THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 956/2023

In the matter between:

JENNIFER EMILY HUTCHINSON WILD	**APPELLANT**

and

LEGAL PRACTICE COUNCIL	**FIRST RESPONDENT**
EASTERN CAPE SOCIETY OF ADVOCATES	**SECOND RESPONDENT**
BISHO SOCIETY OF ADVOCATES	**THIRD RESPONDENT**
GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA	**FOURTH RESPONDENT**

Neutral citation: *Hutchinson Wild v Legal Practice Council & Others* (956/2023) [2024] ZASCA 180 (19 December 2024)

Coram: MOKGOHLOA and KEIGHTLEY JJA and BAARTMAN, COPPIN and DOLAMO AJJA

Heard: 06 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 19 December 2024 at11h00.

Summary: Administrative Law – review of the Legal Practice Council's decision to issue an advisory note – whether the decision is administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000 – Legal Practice Act 28 of 2014 (the LPA) – s 116 of the LPA – standing of General Council of the Bar of South Africa and constituent Bars.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fourie and Bam JJ and Mojapelo AJ, sitting as full court):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Mokgohloa JA (Keightley JA and Baartman, Coppin and Dolamo AJJA concurring):

[1] The appellant, Ms Jennifer Emily Hutchinson Wild (Ms Wild), appeals against a decision of the Gauteng Division of the High Court, Pretoria (the full court), which dismissed her application to review and set aside the decision by the first respondent, the Legal Practice Council (the LPC), to issue an advisory note to all advocates regarding disciplinary proceedings involving advocates. Alternatively, she sought a declaration that the LPC did not take any decision recorded in the advisory note. The appeal is with leave of this Court.

The facts

[2] Ms Wild has been a practicing advocate for 42 years, and is currently a member of the third respondent, the Bisho Society of Advocates (BSA). The LPC is a body corporate with full legal capacity established in terms of s 4 of the Legal Practice Act 28 of 2014 (the LPA). It came into effect on 1 November 2018 and exercised jurisdiction over all legal practitioners. The second respondent, the Eastern Cape Society of Advocates (the ECSA) and the third respondent, the BSA

are voluntary associations and constituent members of the fourth respondent, the General Council of the Bar of South Africa (the GCB). The GCB is a voluntary association of advocates established in 1946. It has 12 constituent members, all being societies of advocates, and it represents the interests of approximately 3150 practising advocates. Only the LPC, the ECSA and the GCB participate in this appeal.

[3] On 26 September 2017, the ECSA issued an application in the Eastern Cape Division of the High Court, Grahamstown (the high court) seeking an order that the name of Ms Wild be struck from the roll of advocates. The application was brought in terms of s 7(4) of the Admission of Advocates Act 74 of 1964 (the AAA) and common-law. The alleged misconduct on which the striking-off application is based arises from three judgments of two divisions of the high court.

[4] On 10 January 2018, Ms Wild brought an application in the high court seeking an order reviewing the decision of the ECSA to institute the striking-off application against her. That application is pending.

[5] As alluded to above, the LPA came into effect on 1 November 2018. On 18 April 2019, the chairperson of the LPC issued an 'advisory note' to all advocates which reads:

'Transitional Arrangements

2.1. As a transitional arrangement, applications for striking or suspension of members of [the] Bar Councils/Societies of Advocates which were instituted in Court before 1 November 2018, should be completed by the applicable Bar Council/Society, at their own costs. The LPC will accredit the Bar Council/Society in terms of s6(2)(c) and (d) for this purpose.

2.2. Details of the pending applications in 2.1 above, as well as monthly progress reports thereon, must be provided to the LPC.

2.3. The LPC reserves the right to withdraw the delegation in 2.1 above, in respect of all or particular pending applications, in which case the application will be taken over by the LPC.

Application for striking or suspension from 1 November 2018

2.4. All applications for striking or suspension of members of Bar Councils/Societies of Advocates which were instituted in Court from 1 November 2018 onwards, must be transferred to the relevant Provincial Council (PC) of the LPC, in terms of the LPA's Regulation 5 read with Chapter 4 of the Act.'

In the full court

[6] On 06 May 2019, Ms Wild brought an application in the full court in which she claimed inter alia the following relief:

(a) An order setting aside the decision taken by the LPC to issue an advisory note on 18 April 2019.

(b) An order that the LPC retract the advisory note and give notice to all legal practitioners of such retraction.

(c) In the alternative to (b) above, an order declaring that the LPC did not take any of the decisions recorded in the advisory note dated 18 April 2019; and

(d) An order directing the LPC to give notice to all legal practitioners that it has not taken the decisions recorded in the said advisory note, and to withdraw the advisory note.

[7] The grounds for the review were these. The decision taken by the LPC regarding the advisory note is contrary to the provisions of the LPA. The effect of s 116(2) of the LPA is that pending striking-off applications must be continued by the LPC and not by any of the Advocates' Societies or the GCB. That Ms Wild has been severely prejudiced as she has not been afforded an opportunity to be heard. As such, she has been forced to be involved in expensive litigation and that the application for the striking-off of her name from the roll of advocates has been launched without a proper enquiry having been conducted. Further that, the LPC

took into account irrelevant considerations and their decision was not authorised by the relevant legislation or LPC regulations.

[8] The full court dismissed the application and ordered that Ms Wild pay half of the costs. The full court's findings can be summarised as follows: the LPC's decision regarding the transitional arrangements in the advisory note was not reviewable because it does not affect Ms Wild's rights, nor does it have a direct, external legal effect. The full court found that prior to the enactment of the LPA, courts had a common-law right derived, from their inherent jurisdiction, to enquire into the conduct of advocates and to determine what disciplinary procedure should be followed. Advocates' Societies, being voluntary associations, were recognised by the courts as having the necessary standing to bring the misconduct of members of the advocates' profession to the attention of the court. Section 7(2) of the AAA recognised and confirmed this common-law standing of the Bar Societies and this standing did not depend upon the provisions of s 7(2).

[9] The full court held that the LPA did not alter the common-law right of the courts to enquire into the conduct of advocates. Neither did the LPA alter the common-law standing and the ability of the GCB and Advocates' Societies to investigate the unprofessional conduct of advocates and to bring applications for the suspension or the removal of their names from the roll, notwithstanding the advisory note issued on 18 April 2019. The full court further held that the GCB and Advocates' Societies do not depend for their standing on accreditation and delegation by the LPC as stated in the advisory note.

[10] The full court found that the LPC as primary regulator, is not the only, or exclusive *custos morum* of the legal profession. The GCB and Advocates'

Societies, which have been acknowledged over many years by the courts, are entitled to be accepted as co-custodians of the advocates' profession.

[11] Regarding s 116 of the LPA, the full court held that this section applies only to pending enquiries and court proceedings, which have been instituted in terms of a statute repealed by the LPA. It does not apply to enquiries and court proceedings which have been instituted in terms of the common-law. Finally, the full court held that it remains the common-law right and prerogative of the courts, and not of a party involved in the proceedings, to decide whether to acknowledge and accept the standing of the GCB, Advocates' Societies or any other applicant, in pending matters concerning disciplinary proceedings involving advocates.

In this Court

[12] There are two issues *that* this Court should determine:

(a) The first is whether the decision Ms Wild seeks to review and set aside is a decision which is reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

(b) The second issue, which is at the heart of the appeal, is the proper interpretation of s 116(2) of the LPA. Whether, correctly interpreted, s 116(2) means that the LPC must take over from the ECSA in the striking-off application of Ms Wild.

Is the decision to issue the advisory note reviewable?

[13] Counsel for Ms Wild submits that the decision by the LPC to issue the advisory note is administrative action which affects her rights and that it has a direct, external legal effect. Counsel submits that Ms Wild is severely prejudiced as the striking-off application has been launched without a proper enquiry having been conducted, nor has she ever been given the opportunity to be heard and that

she has been forced to engage in expensive litigation to defend the striking-off application.

[14] The starting point for any review application is whether the conduct complained of is administrative action as defined in PAJA. If it is not, the conduct is not reviewable under PAJA. Section 1 of PAJA defines administration action as follows:

'…any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect….'

[15] Counsel for the LPC contends that the LPC did take a decision to issue the advisory note. The ECSA and the GCB contend otherwise, pointing out that there is no evidence of any resolution by the LPC adopting the advisory note as a decision. According to them, the advisory note had not more legal status than an advisory opinion. It is not necessary to resolve this dispute for purposes of reviewability. I then proceed on the assumption that a decision to issue the advisory note was taken. The question that follows is whether the decision so taken adversely affects the rights of Ms Wild and has a direct, external effect. Counsel for Ms Wild submits that the decision has a direct and immediate impact on Ms Wild as she has to determine whether it is the LPC or the ECSA that will continue with the striking-off application. According to Counsel, this has a significant practical consequence and has the capacity to affect her rights.

[16] Counsel's submission is misplaced. It is the provisions of s 116 of the LPA that changed the status quo and brought in a new dispensation, not the advisory note. The advisory note was merely restating and explaining how the transition to the new dispensation was to be carried out. In effect, its purpose was to preserve the status quo as regards striking-off applications already instituted by bodies like the ECSA and the GCB. There are no new procedures initiated in the advisory note. The advisory note did not change any law or procedure contained in the LPA. Ms Wild is already facing a striking-off application. It is that application that has the capacity to affect her rights, not the advisory note. I therefore find that Ms Wild failed to demonstrate that the advisory note adversely affects her rights and that it has a direct, external legal effect. Accordingly, it does not constitute administrative action and is not reviewable under PAJA.

Interpretation of section 116(2)

[17] Counsel for Ms Wild submits that prior to its repeal, the AAA regulated the admission to practice, suspend or strike off names of advocates from the roll. It is this Act, according to counsel, that gave Advocates' Societies the legal standing to apply for suspension or striking-off under s 7(2). ince the AAA has been repealed in its entirety, Advocates' Councils/Societies have no legal standing. Counsel submits further that the proper interpretation of s 116(2) is that the LPC takes over from the ECSA in the striking-off application against Ms Wild.

[18] The LPC and Advocates' Societies agree that in terms of s 116(2), the ECSA is entitled to continue with the striking-off proceedings against Ms Wild. The only difference is how this is to be achieved. The LPC's view is that this can be achieved through accreditation of and delegation to the ECSA. Advocates' Societies on the other hand hold the view that not only are they entitled to continue to bring applications to strike the names of advocates from the roll, but

that s 116(2) authorises them to do so without the accreditation and delegation by the LPC. They argue that upon a proper interpretation of the LPA, they retained their right to bring applications before the high court regarding complaints of a disciplinary nature involving advocates, both before and after the coming into operation of the LPA. Ms Wild and the LPC dispute this submission.

[19] Advocates' Societies submit further that on a proper interpretation of the wording of s 116(2), 'reference to the Council' simply means that Advocates' Societies continue to act as if the legislation has not been repealed. They submit that s 116(2) is a deeming provision that has the effect that Advocates' Societies are deemed to stand in the shoes of the LPC as if the LPC has launched the striking-off proceedings. The LPC on the other hand, submits that Advocates' Societies' interpretation entails reading words into s 116(2). According to the LPC, it is the Council that steps into the shoes of Advocates' Societies. Advocates' Societies may continue to finalise the outstanding disciplinary matters only after the LPC has given them accreditation and delegation to do so.

[20] The principles applicable to statutory interpretation are trite. Regard must be had to the text, context and purpose of the provision. And the provision must be within the ambit of the Constitution.[1] Further, the historical context within which the provision was enacted may be relevant to the process of interpretation.

[21] Previously, the legal profession was regulated in a fragmented manner. Attorneys were regulated by the various Law Societies in terms of the Attorneys Act 53 of 1979 and the Rules promulgated thereunder, and membership was mandatory. Advocates, on the other hand, were not regulated by statute and were not required to be members of any organisation or council. They

[1] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

were not subject to oversight unless they elected to become members of a society of advocates or GCB. This was the position until 1 November 2018 when the LPA was promulgated.

[22] In terms of s 3 of the LPA:

'3. The purpose of this Act is to –

(a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld;

(b) broaden access to justice by putting in place –

(i) a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry;

(ii) measures to provide for the rendering of community service by candidate legal practitioners and practising legal practitioners; and

(iii) measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic;

(c) create a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession;

(d) protect and promote the public interest;

(e) provide for the establishment of an Office of Legal Services Ombud;

(f) provide a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners and candidate legal practitioners; and

(g) create a framework for the –

(i) development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal practitioners and candidate legal practitioners;

(ii) regulation of the admission and enrolment of legal practitioners; and

(iii) development of adequate training programmes for legal practitioners and candidate legal practitioners.'

[23] Section 116(2) of the LPA provides:

'Any proceedings in respect of the suspension of any person from practice as an advocate, attorney, conveyancer or notary or in respect of the removal of the name of any person from the roll of advocates, attorneys, conveyancers or notaries which have been instituted in terms of any law repealed by this Act, and which have not been concluded at the date referred to in section 120 (4), must be continued and concluded as if that law had not been repealed, and for that purpose a reference in the provisions relating to such suspension or removal, to the General Council of the Bar of South Africa, any Bar Council, any Society of Advocates, any society or the State Attorney must be construed as a reference to the Council.'

In terms of s 119 of the LPA, the AAA has been repealed in its entirety.

[24] It may appear from the language of s 116, read in isolation from other sections in the LPA, that it seeks to strip Advocates' Societies of their right to bring and continue with the applications either to suspend or to strike the names of advocates from the advocates' roll. However, it is trite that a provision in the act should not be read in isolation but read in conjunction with the whole act.

[25] Consequently, s 116 should be read together with s 44 of the LPA, which states that the provisions of the LPA 'do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity.' Further s 44(2), states:

'Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or *juristic entity* from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or juristic entity. . . .' (My emphasis.)

Advocates' Societies are juristic entities and are therefore not precluded from applying to court to have the name of Ms Wild removed from the roll of advocates.

[26] Counsel for Ms Wild submits that Advocates' Societies do not have the common-law right to bring an application either to suspend or strike the names of advocates from the roll of advocates. Under common-law, so the submission continued, Advocates' Societies could only bring the misconduct of an advocate to the notice of the court and ask the court to exercise its inherent discretion. According to counsel, the courts allowed Advocates' Societies the standing because they required Advocates' Societies to place evidence before them as the *custodes morum* of the advocates' profession. Counsel submits that the effect of the LPA's repeal of the AAA was to strip Advocates' Societies of the standing they enjoyed under the latter statute, and to make the LPC exclusively responsible for the protection and regulation of the legal profession. This submission cannot be correct.

[27] In *De Freitas and Another v Society of Advocates of Natal*[2] the Constitutional Court stated:

'…The standing of the respondent to bring disciplinary matters to the attention of the court did not depend upon section 7(2) [of the AAA]. Prior to the enactment of the section the courts had recognised the standing of a society of advocates to initiate proceedings before it for the disciplining of an advocate, including an advocate who was not a member of the society. It had also recognised the standing of the Attorney–General, and in one case, of the State … . [T]he fact that the respondent is given standing by section 7(2) to bring disciplinary matters to the attention of the court does not necessarily mean that other interested bodies may not do as well. If the second applicant wishes to assert such a right of standing, the time to do so is when the occasion for such application arises. It cannot, however, object to the standing of the respondent which has long been recognised by the courts, and does not depend upon the provisions of section 7(2).'

[2] *De Freitas and Another v Society of Advocates of Natal (Natal Law Society Intervening)* 1998 (11) BCLR 1345 (CC) para 9.

[28] In *Johannesburg Society of Advocates and Another v Nthai and Others*,[3] this Court dealing with an application for re-admission of an advocate, accepted that the LPA makes the LPC primarily responsible for the protection and regulation of the legal profession but stated:

'However, whilst the LPA confers primary jurisdiction for the discipline of legal practitioners on the LPC, this does not deprive existing bodies from having a continuing interest in the professional ethics of the profession or standing. The LPA requires the LPC to establish disciplinary bodies tasked with evaluating complaints about professional conduct. And, it empowers the LPC to punish errant practitioners, including by approaching the High Court for their removal from the roll.

The LPA does not, however, render nugatory the role of the GCB and the constituent Bars in the advocates' profession or in the professional conduct of advocates. It instead affirms the role of persons other than the LPC in these matters.'

[29] It is clear from the above *dictum* that the LPA does not detract from the position of Advocates' Societies, who are still *custodes morum* over the profession of advocates, neither does the LPA intend to afford exclusive jurisdiction to the LPC in this regard. Furthermore, the restructuring brought about by the LPA did not change the common-law as far as inherent powers of the courts over legal practitioners are concerned. Had there been an intention to bring about such a change, such would have been expressly stated. There is no provision in the LPA that clearly and unequivocally indicates an intention to alter the common-law standing of Advocates' Societies, arising from the inherent jurisdiction of the courts to consider striking-off applications. Instead, s 44(2) of the LPA confirms and affords rights to any person who has *locus standi* to apply to the high court 'for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner… .' The long-standing recognition by courts of the locus standi under the common-law to apply for the

[3] *Johannesburg Society of Advocates and Another v Nthai and Others* [2020] ZASCA 171; 2021 (2) SA 343 (SCA); [2020] 2 All SA 37 (SCA) paras 24 and 25.

striking-off of advocates is not ousted by the LPA. On the contrary, it is preserved.

[30] In the result, the following order is made:

The appeal is dismissed with costs including the costs of two counsel.

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F E MOKGOHLOA

JUDGE OF APPEAL

Appearances:

For the appellant:	G D Goddard SC with Z B Mbuyazi
Instructed by:	Netteltons, Pretoria
	Rossouws Attorneys, Bloemfontein
For the first respondent:	R Stocker
Instructed by:	Rooth & Wessels Inc, Pretoria
	Pieter Skein Attorneys, Bloemfontein
For the second and fourth respondents:	P Ellis SC with A T Lamey
Instructed by:	Bernard van der Hoven Attorneys, Pretoria
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