's attention. What is more, there is no explanation whatsoever from the appellant for the period 14 October 2002 and 5 November 2002, the former being the date upon which the incomplete record was received by the appellant. That really disposes of the matter (*Beira v Raphaely-Weiner and Others* 1997 (4) SA 332 (SCA) 337 C-F), but because counsel was invited to deal with the merits of the appeal in his argument in the condonation application, I proceed to consider the prospects of success in the proposed appeal. A brief reference to the facts will be a convenient starting point.

[5] The appellant was admitted and enrolled as an attorney by the Bophuthatswana High Court on 14 June 2002 under and in terms of the provisions of the Attorneys, Notaries and Conveyancers Act 29 of 1984 (the 'Bophuthatswana Act'). That Act regulated the attorneys' profession in the erstwhile Republic of Bophuthatswana. It remains in force by virtue of

Schedule 6 of the Constitution of the Republic of South Africa Act 108 of 1996, which reads:

'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 (interim) Constitution took effect unless subsequently amended to have a wider application; and

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

[6] During August 2001 the appellant lodged an application with the registrar of the Natal Provincial Division in terms of s 20(1) of the Act for his name to be placed on the roll of attorneys of that court. A notice of his application was served on the Law Society of Natal. There was no objection to the application and the appellant's name was placed on the roll of attorneys of the Natal Provincial Division on 18 September 2001.

[7] On 10 October 2001 the appellant applied to the Registrar of the Transvaal Provincial Division, in terms of s 20(1) of the Act, for his name to be placed on the roll of attorneys of that court. Upon receipt of the notice of the application the respondent lodged with the registrar an objection on the basis that such application can only be made by a person who had been admitted and enrolled under the Act. Section 20(1) reads:

'Any person admitted and enrolled as an attorney <u>under this Act</u> may in the manner prescribed by subsection (2), apply to the registrar of any court other than the court by which he was so admitted and enrolled to have his name placed on the roll of attorneys … of the court for which such registrar has been appointed.' (Emphasis added)

Section 20(3) provides:

'A registrar receiving an application referred to in subsection (1) shall place the name of the applicant on the roll of attorneys … kept by him in terms of s 21, unless an objection in writing against it is lodged with him by the secretary of the society concerned within 21 days from the date of receipt of the application by the registrar.' (Emphasis added.)

[8] It is clear from the provisions of s 20(3) that where an objection against an application by an attorney for the placing of his name on the roll of attorneys of a particular court the Registrar of that court cannot enrol such attorney until such time as the objection has been considered one way or the other. However, in spite of the respondent's objection in the instant case, the appellant's name was so enrolled on 9 November 2001. It is not necessary to record here what occurred on that day. Suffice it to say that the respondent's letter of objection was not placed before the Registrar who considered the application and who subsequently placed the appellant's name on the roll of attorneys of the Transvaal Provincial Division. It was subsequent to being informed of the enrolment that the respondent launched the application to remove the appellant's name from that roll.

[9] The first issue raised in this Court by Mr Poswa, for the appellant, concerns the respondent's *locus standi*. It is argued that the respondent is not a statutorily recognised body whose continued existence is ensured or recognised by s 56 of the Act. The Law Society, which has powers to regulate the exercise of the attorneys' profession in the area where the appellant sought to be enrolled, is the Transvaal Law Society and is thus the only entity, so it was argued, which could and should have launched the application to set aside the placing, by the registrar, of the appellant's name

on the roll of attorneys of the Transvaal Provincial Division.

[10] This argument is fallacious. The respondent describes itself in the founding affidavit as the Law Society of the Northern Provinces, which came into existence 'by Volksraadbesluit 1307 dated 10 October 1892' and which continued in existence 'by virtue of the Constitution of the Incorporated Law Society of the Transvaal Ordinance No 1 (Private) of 1905' and continued further in existence by virtue of the Attorneys Act. It is true that the name of the respondent does not appear amongst the Law Societies mentioned in s 56 of the Act, but on its letterhead and date stamp and below the name of the respondent appears the words: 'Incorporated as the Law Society of the Transvaal' and the words: 'Serving Gauteng, Mpumalanga, Northern and North West Provinces'. It can hardly be disputed that the old Transvaal no longer exists, this since the advent of our constitutional dispensation. In my view, judicial notice can be taken of the fact that the areas served by the respondent as indicated on its letterhead now make up the biggest portion, if not all, of what used to be known as 'Transvaal'. It was not suggested in this Court that there exists any other body or entity in the area concerned that performs the functions of the Law Societies as provided for in ss 58 and 59 of the Act other than the respondent. Section 57 of the Act 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. Again there was no suggestion that attorneys practising in the area of the registrar of the Transvaal Provincial Division belong to a law society other than the respondent.

[11] 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.*

[12] In the respondent's founding affidavit the deponent, Jan Petrus Stemmett, who was at the time president of the respondent, alleges that on receipt of the appellant's application the appellant was requested to appear before a meeting of the respondent's council on 5 November 2001. After a discussion between the appellant and members of the respondent's counsel the appellant was advised that the respondent could not support his application and that he had to lodge a substantive application in terms of s 15 of the Act. (Section 15 deals with the admission and readmission of attorneys.) Indeed, in a letter to the appellant dated 6 November 2002 the respondent reiterated its stance that the appellant should apply under s 15 of the Act to be admitted as an attorney of the Transvaal Provincial Division. That stance clouded the real issue before the court *a quo*, which was whether, because there was an objection to it, the enrolment of the appellant by the registrar as an attorney of the Transvaal Provincial Division in terms of s 20(1) of the Act was irregular and thus liable to be set aside.

[13] I have already stated in para 8 above, as did the court *a quo*, that the registrar is not empowered to enrol an applicant's name in such circumstances until the objection has been disposed of. It follows that the order of the court *a quo* cannot be interfered with. The result is that there are, in my view, no prospects of success on appeal.

[14] In the course of its judgment the court *a quo* considered an argument advanced on behalf of the appellant that s 20(1) of the Act is inconsistent

with the Constitution. The submission, in which counsel persisted in this Court, was that the sub-section discriminates against persons who have been admitted and enrolled as attorneys in the area of the former Bophuthatswana Republic and under the Bophuthatswana Act. Such persons, it was correctly argued, cannot utilise the provisions of s 20(1) of the Act should they wish to be enrolled as attorneys of any other court in the country, because they would not have been admitted and enrolled 'under this Act', ie the Attorneys Act, whereas persons who have been admitted as attorneys elsewhere in the country can do so. The court *a quo* found that the mere fact that 'the administrative process in terms of section 20 is not available' to the appellant – since he was admitted under the Bophuthatswana Act – is 'not discrimination let alone unfair discrimination'.

[15] Because there are no prospects of success on appeal, it is not necessary to consider the correctness or otherwise of the finding of the court *a quo* in relation to the constitutional issue. I would, however, recommend that legislative attention be given to the issue as soon as possible so as to ensure uniformity and certainty in the attorneys' profession.

[16] The application for condonation for the late filing of the record is dismissed with costs, including the costs relating to the appeal.

L MPATI DP

CONCUR:

HARMS JA
SCOTT JA
ZULMAN JA
MOTATA AJA